1040

THE CIVIL LAW IN ITS Natural ORDER:

Together with the

PUBLICK LAW.

Written in FRENCH by

MONSIEUR *DOMAT*,

The late *French* King's Advocate in the Preſidial
Court of CLERMONT in FRANCE:

And Tranſlated into ENGLISH by

***WILLIAM STRAHAN*, LL.D.**

Advocate in DOCTORS COMMONS.

With Additional REMARKS on ſome Material Differences
between the CIVIL LAW and the LAW OF *ENGLAND*.

In TWO VOLUMES.

VOL. I.

Turpe eſſe Patricio, & Nobili, & Cauſas oranti, Jus, in quo verſaretur, ignorare. L. 2. §. 43. Dig. de Origine Juris.

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M.DCC.XXII.

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MVSEVM
BRITAN
NICVM

To his GRACE,

JAMES,

DUKE of

CHANDOS, &c.

My LORD,

HAVING undertaken the Tranſlation of this Book with no other View but to render it of more general uſe here in *England*, I thought I could not introduce it more favourably into the World, than under the Protection of a truly Noble Patriot, who is an Encourager of all Liberal Arts and Sciences, and who readily embraces all opportunities of promoting every thing that may be of real Service to his Country.

IT is upon this account, My LORD, that I have preſumed to prefix Your GRACE's Name to this Work. The Subject it treats of is ſo Noble in it ſelf, and of ſo large and extenſive an uſe, that it cannot fail to merit Your GRACE's Approbation, who is ſo perfect a Judge and Maſter of all Polite Learning. For it contains, as it were, the Whole Duty of Man, with reſpect to this Life; and lays down a Rule for the Government of all his Actions, whether we conſider him in a private, or in a publick Capacity.

WHEN the Book was firſt publiſhed in the Original Language in which it is written, it was judged to be of ſo great conſequence to the Advancement of Learning, that the late *French* King, one of whoſe brighteſt Characters was that of being an Univerſal Patron to all Learned Men, in all Sciences, and of all Countries, was pleaſed to vouchſafe it his Royal Protection. Which, I hope, may in ſome meaſure excuſe the Freedom I take in laying a Tranſlation of it at Your GRACE's Feet; who has given ſo many ſignal Inſtances of Your Favour and Good-will to Men of Letters, and of Your Zeal to promote Learning, ſo as to extend Your Beneficence for the Encouragement of it, even to the remoteſt Corners of the Iſland.

BUT, My LORD, it is not only as Your GRACE is a Patron of Learning, that this Book implores Your Protection; it lays claim to it likewiſe on another ſcore, and that is, as You are the Promoter and Protector of Trade. For although it is a Book of Law, yet as it contains all the Fundamental Rules of Juſtice in matters of Trade and

Commerce, it may be reckoned as very uſeful and ſubſervient to Trade, for eſtabliſhing it on a ſure and laſting Foundation. It not only deſcribes the Nature and Obligation of all manner of private Contracts, and the reciprocal Duties of thoſe who are Parties to them; but it likewiſe lays down many uſeful Rules for the Government of Publick Companies, and for carrying on Trade and Commerce with Foreign Nations in the moſt beneficial manner.

THE indefatigable pains which Your GRACE has taken to retrieve one of the moſt profitable Branches of the Trade of this Kingdom, which was in a manner totally loſt to the Nation, thro' the Negligence, or rather Treachery, of former Managers, as it is matter of wonder and admiration to thoſe who ſee it more nearly, ſo it has procured You the univerſal Love and Eſteem of all Your Countrymen. For what an agreeable Proſpect muſt it afford to a Nation, when they ſee Perſons of the firſt Rank and Quality among them, inſtead of indulging themſelves in Eaſe and Pleaſure, ſpend all their time and thoughts in promoting the Good and Welfare of their Country? Such an Example cannot fail to have a happy influence on Subjects of an inferior Rank, and make them reflect within themſelves, that Man is not created for himſelf alone, but to be an Inſtrument of doing Good to others, and more eſpecially to the Commonwealth of which he is a Member.

MY LORD, as I know it would not be agreeable to Your GRACE's inclination, ſo it is not my intention here to expatiate on the many engaging

Qualities which gain You the Hearts and Affections of all thoſe who have the Honour of Your Acquaintance. I ſhall only obſerve in general, that it is no ſmall degree of Happineſs, to be thought worthy of it by others. And in this Your GRACE is peculiarly happy, that every body wiſhes Your Proſperity, and no body envies Your Greatneſs.

AS Your GRACE takes pleaſure in promoting the Good of Your Country in Your own Lifetime, ſo it is no leſs a ſhining part of Your Character, the care You take to render thoſe of Your Family who are to come after You, uſeful Members of the Commonwealth, by giving them all the advantages of Education that may qualify them to ſerve their Prince and Country. Your GRACE is too ſenſible how much the future Proſperity of a State depends on a right Education of the Youth, to neglect a matter of that great importance.

YOU have therefore taken care to have the Marquis of CAERNARVON, who is Heir apparent to Your GRACE's Honour and Eſtate, thoroughly inſtructed in the Learning that is taught in the Schools and Univerſities of this Kingdom. Having finiſhed his Studies there, You directed him to make the Tour of his own Country, that he might not be altogether a Stranger to it, but might be able to give ſome account of it in his Converſation with Foreigners. And now You have ſent him into Foreign Countries, that he may there learn, not ſo much the Languages and Cuſtoms of other Nations, as their ſeveral Intereſts and Alliances, together with their Maxims of Government,

ment, by which they ſupport their State within, and promote their Trade and Commerce abroad. So that there is reaſon to hope, that a young Nobleman endowed with ſo good Natural Talents as my Lord CAERNARVON is, having had all the advantages of a Home Education, and purſuing his Travels beyond Sea according to the Inſtructions which He has from Your GRACE, cannot fail to return to his Native Country duly qualified in all reſpects to be a Counſellor to his Prince in the weighty and arduous Affairs of State, to which he is intitled by his Birth-right.

AND while I am mentioning the laudable care which Your GRACE takes to educate Your Poſterity in ſuch a manner as to render them uſeful Patriots to their Country, and Ornaments of the antient Family from which they are deſcended, I cannot forbear taking notice of Your GRACE's care to train them up in the Principles and Practice of Religion, by obliging them to a conſtant Attendance on the Publick Worſhip of GOD in their Pariſh Church, where Your GRACE takes care to have the Divine Service performed with that Religious Symphony, and that Order and Decency, that is ſuitable to the Divine Majeſty of the Object of our Worſhip; and where the grave and devout Attention of Your GRACE's Family to all the parts of the Service gives a very edifying Example to others. And however light the Scepticks of our Age may make of Religion, and of all Religious Worſhip; yet there is nothing more certain, than that without a Principle of Religion there is no true ſolid Honour; and it is Religion alone that muſt be our only Comfort and Support, when all the tranſitory Vanities of this Life are paſt and vaniſhed into Smoke.

THAT YOUR GRACE may long live to enjoy the Fruits of Your Labours, and to be ſtill a farther Inſtrument of Good to Your Country, is what I moſt heartily wiſh; being with all Duty and Reſpect,

My LORD,

Your GRACE's moſt Obedient,

And moſt Humble Servant,

DOCTORS COMMONS,
Sept. 1st, 1721.

Will. Strahan.

THE AUTHOR's PREFACE.

CONCERNING

The Deſign of This BOOK.

The Cauſes of the Difficulties in the Study of the Roman *Laws.*

IT ſeems very ſtrange that the *Roman* Laws, the Uſe of which is ſo neceſſary, ſhould be ſo little known, and that they being all of them nothing elſe but Rules of Equity, the Knowledge of which is ſo natural to us, the Study of them, which ought to be eaſy and agreeable, ſhould be ſo hard and ſo difficult.

Nevertheleſs it muſt be owned, that conſidering the manner in which the ſaid Laws have been collected in the Books of the *Roman* Law, which is the only Place where they are depoſited, it is not ſo eaſy to attain to a thorough Knowledge of them. And this is the reaſon why even among thoſe who are obliged by their Profeſſion to know them, many are wholly ignorant of them, and no body can make himſelf thoroughly Maſter of them, but by a long and laborious Study.

We are not, however, to draw from this Truth any Conſequence that may leſſen the Eſteem and Reſpect that is due to the ſaid Books; ſince on one part we ought to admire in them the Light and Knowledge which God was pleaſed to communicate to Infidels, whom he thought fit to employ as his Inſtruments in compoſing a Science of the Law of Nature; and on the other, we muſt confeſs that this Science could not well be formed in any other manner than ſuch as would create Difficulties for the right underſtanding of it. And in order to judge aright of this matter, we muſt in the firſt place conſider in what manner the Authors of thoſe Laws did compoſe them, and afterwards ſee how they are collected in the Body of the *Roman* Law: And then we ſhall explain the Deſign we have propoſed in this Work, to render the Study of the Civil Law eaſy and agreeable.

The AUTHOR'*s* PREFACE.

All the Laws and Rules that we have touching all Matters of Law, have been the Fruit of an infinite number of Reflections on the Events from which Differences and Diſputes of all kinds have ariſen. They began firſt with a Survey of the Natural and Immutable Principles of Equity, ſuch as, for inſtance, theſe General Truths: That we muſt do hurt to no Man: That we muſt render to every one what is his due: That we ought to be ſincere in Covenants, and faithful in all manner of Engagements. And in the next place they deſcended to Particular Rules, ſuch as theſe, for Example: That every Seller ought to warrant: That the Loſs and the Gain ought to be ſhared among Partners: That he who borrows any thing of another ought to take care of it: That the Tutor ought to be a Father to the Minor, to whom he is in the place of one, and a thouſand other Laws of the like nature, which are the Natural Rules of the Society of Mankind.

And becauſe there was occaſion to fix by Regulations certain Difficulties, in which the Laws of Nature do not preciſely determine what is juſt; it was neceſſary to provide for them by other Laws. Thus, for Example, the Law of Nature will have thoſe who have not ſufficient Age and Experience, to be incapable of entring into Engagements which may be hurtful to them; but becauſe all perſons do not acquire that Experience within the ſame time, and that it was impoſſible to make a particular Rule for every one, a common Rule was made for all, which marks out for all perſons one Moment of Age, at which every one is capable of Engagements. Thus, they were obliged to regulate the Time for Preſcriptions, the Formalities of Teſtaments, and other the like Difficulties which required Rules. And this is what was done by Laws which are called Arbitrary, becauſe they depend on the Prudence of thoſe who have a right to eſtabliſh them, and becauſe they are different in divers Places, and even in the ſame Places are ſubject to changes and alterations[a]. But theſe Arbitrary Rules are in a ſmall number in the Body of the *Roman* Laws: and all the Rules of the *Roman* Law which are received with us, conſiſt almoſt wholly of the Laws of Nature, and but very few of them are Arbitrary Laws.

It is in this manner that all Nations have made Laws to themſelves: and it is well known in what manner the *Romans* borrowed from other Nations, and cultivated among themſelves the Science of the Law, and that it was only by the means of an infinite number of Events for many Ages, and in the Extent of the greateſt Empire that ever was, that the Application of a great number of ingenious Perſons, was able to collect the Facts which gave riſe to the Diſputes, to remark the Principles which were made uſe of for deciding them, to form Rules upon the ſaid Principles, to diverſify them according as the different Facts make it neceſſary to diſtinguiſh them, to apply thoſe Rules to their proper Matters, and by collecting together the ſaid Matters, and their Rules, to compoſe a Science, which hath for its Object every thing that paſſes in the Society of Mankind, and which may occaſion any differences among them.

It is eaſy to apprehend, by this account of the manner in which it was neceſſary to compoſe the *Roman* Laws, that it was not poſſible for ſo many Works of ſo many Perſons, made at divers times, with different Views, on ſeveral Subjects, and by an inſenſible Progreſſion of particular Remarks on Facts of all kinds, to form a Body of Laws in the Order which they really have among themſelves, and ſuch as Truths, which are the Rules of Civil Society, ought naturally to have.

The Emperor *Juſtinian* had it in his View to compoſe one Body of Law out of ſeveral Pieces of that infinite Number of Works, of which he made his *Digeſts*, and collected in them divers Fragments, giving them the Authority and Force of Laws; in the ſame manner as he collected in his *Code* a great Number of Laws, Conſtitutions and Reſcripts of the Emperors that had gone before him. But it is eaſy to be perceived in theſe two Collections, that they were principally intended for preſerving the Laws and Rules which are therein collected, and that the Natural Order which links them together, was not what the Compilers of them had then in view.

We ſee in theſe two Collections, that the ſame Matters are collected one way in the *Digeſts*, and another quite different way in the *Code*: That both in the one and the other of theſe two Collections, many Matters are out of their proper

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[a] *See the Origin of Arbitrary Laws, and the Cauſes which have rendred them neceſſary, in* The Treatiſe of Laws, Chap. XI.

place, being joined with others to which they have no manner of relation, and ſome of them are diſperſed up and down in ſeveral places.

That in the detail of each particular Matter, we do not find in any one of them an exact Order of its Definitions, its Principles, and its Rules, according to the dependance which they have one upon another, or according as they are linked together by the relation which they have one to another; but we ſee there only a Collection of a great many Rules, the greateſt part without any Coherence.

That many Rules which are general and common to ſeveral Matters, are inſerted there under Titles of particular Matters: and that many particular Rules belonging to one Matter, have been placed under Titles of Matters wholly different.

That among all theſe Rules, there are few of them ſet out in their proper light; but the greater part of them are wrapped up in Deciſions of particular Facts, without being laid open there as Rules; but are to be gathered from thence, by conſidering under different Reflections, the Reaſons for doubting, in order to find out the Grounds upon which the Deciſion is founded, and which are to form the Rules.

That many of theſe Rules do not give a view of their full ſenſe and meaning; but there is frequently occaſion to collect from ſeveral places the different parts of one and the ſame Rule. And that on the contrary, in ſome places, two Rules which ought to be ſeparated, are joined together in one and the ſame text, which does not take notice of the diſtinction that is between them.

That even the Rules which are placed under a laſt Title of the Rules of Law, as if it were to reduce within a ſmall compaſs all the Rules that are moſt neceſſary to be remembred, are placed there with ſo little order, that we ſhall hardly find two relating to the ſame Matter that follow ſucceſſively one after the other; and that many Rules appear there as being General, and common to ſeveral Matters, which are proper only to one; which expoſes the Readers to the danger of applying them wrong.

That almoſt in all the Matters, we find mixed with what is uſeful and neceſſary, a great deal that is uſeleſs and ſuperfluous, and many repetitions: and we ſee there alſo in ſeveral places ſome of thoſe Niceties of the *Roman* Law which are neither natural, nor in uſe with us; which increaſes the Labour of the Study, ſeeing in order to make it uſeful, we muſt not only read the ſame Laws over and over, but muſt read them with great application and diſcernment, in order to be able to ſeparate the Principles and the Rules from thoſe Niceties and Subtilties which inviron them, and to form to ourſelves juſt Ideas of them.

That in conſequence of this want of Order, many Rules are obſcure, becauſe they are remote from the Principles on which they depend: that others being ſeparated from the Exceptions which are neceſſary for limiting their Senſe that is too large and undetermined, may be eaſily miſapplied to the Caſes which are excepted: that ſome of them appear to be contrary to one another, whether it be that in reality there is ſome contrariety, or becauſe they are not clearly and fully expreſſed, there appears to be a contradiction to thoſe who are not learned enough to reconcile them: and in fine, that there are many Rules which, by reaſon they are not in their proper place, nor in their true light, nor in their full extent, may be miſunderſtood and miſapplied.

It is upon account of theſe difficulties in the Study of the Laws in the Books of *Juſtinian*, that people have ſo little obſerved the Prohibitions which he made againſt commenting upon them, upon pain of Forgery, and Confiſcation of the Books[b]; and we might likewiſe add other Remarks beſides thoſe which have been juſt now made. But the few Remarks which have been made may ſuffice to ſhew, that in the reading of theſe Books, the Memory being burdened, and the Judgment perplexed with this vaſt Detail in confuſion, it is difficult for one to form to himſelf a clear and certain Syſtem of each Matter, and to rank in Order in his own Mind what is placed out of Order in the Books where it muſt be learnt. And it is becauſe of this that many conceive a diſguſt at the Study, that few ſucceed in it, and that ſome make a bad uſe of the Laws, by reaſon of the opportunity of miſapplying them, which this manner in which the Laws are collected affords to thoſe who want the neceſſary Light and Knowledge, and to thoſe who want Sincerity. And ſeeing there is no Human Science in which the conſequence of Miſtakes is of greater importance than in that of the Law, and that the Intereſt which depends on the manner of applying them, engages the Heart therein, and turns the Views of the Mind into thoſe of Self-intereſt: we ſee what Abuſes are made of the Laws by thoſe who engage in the defence or protection of bad Cauſes.

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[b] *De confirm. Digeſt. ad Senat. & omn. pop.* §. 21. *de confirm. Digeſt. ad mag. Senat.* §. 21.

All that has been hitherto ſaid, ſhews plainly on one part, the Uſefulneſs of the Books of the *Roman* Law, which are the Repoſitory of the Natural Rules of Equity, and on the other, the Inconveniences which ariſe from the want of Order in the ſaid Books. And this diſcovers to us at the ſame time the cauſes why theſe Books of the *Roman* Law are conſidered in *France* in two manners ſo different, and even directly oppoſite to one another. For on one ſide, as they contain the Law of Nature, and written Reaſon, they are quoted in the Tribunals, they are taught publickly in the Schools, and it is upon the Study of the ſaid Books that Degrees are conferred, and Perſons examined as to their Qualifications for the Exerciſe of Offices of Judicature. But on the other hand, the Difficulties which have been obſerved, and the Contrariety there is in ſome things between the *Roman* Law and the Laws and Cuſtoms of *France*, are juſt cauſes why the *Roman* Law hath not in *France* a fixed and abſolute Authority, except in the Provinces where it ſerves as a Cuſtom, in ſo far as they receive the Diſpoſitions thereof. So that becauſe of the Uſefulneſs of the ſaid Books, many perſons dip into them without judgment, and take for Principles, either Subtilties which are not in uſe with us, or Rules not rightly underſtood: and others making light of the ſaid Books, becauſe they have not the Authority which the Cuſtoms and Ordinances have, do often reject the beſt Rules, and do not ſo much as diſcern in them the Authority of the Law of Nature, becauſe they conſider nothing as Law, but what is promulged, and entred upon Record.

We may add as a laſt Reflection upon the Law, that the want of Order in the Collections made by *Juſtinian*, having hindred people from ſeeing clearly and ſucceſſively the whole Detail of each Matter, has occaſioned ſeveral void Spaces, where is wanting many Rules for certain general Queſtions which often happen, and which occaſion many Law-ſuits which fixed Rules might have prevented. And as in compiling the *Code*, they inſerted into it ſome Deciſions made by that Emperor of ſome of theſe ſorts of Difficulties, which were not regulated in the Old Law, and about which the Lawyers themſelves were divided; ſo they left there likewiſe many empty Spaces, which have given occaſion to that other Branch of the Law, which conſiſts of Decrees and Judgments. But the Decrees being pronounced only upon particular Differences, and they not being made in the form of a General Law, the ſame Queſtions are often ſtarted anew, under pretext that the Decrees may have been founded upon particular circumſtances. And we ſee likewiſe that ſome Queſtions are differently decided in different Parliaments.

We make here this Remark only occaſionally, as being a conſequence of the other Remarks which have been made, and that only to ſhew, that theſe ſorts of Difficulties requiring ſo many Rules, it were to be wiſhed that Proviſion were made for them by fixed and ſtated Rules.

We have been obliged to make all theſe Reflections on the Uſefulneſs of the Books of the *Roman* Law, and on the Difficulties of attaining to a thorough Knowledge of the Laws in the ſaid Books, that we might be able to give an account of the Motives which induced us to undertake the Digeſting of the *Roman* Laws into their true and Natural Order, hoping thereby to render the Study of them more eaſy, more uſeful, and more agreeable.

Every body knows of what great uſe Order is in all Things, and that if in Things which are only the Object of our Senſes, the right diſpoſition of the Parts which make up the Whole, is neceſſary for expoſing them fully to ſight, Order is much more neceſſary for diſpoſing the Mind to apprehend clearly the infinite Variety of Truths which compoſe a Science. For it is their nature, to have Relations and Ties with one another, which is the reaſon why they enter into the Mind only the one by the other: that ſome Truths which are to be underſtood by themſelves, and which are the Sources of others, ought to go before them: that the others ought to follow, according as they depend on the firſt, and are linked with one another: and that therefore ſince the Mind is to be guided from the one to the other, it ought to ſee them in Order; and this Order conſiſts in the right placing of the Definitions, the Principles, and the Particulars. From whence it is eaſy to judge, how great a difference there is between ſeeing the Detail of the Truths which compoſe a Science placed in Confuſion, and ſeeing the ſame Detail ranked in its proper Order; ſince it may be ſaid, that there is no leſs difference than between the ſight of a confuſed Heap of Materials deſtined for a Building, and the ſight of the Edifice raiſed in its due Symetry.

The Deſign of this Book.

The Deſign therefore propoſed in this Book, is to ſet the *Roman* Laws in their true Order: to diſtinguiſh the Matters of the Law, and to place them according to the Rank which they have in the Body which they naturally compoſe: to divide each Matter according to its Parts; and to rank in each Part the Detail of its Definitions, its Principles, and its Rules, advancing nothing but what is either clear in it ſelf, or preceded by every thing that may be neceſſary for the right underſtanding of it. So that it is not an Abridgment of the *Roman* Law, or bare Inſtitutes, that we propoſed to our ſelves to make; but we have endeavoured to comprehend in this Work the whole Detail of the Matters which we are here to treat of.

We propoſed to our ſelves two principal Effects of this Order; Brevity, by retrenching all that is uſeleſs and ſuperfluous; and Perſpicuity, by the bare ranking of Matters in their proper places. And we hoped, that by the means of this Brevity and Perſpicuity, it would be eaſy to learn the Laws thoroughly, and in a ſhort time; and that even the Study of them being by this means rendred eaſy, it would become agreeable. For as Truth is the Natural Object of the Mind of Man, ſo it is the View of Truth that makes his Delight; and this Delight is the greater, according as the Truths are more Natural to our Reaſon, and that we ſee them in their true Light without pain.

We ſhall not take up any time in explaining at length the Advantages which may accrue from the facility of learning the Laws, the Knowledge of which is ſo neceſſary to many perſons. For the uſefulneſs of them is not barely confined to the Miniſtry of Juſtice in Lay Tribunals: the Eccleſiaſtical Judges, the Paſtors and Doctors of the Church, and the Directors of the Conſciences of the People, are obliged to have recourſe to the Civil Law, whether it be to judge, or to give advice, and to decide Caſes of Conſcience, which depend on the ſaid Law, which the Imployments of the ſaid perſons do not allow them time to ſtudy thoroughly in the Books of the *Roman* Law. And even perſons in a private capacity may find benefit by ſtudying theſe Laws for their own private Affairs, and by conſulting them in order to make a right judgment of their own Pretenſions, and to prevent their imbarking in ill-grounded Law-Suits.

It was upon theſe Views that we engaged in this Deſign of digeſting the Civil Law into its Natural Order. But the infinite difficulties of this Undertaking make us fear, and that with reaſon, leſt the Work ſhould not anſwer our Deſign ſo much as we could wiſh; and it is not ſo much to ſet off its worth, that we have remarked the Uſefulneſs and Advantages which we propoſed by it, as to excuſe by the Uſefulneſs of the Deſign, the Faults and Imperfections of the Work.

It may be neceſſary, in order to ſatiſfy ſome perſons, to give ſome account of the reaſons which induced us to put the Laws into the *French* Language. All the Laws, and eſpecially thoſe which are only Natural Rules of Equity, are proper for all Nations, and for all Men, and conſequently are proper for all Languages. *Juſtinian* ſuffered the *Digeſts* and the *Code* to be tranſlated into *Greek*[c], for the Uſe of the Provinces of his Empire, where the *Greek* Language was in uſe. And the *French* Language being at preſent arrived to a perfection which equals, and even ſurpaſſes in many things the antient Languages, it is for this reaſon become univerſal in moſt Nations; and it has particularly the clearneſs, the juſtneſs, the exactneſs, and dignity, which are the Characters that are eſſential to the Expreſſions of Laws, ſo that there is no Language which is more adapted to them; and the defects of Expreſſion which may be found in this Book, the Author deſires they may be rather imputed to himſelf, than to the Language.

Some perſons who read this Book, may perhaps be ſurprized to find in many places of it Truths which are ſo common and ſo eaſy, that it will ſeem to them to have been ſuperfluous to put them down, ſeeing no body can be ignorant of them. But they may learn from thoſe who are acquainted with the Order of Sciences, that it is by the help of theſe ſorts of Truths, which are ſo plain and ſo evident, that Men attain to the Knowledge of thoſe which are leſs evident;

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[c] *De confirm. Digeſt. ad Senat. & omn. pop.* §. 21. *de confirm. Digeſt. ad mag. Senat.* §. 21.

and that for the detail of a Science, it is neceſſary to gather all the Truths, and to form the whole Body, which is to be compoſed of the ſeveral Truths collected together. Thus, in Geometry, it is neceſſary to begin by learning that the Whole is greater than any of its Parts; that two Things equal in Greatneſs to a third, are equal between themſelves, and other Truths which Children know, but the uſe of which is neceſſary for penetrating into other Truths which are not ſo clear, and many of them ſo abſtruſe, that all Minds are not capable of them.

If any one ſhould find fault that there is no Table of the Matters, it is enough to acquaint the Reader, that the Table of the Titles, and of their Sections, which is at the beginning of the Book, is ſufficient to direct the Reader how to find in its proper place whatever he may have occaſion to ſearch for.

It remains only that we give an account of the manner in which we have quoted on each Article the Texts of the Laws. It is eaſy to judge by the Remarks which have been made on the manner in which the Laws are collected in the Body of the *Roman* Law, that it was not poſſible to quote on every Article one Text alone that ſhould anſwer to it, and that it was neceſſary in many places to aſſemble ſeveral Texts, in order to form the ſenſe of a Rule; as on the contrary, it was neceſſary in other places to give to the Rule a larger extent than the Text has, in order to make it intelligible. But nevertheleſs an exact Fidelity has been obſerved all throughout, that no Text might be wreſted from its true meaning, and that nothing might be advanced without Authority; becauſe that although the Rules which have been drawn from the Texts of the Laws, bear the Character of Truth, by reaſon of the Natural Equity which is the Spirit of them; it is neceſſary to fortify them by the Authority of the Texts taken out of the *Roman* Law, which adds this Effect to their Certainty, that it ſets the Mind at reſt, by perceiving firſt the Truth by it ſelf, and having this farther Aſſurance, that his Judgment is ſupported by that of ſo many learned and judicious perſons who were the Authors of theſe Laws, and by the univerſal Approbation which they have had every where for ſo many Ages paſt.

REASONS, *Why we have made a* Treatiſe of Laws.

THE Deſign of digeſting the Civil Law into its Natural Order, hath engaged the Author to compoſe a Treatiſe of Laws, which he judged to be fully as neceſſary for the right underſtanding of the Civil Law, as it is neceſſary for learning Geography, to have at leaſt a general Knowledge of the whole Syſtem of the World, ſuch as we have in Coſmography.

All Laws derive their Origin from the firſt Principles, which are the Foundations of the Order of the Society of Mankind; and we cannot well underſtand the Nature and Uſe of the different kinds of Laws, but by a View of their Connection with thoſe Principles, and of their Relation to the Order of that Society, of which they are the Rules. It is therefore in the Syſtem and Plan of this Univerſal Order, that we muſt find out the Situation and Extent of the *Roman* Laws, what they have in common with the other kinds of Laws, what it is that diſtinguiſhes them from the others, and many Truths which are eſſential for the right underſtanding of them, and for making a juſt application of them in the Matters to which they have Relation. It is likewiſe in the ſame Plan that we diſcern what theſe Matters are, and what their Order is; and all theſe Views both of the Laws, and of their Matters, ſhall be the Subject of this Treatiſe of Laws.

Some perſons may be apt to think, that this Treatiſe was not neceſſary for the Study of the Civil Law, and that the greateſt part of perſons learn it without the help of any ſuch general Diſſertation; and for this reaſon the Author was in doubt, whether he ſhould join to this Work this Treatiſe of Laws. But perſons whoſe Rank and Capacity rendred them fit Judges of the matter, were of opinion, that this Treatiſe ought not to be ſeparated from the Body of this Work, and that its Uſefulneſs makes it neceſſary that it ſhould be joined with it.

This is not the proper place to explain what it is wherein its Uſefulneſs does conſiſt; for it is only by reading it that we can judge thereof: and it may ſuffice to acquaint thoſe who have a mind to read this Treatiſe, that they need only to look over the Table of the Chapters, and the Contents of each Chapter, to judge of the benefit they may reap by reading it.

ADVERTISEMENT,

TOUCHING

The Second, Third and Fourth BOOKS of the FIRST PART of *The CIVIL LAW in its Natural Order.*

IT has been thought neceſſary to acquaint the Reader in this place, with the Rank which is aſſigned in the Book of *The Civil Law in its Natural Order*, to the Matters which compoſe the ſecond, third and fourth Books of the Firſt Part, of Engagements, *&c.* For altho' it be eaſy to judge of it by the Plan of all the Matters, which is in the fourteenth Chapter of *The Treatiſe of Laws*, and that the bare reading of the General Table which follows the ſaid Treatiſe, at the beginning of this Work, gives an Idea of it which it is not difficult to conceive and to retain: Yet it may happen that ſome Readers may neglect to read this Plan, and that reading the particular Table of the Matters treated of in the Second, Third, and Fourth Book, without reflecting on the General Order that has been given to all the Matters, they may not rightly apprehend what place the Titles of the ſaid Books have in the whole Work. Thus, the Reader who ſhall happen not to have this Idea preſent to his Mind, is deſired to read the fourteenth Chapter of the *Treatiſe of Laws*, and the General Table of Matters which follows it, and there to obſerve that a General Diviſion has been made of all the Matters into Two Parts: One, of Engagements; and the other, of Succeſſions. That the Firſt Part, of Engagements, has been divided into five Books: One intituled the Preliminary Book, becauſe it contains three Matters which are common to all the others, and which ought to go before them. The Firſt of the other four, wherein is conſidered the firſt kind of Engagements, which are thoſe into which people enter by Covenant: The Second, which contains the ſecond kind of Engagements, which are thoſe into which people enter without Covenant: The Third, of the Conſequences of theſe two ſorts of Engagements which add to them, or corroborate them. And the Fourth, of the Conſequences of the ſame Engagements which annul them, or diminiſh them. Purſuant to this Plan, we have ſet down next to the *Treatiſe of Laws*, the *Preliminary Book*, and the Firſt of the four others which treat of Covenants: And the Sequel takes in the three other Books. Thus, we have in theſe Five Books of the Firſt Part, every thing that relates to Engagements; that is to ſay, the Firſt Part of the Matters treated of in this Book of the *Civil Law in its Natural Order*.

As to the Second Part, it contains the Matter of Succeſſions. Thus, we ſhall have in theſe Two Parts, every thing that the Author intended to treat of in this Book of *The Civil Law in its Natural Order*; purſuant to the Project explained in the thirteenth and fourteenth Chapters of the *Treatiſe of Laws*. That is to ſay, all the Matters which any way concern the Tranſactions between Man and Man, and the Rules of which are almoſt all of them of the Law of Nature, and of Equity, and which we find collected no where elſe but in the Body of the *Roman* Law.

The AUTHOR's *PREFACE*.

ADVERTISEMENT,

CONCERNING

The SECOND PART of *The CIVIL LAW in its Natural Order.*

WE ſuppoſe that thoſe who have a mind to read this *Second Part* of the Civil Law, which treats of Succeſſions, have already ſeen by the foregoing Matters, which make the *Firſt Part*, what is the Deſign and Order of this Book. And therefore they need only to be acquainted, as to what concerns this Second Part, that whereas in the Firſt, the Remarks which are there made on the Rules, are all of them very ſhort, and in a few lines; the Author has been obliged to make in this Second Part many Remarks of a large extent. So that it behoveth at preſent to give an account of the difference between the Remarks of this Second Part, and thoſe of the Firſt.

This difference has been a neceſſary conſequence of the Deſign propoſed by the Author in this Book, to explain all the Principles, and all the Detail of the Matters of the Civil Law, and to ſet them in ſuch a clear Light as to make them eaſy to all Readers. For the Author having this View, the infinite number of Difficulties in the Matters of Succeſſions have obliged him in many places to make different Reflections, either to explain what is obſcure in the Laws relating to this Matter, or to unravel what is confuſed and perplexed, or to diſcover Natural Principles which do not appear in the Laws themſelves, and which may help to clear up the difficulties of them, and give Views for the right Uſe of them, or to examine Queſtions which have divided the Interpreters, or to oppoſe in ſeveral places the Principles of Equity, which are received in our Uſage, to the Subtilties and Niceties of the *Roman* Law which they reject. And the Author has thought it neceſſary to ſtart in ſeveral places, Difficulties and Queſtions which ariſe ſo naturally from the Rules, that altho' the texts of the Law make no mention of them, yet they ought not to be ſuppreſſed. It would be eaſy to give here Examples of all theſe ſeveral Cauſes, and alſo of ſome others which have induced the Author to make all theſe Remarks or Reflections: but ſuch a long diſcuſſion would exceed the bounds of an Advertiſement; and the Readers may be able to diſcern them in each Remark, and to judge of the uſefulneſs which the Author propoſed by them.

Some may perhaps wonder that there are no ſuch Reflections made upon the Matters of the Firſt Part; and it is but reaſonable to give them Satisfaction therein.

There is this difference between the Matters of Succeſſions and all the others, that thoſe other Matters which have been explained in the Firſt Part, have almoſt no other Rules beſides thoſe of the Law of Nature, and we ſee there but few Arbitrary Laws; whereas in the Matters of Succeſſions, there are a great many more Arbitrary Laws in proportion; ſuch as, for example, thoſe which have regulated the *Quota* of the Filial Portions, the Formalities of Teſtaments, the Codicillary Clauſes, the Right of Accretion, the Right of Tranſmiſſion, the Subſtitutions of ſeveral ſorts, the Falcidian Portion, the Trebellianick Portion, and many others. And altho' in all theſe particular Matters, the greateſt number of their Principles, and even of the Detail of their Rules, are of the Law of Nature, and of Equity; yet the Arbitrary Laws that are mixed with them, contain two Sources of Difficulties.

The firſt ariſes from the different Changes that have been made of ſome of theſe Arbitrary Laws at divers times, and becauſe theſe Changes have not only perplexed that Law by their multitude, but have rendred it in ſome of thoſe Matters, obſcure, difficult, and uncertain. For ſeeing thoſe who made the ſaid Changes in the preceding Laws, had their Views confined to certain Heads, they made Proviſion only for what they had a mind to alter, or repeal, and leaving the reſt which had a coherence with what they did alter, or repeal, without regulating the preciſe Bounds which their new Diſpoſitions were to ſet to the preceding Laws, they have by that means left it uncertain what Effect theſe Changes ought to have, and what Bounds or Extent muſt be given to them, in order to reconcile them with what they had a mind to retain of the Laws which they did alter.

The other Source of Difficulties which ariſe from the Arbitrary Laws, and which is Natural to all the Laws that have this Character, proceeds from this, that theſe ſorts of Laws can provide but imperfectly againſt Events; which being unforeſeen do often make it neceſſary to make Exceptions to the ſaid Laws: whereas no Event eſcapes the Law of Nature, nor can it be unforeſeen by it.

More might be ſaid on this Subject; but the little that is ſaid may ſuffice within the Bounds of an Advertiſement.

We muſt not comprehend in the number of the Difficulties which have been juſt now mentioned, thoſe which ariſe from the Diſpoſitions of Teſtators, either obſcure or imperfect, or ill laid together, or which have other ſorts of defects; for theſe ſorts of Difficulties are of a nature altogether different, and have their peculiar Rules, which determine the Effect that is to be given to ſuch Diſpoſitions, and which ſhall be explained in their proper places.

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A TREATISE OF LAWS.

CHAPTER I.

Of the Firſt Principles of all Laws.

The CONTENTS.

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I.

1. *The firſt Principles of Laws were unknown to* Pagans.

ONE would think, that nothing ought to be better known by Men, than the firſt Principles of the Laws, which regulate both the Conduct of every one in particular, and the Order of the Society which they compoſe together: And that even thoſe perſons who have not the advantages of Religion, by which we learn what thoſe Principles are, ought at leaſt to diſcover them in their own Breaſts, ſeeing they are engraved on all our Hearts by Nature. Nevertheleſs we ſee that the moſt learned of thoſe who were ignorant of what Religion teaches us concerning them, knew ſo little of them, that they have eſtabliſhed Rules which violate and deſtroy them.

Thus, the *Romans*, who have excelled all other Nations in cultivating the Civil Laws, and who have made ſo great a number of very juſt ones, took the ſame Licenſe as other People did, to take away the Lives of their Slaves, and of their own Children[a]. As if the Power which the quality of Father, and that of Maſter, gave them, could diſpenſe with the Laws of Humanity.

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[a] *V. l. ult. C. de patr. pot.* §. 1. & 2. *inſt. de his qui ſui, vel alieni juris ſunt.*

This extreme Oppoſition between the Equity which ſhines in the juſt Laws made by the *Romans*, and the Inhumanity of this Licenſe, ſhews plainly that they were ignorant of the Sources of that very Juſtice which they underſtood, ſince they violated in ſo groſs a manner, by theſe barbarous Laws, the Spirit of thoſe Principles, which are the Foundations of all the Juſtice and Equity that is in their other Laws.

This Error is not the only one by which we may judge how much they were Strangers to the Knowledge of thoſe Principles; we have another very remarkable Proof of it, in the Idea which their Philoſophers gave them of the Origine of the Society of Mankind, of which thoſe Principles are the Foundation. For they were ſo far from knowing them, and from perceiving how they ought to form the Union of Men, that they imagined that Men lived at firſt as wild Beaſts in the Fields, without any Communication, and without any Tie to one another, until one of them bethought himſelf that it was poſſible to join them together in Society, and began to civilize them for that purpoſe[b].

We ſhall not ſtop here to enquire into the Cauſes of this ſtrange Contrariety of Light and Darkneſs in Men, who were the moſt learned of all the Heathens; and how they could know ſo many Rules of Juſtice and Equity, without perceiving in them the Principles on which they depend. The very firſt Elements of the Chriſtian Religion explain this Riddle; and what it teaches us concerning the State of Man, diſcovers to us the Cauſes of this Blindneſs, and informs us at the ſame time what are theſe firſt Principles which God has eſtabliſhed, as the Foundations of the Order of the Society of Mankind, and which are the Sources of all the Rules of Juſtice and Equity.

But altho' theſe Principles are known to us only by the Light of Religion, yet it points them out to us in our very Nature, with ſo much clearneſs, that we ſee plainly that Man is ignorant of them only becauſe he does not know himſelf; and therefore that nothing is more aſtoniſhing than the Blindneſs that hinders him from ſeeing them.

II.

2. The Certainty of the Principles of Laws.

Since therefore there is nothing more neceſſary in Sciences, than to poſſeſs the firſt Principles of them, and that every Science begins with eſtabliſhing its own Principles, and ſetting them in ſuch a Light as may beſt diſcover their Truth and their Certainty, that they may ſerve for a Foundation to all the Particulars which are to depend upon them; it is of importance to conſider what are the Principles of Laws, in order to know the Nature and Firmneſs of the Rules which depend on them. And we may judge of the certainty of theſe Principles, by the double Impreſſion which ſuch Truths ought to make upon our Minds, which God reveals to us by Religion, and makes us to apprehend by our Reaſon. So that we may ſay, that the firſt Principles of Laws have a Character of Truth, which touches and perſuades more than that of the Principles of other human Sciences. And that whereas the Principles of other Sciences, and the particular Truths which depend upon them, are only the Object of the Mind, and not of the Heart, and that they do not even enter into the Minds of all Perſons; the firſt Principles of Laws, and the particular Rules eſſential to theſe Principles, have a Character of Truth which every body is capable of knowing, and which affects the Mind and the Heart alike. Thus, the whole Man is more penetrated by them, and more ſtrongly convinced of them than of the Truths of all the other humane Sciences.

There is no Body, for inſtance, but whoſe Heart and Mind tell him, that it is not lawful to kill him, or to rob him, nor to kill, or rob others; and who is there that is not more fully perſuaded of theſe Truths than of any Theorem of Geometry? Nevertheleſs theſe very Truths, that Murder and Robbery are unlawful, however clear and evident they are, have not a degree of Certainty equal to that of the firſt Principles on which they depend; for whereas theſe Principles are Rules which admit of no Diſpenſation, or Exception, theſe Truths are liable to Exceptions and Diſpenſations. As for inſtance, *Abraham* might lawfully kill his Son, when the Lord of Life and Death commanded him to do it[c]: And the *Hebrews* took, without any Crime, the Riches of the *Egyptians*, by order of the Maſter of the Univerſe, who gave them to them[d].

III.

3. The Knowledge of the firſt

We cannot take a more ſimple and ſurer way for diſcovering the firſt

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[b] *Cic. de Inv. L.* 1. *S.* 2.

[c] *Gen.* xxii. 2.

[d] *Exod.* xi. 2. xii. 36.

Principles of Laws, is attained to by the Knowledge of Man. ciples of Laws, than by ſuppoſing two prime Truths, which are only bare Definitions. One is, that the Laws of Man are nothing elſe but the Rules of his Conduct: And the other, that the ſaid Conduct is nothing elſe but the Steps which a Man makes towards his End.

In order therefore to diſcover the firſt Foundations of the Laws of Man, it is neceſſary to know what is the End of Man; becauſe his deſtination to that End, will be the firſt Rule of the Way, and Steps that lead him to it, and conſequently his firſt Law, and the Foundation of all the others.

To know the End of a Thing, is only to know why it is made. And we know why a Thing is made, if by obſerving how it is made, we diſcover what its Structure may have relation to. Becauſe it is certain, that God has proportioned the Nature of every Thing to the End for which he has deſigned it.

We all know and feel, that Man hath a Soul which animates a Body: And that in this Soul there are two Powers or Faculties, an Underſtanding, which is capable of knowing; and a Will capable of loving. Thus we ſee that it is to know, and to love, that God has made Man, and conſequently that it is to unite himſelf to ſome Object, in the Knowledge and Love of which his Quiet and Happineſs does conſiſt; and that it is towards this Object that he ought to direct all his Steps. From whence it follows, that the firſt Law of Man, is his deſtination to the Knowledge and Love of that Object, which ought to be his End, and in which he is to find his Happineſs: And that it is this Law, which being the Rule of all his Actions, ought to be the Principle of all his Laws.

To know therefore what is this firſt Law, what is the Spirit of it, and in what manner it is the Foundation of all others; we muſt ſee for what Object it is that the ſaid Law deſigns us.

Among all the Objects which offer themſelves to Man in the whole World, even including Man himſelf, there will be none of them found that is worthy of being his End. For in himſelf, he will be ſo far from finding his Happineſs there, that he will ſee nothing there but the Seeds of Miſery and Death: And round about him, if we go over the whole Univerſe, we ſhall find nothing there that is capable of being propoſed as an End either to his Mind, or to his Heart: And that the Things which we ſee there are ſo far from being conſidered as our End, that we are theirs: And that it is only for us that God has made them[e]. For all that is contained in the Earth and in the Heavens, is only a Proviſion made of Things neceſſary for all our Wants, which will periſh when they ceaſe. And we ſee plainly, that every thing there is ſo little worthy both of our Mind, and our Heart; that as for the Mind, God has hidden from it all other Knowledge of the Creatures, beſides what concerns the ways of uſing them well: And that the Sciences which apply themſelves to the Knowledge of their Nature, diſcover nothing in them beſides what may be of uſe to us; and grow darker and more unintelligible, the more they attempt to penetrate into that which is of no uſe to us[f]. And as for the Heart, every body knows that the whole World is not capable of filling it: And that it was never able to make any of thoſe perſons happy who have ſet their Affections moſt upon it, and have enjoyed the greateſt ſhare of it. Every body is ſo fully convinced of this Truth, that there is no occaſion to perſuade any one of it. And in fine, we muſt learn from him who has formed Man, that it is he alone, who as he is his Principle, is alſo his End[g]: And that it is only God alone, who is able to fill the infinite vacuity of that Mind, and of that Heart which he has made for himſelf[h].

It is therefore for God himſelf, that God has made Man[i]. It is that he may know him, that he has given him an Underſtanding: It is that he may love him, that he has given him a Will; and it is by the Ties of this Knowledge, and of this Love, that he would have Men to unite themſelves to him, that they may find in him their true Life, and their only Happineſs[l].

[e] And leſt thou lift up thine eyes unto heaven, and when thou ſeeſt the ſun, and the moon, and the ſtars, even all the hoſt of heaven, ſhouldeſt be driven to worſhip them and ſerve them, which the Lord thy God hath divided unto all Nations under the whole heaven, *Deut.* iv. 19.

[f] But what is commanded thee, think thereupon with reverence; for it is not needful for thee to ſee with thine eyes the things that are in ſecret, *Ecclus.* iii. 22.

[g] I am Alpha and Omega, the beginning and the end, the firſt and the laſt. *Rev.* xxii. 13. *Iſai.* xli. 4.

[h] I ſhall be ſatisfied, when I awake, with thy likeneſs. *Pſal.* xvii. 15.

[i] The Lord hath made all things for himſelf. *Prov.* xvi. 4. And to make thee high above all na-

tions which he hath made, in praiſe, and in name, and in honour. *Deut.* xxvi. 19. Even every one that is called by my name: for I have created him for my glory, I have formed him, yea, I have made him. *Iſaiah* xliii. 7.

[l] For he is thy life. *Deut.* xxx. 20. And this is life eternal, that they might know thee. *John* xvii. 3.

It is this conſtruction of Man, who is formed to know and to love God, which makes him to be like God [m]. For ſince God alone is the ſovereign Good, it is his Nature to know himſelf and to love himſelf: and it is in this Knowledge, and in this Love, that his Happineſs does conſiſt. So that it is to be like him, to be of a Nature that is capable of knowing him, and of loving him: And it is to partake of his Happineſs, to attain to the perfection of this Knowledge, and this Love [n].

[m] Let us make man in our own image, after our likeneſs. *Gen.* i. 26. *Wiſdom of Solomon* ii. 23. *Ecclus.* xvii. 1. *Coloſ.* iii. 10.

[n] But we know, that when he ſhall appear, we ſhall be like him, for we ſhall ſee him as he is. 1 *John* iii. 2.

IV.

4. The Nature of Man.

Thus we diſcover by this Reſemblance which Man has to God, what it is his Nature conſiſts in, his Religion, and his firſt Law. For his Nature is nothing elſe but that Being which is created after the Image of God, and capable of poſſeſſing that Sovereign Good, which is to be his Life and his Bleſſedneſs.

V.

5. The Religion of Man.

His Religion, which is the Collection of all his Laws, is nothing elſe beſides the Light, and the Way which lead him to that Life [o].

[o] For the commandment is a lamp, and the law is light. *Prov.* vi. 23.

VI.

6. The firſt Law of Man.

And his firſt Law, which is the Spirit of his Religion, is that which enjoins him to ſearch after, and to love that Sovereign Good; to which he ought to raiſe himſelf with all the force of his Mind, and of his Heart, which are made on purpoſe to poſſeſs it [p].

[p] This is the firſt and great commandment. *Matt.* xxii. 38. And love is the keeping of her laws. *Wiſd. of Solomon* vi. 18.

VII.

7. The ſecond Law of Man.

It is this firſt Law, which is the Foundation and firſt Principle of all the others. For this Law, which commands Man to ſearch after and to love the Sovereign Good, being common to all Mankind, it implies a ſecond Law, which obliges them to Unity among themſelves, and to the Love of one another; becauſe being deſtined to be united in the poſſeſſion of one only Good, which is to make their common Happineſs, and to be united in it ſo ſtraitly, that it is ſaid that they ſhall be but One [q]; they cannot be worthy of that Union in the poſſeſſion of their common end, if they do not begin their Union, by linking themſelves together by the tie of mutual Love in the way that leads them to it. And there is no other Law which commands every one to love himſelf, becauſe no one can love himſelf better than by keeping the firſt Law, and by ſteering the courſe of his Life towards the Fruition of that Good to which it calls us.

[q] That they all may be one, as thou, Father, art in me, and I in thee; that they alſo may be one in us. *John* xvii. 21.

VIII.

8. The Foundation of the Society of Mankind on theſe two Laws.

It is by the Spirit of theſe two Laws that God, deſigning to unite Mankind in the Poſſeſſion of their common end, hath begun to form among them a prior Union, in the uſe of the means which guide them to that other Union. And he has made this laſt Union, in which their Happineſs is to conſiſt, to depend on the good uſe of that firſt Union, which is to form their Society.

It is in order to unite them in this Society, that he hath made it eſſential to their Nature. And as we ſee in the Nature of Man his deſtination to the ſovereign Good, we ſhall alſo diſcover in it his deſtination to Society, and the ſeveral Ties which engage him to it from all parts; and that theſe Ties, which are Conſequences of the Deſtination of Man to the exerciſe of the firſt two Laws, are at the ſame time the Foundation of the particular Rules of all his Duties, and the Fountain of all Laws.

But before we proceed any farther, to ſhew the Connexion which links all the Laws with theſe two firſt, it is neceſſary to obviate the Reflection which it is natural to make on the ſtate of this Society; which, altho' it ought to be founded on the two firſt Laws, does nevertheleſs ſubſiſt, notwithſtanding the Spirit of theſe Laws has but very little Influence in it; ſo that it ſeems as if it maintained it ſelf by other Principles. However, although Men have violated theſe Fundamental Laws, and although Society be in a ſtate ſtrangely different from that which ought to be raiſed upon theſe Foundations, and cemented by this Union; it is ſtill true, that theſe Divine Laws, which are eſſential to the Nature of Man, remain immutable, and have never ceaſed to oblige Men to the Obſervance of them: and it is likewiſe certain, as will hereafter appear, that all the Laws which govern Society, even in the condition in which it is at preſent, are no other than Conſequences of theſe firſt Laws. Thus, it was neceſſary to eſtabliſh theſe firſt Principles: and beſides, it is not poſſible to comprehend aright the manner in which we ſee Society ſubſiſt at preſent, without knowing the Natural State in which it ought to be; and conſidering in it the Union, which the Diviſions of Mankind have broken, and the Order which they have inverted.

In order to judge therefore of the Spirit and Uſe of the Laws, which maintain Society in the condition in which it is at preſent, it is neceſſary to draw a Plan of this Society on the foundation of the two primary Laws, to the intent that we may diſcover in it the Order of all the other Laws, and the Connexion which they have with theſe two firſt. And then we ſhall ſee what method God hath taken to make Society ſubſiſt in the ſtate in which we ſee it at preſent, and among thoſe Perſons, who not governing themſelves in it according to the Spirit of the Fundamental Laws, ruine the Foundations which he had laid for it.

CHAP. II.

A Plan of Society, on the Foundation of the two firſt Laws, by two kinds of Engagements.

The CONTENTS.

1. *The Relation which the State of Man in this Life, has to the Exerciſe of the firſt Law.*
2. *The relation which the ſame ſtate of Man has to the exerciſe of the ſecond Law.*
3. *Deſtination of Man to Society, by two kinds of Engagements.*

I.

1. The Relation which the State of Man in this Life, has to the Exerciſe of the firſt Law.

ALtho' Man was made to know, and to love the Sovereign Good; yet God did not put him immediately in poſſeſſion of that end, but placed him firſt in this life, as the way to attain to it. And ſeeing Man cannot move towards any objects by other ſteps than the Light of his Underſtanding, and the Motions of his Will; God hath made the clear Knowledge, and the unchangeable Love of the Sovereign Good, in which the Happineſs of the Mind and Heart of Man does conſiſt, to depend on Man's Obedience to the Law, which commands him to meditate on, and to love that only Good, as much as he is able in this Life; which he gives him for no other end, but that he may imploy it wholly in the purſuit of this object; the only one that is worthy to employ all his Thoughts, and to ſatisfy all his Deſires[a].

We do not pretend to explain here the Truths which Religion teaches us, concerning the manner in which God directs and trains up Man to this Purſuit. It ſufficeth for giving an Idea of the Plan of Society, to ſuppoſe them, and to obſerve, that it is ſo much for imploying Man in the exerciſe of the firſt and ſecond Law, that God has given him the uſe of Life in this world, that every thing in it that preſents it ſelf to his view, both in himſelf and in all the reſt of the Creatures, are ſo many objects given him to engage him to it. For as to the firſt Law, he ought to perceive by the ſight and uſe of all theſe objects, that they are ſo many Lineaments and Images of that which God would have them to know, and to love in him.

II.

2. The Relation which the ſame ſtate of Man has to the Exerciſe of the ſecond Law.

And as to the ſecond Law, God hath ſo ſorted and matched Men among themſelves, and adapted the Univerſe to all Mankind, that the ſame objects which ought to excite in them the Love of the Sovereign Good, engages them likewiſe to Society, and to a mutual Love of one another. For we ſee nothing, and we know nothing, either without Man, or within him, but what points out his deſtination to Society.

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[a] Hear, O *Iſrael*, the Lord our God is one Lord. And thou ſhalt love the Lord thy God with all thine heart, and with all thy ſoul, and with all thy might. And theſe words which I command thee this day, ſhall be in thine heart. And thou ſhalt teach them diligently unto thy children, and ſhalt talk of them when thou ſitteſt in thine houſe, and when thou walkeſt by the way, and when thou lieſt down, and when thou riſeſt up. And thou ſhalt bind them for a ſign upon thine hand, and they ſhall be as frontlets between thine eyes. And thou ſhalt write them upon the poſts of thy houſe, and on thy gates. *Deut.* vi. 4, *&c.* *Ibid.* xi. 18.

Thus without Man, the Heavens, the Stars, the Light, the Air, are objects which preſent themſelves to Mankind, as a Good common to them all, and of which every perſon hath the entire uſe. And all the things which the Earth and the Waters bear or bring forth, are likewiſe of common uſe; but in ſuch a manner, that not any one of them paſſes to our uſe, but by the Labour of many perſons. And this renders Men neceſſary one to another, and forms among them the different Ties for the uſes of Agriculture, Commerce, Arts, Sciences, and for all the other Communications which the ſeveral Wants of Life may demand.

Thus within Man, we ſee that God hath formed him by an inconceivable conjunction of Spirit and Matter together; and that he hath created him, by the union of a Soul and a Body, in order to make of the ſaid Body united to the Soul, and of the ſaid Divine Structure of Senſes and Members, the Inſtrument of two Uſes eſſential to Society.

The firſt of theſe two uſes is, that of uniting the Minds and Hearts of Men among themſelves; which is effected by a natural conſequence of the union of the Soul and the Body. For it is by the uſe of the Senſes united to the Mind, and by the impreſſions of the Mind upon the Senſes, and of the Senſes upon the Mind, that Men communicate to one another their Thoughts and their Sentiments. Thus, the Body is at the ſame time the Inſtrument and the Image of that Mind and of that Heart, which are the Image of God.

The ſecond Uſe of the Body is, that of applying Men to all the different Labours which God hath rendred neceſſary for ſupplying all their Wants; for it is for Labour that God hath given us Senſes and Members. And although it be true, that the Labours which imploy Man at preſent are a Puniſhment which God inflicts on him, and that God hath not given unto Man a Body fit for Labour, to puniſh him by the Labour it ſelf; yet it is certain, that Man is ſo far deſtined by Nature for Labour, that he was commanded to work even in the State of Innocence[b]. But one of the differences between the Labours of that firſt State of Man, and theſe of the preſent, conſiſts in this, that the Labour of Man in his State of Innocence, was an agreeable Occupation to him, without Pain, without Diſguſt, without Wearineſs; whereas our Labour is impoſed on us as a Puniſhment[c]. Thus, the Law which enjoins Labour is equally eſſential both to the Nature of Man, and to the State to which his Fall hath reduced him. And this Law is alſo a natural conſequence of the two primary Laws, which by placing Man in Society, engage him to Labour, which is the Bond of it; and appoint to every one his particular Work, in order to diſtinguiſh by the different Labours, the ſeveral Imployments, and the different Conditions, which are to compoſe the Society.

III.

3. Deſtination of Man to Society by two kinds of Engagements.

It is thus that God, having deſtined Mankind for Society, hath formed the Ties which engage him to it. And ſeeing the general Ties which he makes among all Men by their Nature, and by their Deſtination to one and the ſame End, under the ſame Laws, are common to all Mankind, and that they do not form in every one any ſingular Relation which engages him to ſome more than to others; he adds to thoſe general and common Ties, other particular Ties and Engagements of ſeveral ſorts, by which he unites Men among themſelves more cloſely, and determines every one to exerciſe effectually towards ſome particular Perſons, the Duties of that Love which no one can exerciſe towards all Mankind in general. So that theſe Engagements are to every one as it were his particular Laws, which point out to him what it is that the ſecond Law demands of him, and which conſequently are the Rule of his Duties. For the Duties of Men towards one another, are nothing elſe but the Effects of the ſincere Love which every Man owes to another, according to the Engagements under which he happens to be.

Theſe particular Engagements are of two kinds. The firſt is, of thoſe which are formed by the Natural Ties of Marriage, between Huſband and Wife; and of Birth, between Parents and Children: And this kind comprizes likewiſe the Engagements of Kindred and Affinity, which are the Conſequences of Birth and Marriage.

The ſecond kind takes in all the other ſorts of Engagements, which draw all manner of Perſons nearer to one another, and which are formed differently, either by the ſeveral Communications which paſs among Men of their Labour, of their Induſtry, and of all ſorts of Offices, Services, and other Aſſiſtances: or by thoſe which relate to the uſe of Things. And this comprehends all the different uſes of Arts, of Implovments, and of Profeſſions of all kinds, and every thing elſe that may link Perſons together, according to the different Wants of Life; whether by free and gratuitous Communications, or by Commerce.

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[b] And the Lord God took the man and put him into the garden of *Eden*, to dreſs it, and to keep it. *Gen.* ii. 15.

[c] In the ſweat of thy face ſhalt thou eat bread. *Gen.* iii. 19.

It is by all theſe Engagements of theſe two kinds, that God forms the Order of the Society of Mankind, to link them together in the Exerciſe of the ſecond Law. And ſeeing he marks in every Engagement what it is that he enjoins to thoſe whom he puts under it; one perceives in the Characters of the different ſorts of Engagements, the Foundations of the ſeveral Rules of that which Juſtice and Equity demand of every perſon, according to the Conjunctures in which his particular Engagements place him.

CHAP. III.

Of the firſt Kind of Engagements.

The CONTENTS.

1. *Natural Engagements of Marriage, and of Birth.*
2. *Divine Inſtitution of Marriage, and the ſeveral Principles of the Laws which depend on it.*
3. *The Tie of Birth, and the Principles of the Laws which are the conſequences of it.*
4. *The Ties of Kindred and Affinity, and their Principles.*

I.

1. Natural Engagements of Marriage, and of Birth.

THE Engagement which Marriage produces betwixt the Huſband and the Wife, and that which Birth makes between them and their Children, forms a particular Society in every Family, in which God links the ſaid Perſons more cloſely together, in order to engage them to a continual Practice of the ſeveral Duties of mutual Love. It is with this view that he has not created all Men as he did the firſt; but that he hath made them to be born of the Union which he has formed between the two Sexes in Marriage, and to be put into the world in a ſtate ſubject to a thouſand Wants, where the help of both Sexes is neceſſary to them for a long time. And it is from the manner in which God hath formed theſe two Ties of Marriage and Birth, that we muſt diſcover the Foundations of the Laws which relate to them.

II.

2. Divine Inſtitution of Marriage, and the ſeveral Principles of the Laws which depend on it.

In order to form the Union between Man and Woman, and to inſtitute Marriage, which was to be the Source of the Multiplication and Union of Mankind: And to give to the ſaid Union Foundations proportionable to the Characters of the Love which was to be the Bond of it; God created in the firſt place only Man alone[a], and then took out of him a ſecond Sex, and formed Woman of one of the Ribs of Man[b], to ſhew from the Unity of their Origin, that they make only one Being; where the Woman is taken out of Man, and given to him by the hand of God[c] as a Companion, and as a Help meet for him[d], and formed out of him[e]. It was in this manner, that he linked them together by this Union, which is ſo ſtrict, and ſo holy, and of which it is ſaid, that it is God himſelf who has joined them together[f], and who has made them two to be one Fleſh[g]. He made Man the Head of this intire Being[h]; and he eſtabliſhed their Union, by forbidding them to ſeparate what he himſelf had joined[i].

It is theſe myſterious ways by which God hath formed the Engagement of Marriage, which are the Foundations not only of the Laws which regulate all the Duties of the Huſband, and of the Wife, but alſo of the Laws of the Church, and of the Civil Laws which concern Marriage, and of the Matters which

[a] And the Lord God formed Man of the duſt of the ground. *Gen.* ii. 7.

[b] And he took one of his ribs, and cloſed up the fleſh inſtead thereof. And the rib which the Lord God had taken from Man, made he a Woman. *Gen.* ii. 21, 22.

[c] And brought her unto the Man. *Gen.* ii. 22.

[d] It is not good that the man ſhould be alone; I will make him a help meet for him. *Gen.* ii. 18.

[e] This is now bone of my bones, and fleſh of my fleſh: ſhe ſhall be called Woman, becauſe ſhe was taken out of Man. *Gen.* ii. 23.

[f] What therefore God hath joined together, let not Man put aſunder. *Matt.* xix. 6.

[g] And they ſhall be one fleſh. *Gen.* ii. 24. Wherefore they are no more twain, but one fleſh. *Matt.* xix. 6. *Epheſ.* v. 31. *Mark* x. 8.

[h] The head of the woman is the Man. 1 *Cor.* xi. 3. Wives ſubmit your ſelves unto your own Husbands, as unto the Lord. For the Husband is the Head of the Wife, even as Chriſt is the Head of the Church. *Eph.* v. 22, 23. Thy deſire ſhall be to thy Husband, and he ſhall rule over thee. *Gen.* iii. 16. 1 *Cor.* xiv. 34.

[i] What therefore God hath joined together, let not Man put aſunder. *Matt.* xix. 6.

which depend on it, or which have any relation to it.

Thus Marriage being a Tie formed by the hand of God, it ought to be celebrated in a manner becoming the Holineſs of the Divine Inſtitution which hath eſtabliſhed it. And it is a natural Conſequence of this Divine Order, that the Marriage be preceded and accompanied by Decency, by the reciprocal Choice of the Perſons who engage in it, by the Conſent of Parents, who are in many reſpects in the place of God: and that it be celebrated by the Miniſtry of the Church, where this Union ought to receive the Divine Benediction.

Thus the Huſband and Wife being given the one to the other by the hand of God, who unites them in one compleat Being, that cannot be ſeparated. A Marriage which has been once lawfully contracted, can never be diſſolved[l].

Thus this Union of Perſons in Marriage is the Foundation of Civil Society, which unites them in the Uſe of their Goods, and of all other Things.

Thus the Huſband being, by Divine Appointment, the Head of the Wife, he has over her a Power proportionable to the rank he has in their Union: and this Power is the Foundation of the Authority which the Civil Laws give to the Huſband, and of the Effects of this Authority in the matters where it hath its uſe.

Thus Marriage being inſtituted for the multiplying of Mankind, by the Union of the Huſband and Wife, linked together in the manner in which God unites them; all manner of Conjunction beſides that of Marriage, is unlawful, and cannot give other than an Illegitimate Birth. And this Truth is the Foundation of the Laws of Religion, and of Civil Government, againſt unlawful Conjunctions; and of the Laws which regulate the State of Children which iſſue from ſuch unlawful Conjunctions.

The Tie of Marriage which unites the two Sexes, is followed by that of Birth, which unites to the Huſband and Wife the Children which are born of their Marriage.

III.

3. The Tie of Birth, and the Principles of the Laws which are the conſequences of it.

It is in order to form this Tie, that God hath eſtabliſhed, that Man ſhould receive his Life from his Parents, in the boſom of a Mother; that his Birth ſhould be the Fruit of the Pains and Labours of the ſaid Mother; that he ſhould be born incapable of preſerving this Life into which he enters; that he ſhould continue in it a long time in a ſtate of Weakneſs, and ſtand in need of the help of his Parents, in order to his ſubſiſting, and being educated in it. And as it is by this Birth that God forms the mutual Love, which unites ſo ſtrictly him who by begetting his own Likeneſs gives him Life, with him who receives it; ſo he gives to the Love of Parents a Character ſuited to the condition of Children in their Birth, and to all the Wants which are the Conſequences of this Life which they have given them; that he may engage them, by the ſaid Love, to the Duties of Education, Inſtruction, and all the other Paternal Duties. And he gives to the Love of Children a Character ſuited to the Duties of Dependance, Obedience, Gratitude, and all the other Filial Duties, to which they are engaged by the Benefit of Life, which they hold in ſuch a manner of their Parents, of whom God makes them to be born, that he teaches us, that without them they would not have that Life[m]. And this obliges them to render to their Parents all manner of Aſſiſtance, and all manner of Service in their Wants; and eſpecially in thoſe of old Age, and other Weakneſſes, Infirmities, and Neceſſities, which afford Children an occaſion of paying to their Parents Duties which anſwer the firſt Benefits which they received from them.

It is this Order of Birth, which, by forming the Engagements between Parents and Children, is the Foundation of all their Duties, the Extent whereof it is eaſy to diſcover by the Characters of theſe different Engagements. And on theſe very Principles depends all that the Civil Laws have regulated touching the Effects of the Paternal Power, and of the mutual Duties of Parents towards Children, and of Children towards Parents; according as they are Matters that are ſubject to the Regulation of Policy; ſuch as the Rights which the Laws and Cuſtoms give to Fathers for the Government of their Children, for the Celebration of their Marriages, for the Adminiſtration and Enjoyment of their Eſtates, the Undutifulneſs and Diſobedience of Children to their Parents, the Injuſtice of Parents, or of Children, who refuſe Allimony to one another, and other Matters of the like nature.

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[l] Whoſoever ſhall put away his Wife, except it be for Fornication. *Matt.* xix. 9.

[m] Honour thy father with thy whole heart, and forget not the ſorrows of thy mother. Remember that thou waſt begot of them, and how canſt thou recompenſe them the things that they have done for thee. *Ecclus.* vii. 27, 28.

It is likewiſe upon this Order, which God has made uſe of for giving Life to Children by their Parents, that the Laws are founded which convey to Children the Eſtates of their Parents after their death; for Temporal Goods being given to Men for all the different Neceſſities of Life, and being only a Conſequence of that Benefit; it is agreeable to the Order of Nature, that after the death of the Parents, the Children ſhould inherit their Goods, as an Acceſſory to the Life which they have received from them.

The Tie of Birth, which unites Fathers and Mothers to their Children, unites them likewiſe to thoſe who are born and deſcended of their Children. And this Tie makes all the Deſcendants to be conſidered as Children, and all the Aſcendants as being in the rank of Fathers, or Mothers.

It may be remarked on the difference of the Characters of the Love which unites the Huſband and the Wiſe, and of that which unites Parents and Children, that it is the oppoſition of theſe different Characters, which is the Foundation of the Laws which prohibit Marriage between Aſcendants and Deſcendants in all degrees, and between Collaterals in ſome degrees: and it is eaſy to perceive the reaſons of ſuch Prohibition, by barely reflecting on what has been juſt now remarked in reference to theſe Characters, on which it is not neceſſary to enlarge here.

IV.

4. The Ties of Kindred and Affinity, and their Principles.

Marriage and Birth, which unite ſo ſtrictly the Huſband and Wiſe, Parents and Children, form alſo two other ſorts of Natural Ties, which are conſequences of them. The firſt is, that of Collateral Relations, which is called Kindred; and the ſecond is, that of Allies by Marriage, which is called Alliance, or Affinity.

Kindred unites the Collateral Relations, who are thoſe Perſons whoſe Birth hath its Origine from one and the ſame common Aſcendant. They are called Collaterals, becauſe whereas the Aſcendants and Deſcendants are in a direct Line from Father to Son; the Collaterals have every one their own Line, which terminates in that of the common Aſcendant. Thus they are at the ſide of one another; and the Foundation of their Tie and Kindred is, their common Union to the ſame Parents, from whom they derive their Birth.

This is not the proper place to explain the Degrees of Kindred; it is a matter which makes a part of that of Succeſſions. And it ſufficeth to remark here, that this Union of Kindred is the Foundation of ſeveral Laws; ſuch as thoſe which forbid Marriage between Perſons who are near of Kin; thoſe which call them to Succeſſions, and to Guardianſhips; thoſe of the Challenges of Judges, and Exceptions againſt Witneſſes, who are Relations to the Parties, and others of the like nature.

Affinity is the Tie and Relation which is made between the Huſband and all the Kindred of the Wife; and between the Wife and all the Kindred of the Huſband. The Foundation of this Tie, is the ſtrict Union between the Huſband and the Wife, which makes that thoſe who are tied by Kindred to one of the two, are of conſequence tied to the other: and this Affinity makes the Huſband conſider the Father and Mother of his Wife as being in the place of Father and Mother to himſelf: and her Brothers, her Siſters, and her other Relations, as being to him in the ſtead of Brothers, Siſters, and Relations: and the Wife looks upon in the ſame manner the Father and Mother, and all the Kindred of her Huſband, as having the ſame Relation to her ſelf.

This Relation of Affinity is the Foundation of thoſe Laws which forbid Marriage between perſons that are allied in a direct Line of Aſcendants and Deſcendants, in all Degrees; and between Collateral Allies, within the compaſs of certain Degrees: and likewiſe of the Laws which call Allies to Tutorſhips, of thoſe which reject Judges and Witneſſes who are allied to the Parties, and of others of the like nature.

CHAP. IV.

Of the ſecond kind of Engagements.

The CONTENTS.

1. *What theſe Engagements are, and how God puts every one under thoſe that are peculiar to him.*
2. *Theſe Engagements are of two ſorts; thoſe which are voluntary, and thoſe which do not depend upon the Will.*
3. *Voluntary Engagements.*
4. *Engagements independent on the Will.*

5. *The Spirit of the ſecond Law in all Engagements.*
6. *The Order of Government for keeping men within their Engagements.*
7. *The Engagements are the Foundations of the particular Laws which relate to'em.*

I.

1. What theſe Engagements are, and how God puts every one under thoſe that are peculiar to him.

SEeing the Engagements of Marriage and Birth, of Kindred and Affinity, are limited to certain Perſons, and that God hath placed Mankind in Society, there to unite them by mutual Love, in ſuch a manner that every perſon may be diſpoſed to produce towards others the Effects of this Love, according as occaſion may oblige him to it; he hath made neceſſary in Society a ſecond kind of Engagements, which approach and link differently together all manner of Perſons, and frequently even thoſe who are the greateſt Strangers to one another[a].

It is to form this ſecond ſort of Engagements, that God multiplies the Wants of Men; and that he makes them neceſſary to one another for getting all theſe Wants ſupplied. And he makes uſe of two Ways to place every one in the Order of the Engagements for which he deſigns him.

The firſt of theſe two Ways is the ranging of Perſons in Society, where he aſſigns to every one his place, that he may point out to him by the ſituation of it, the Relations which tie him to others, and the Duties that are peculiar to the Rank which he holds; and he places every one in his proper Rank, by his Birth, by his Education, by his Inclinations, and by the other Effects of his Conduct, which range and diſpoſe Men in their Places. It is this firſt Way, which produces to all Men the general Engagements ariſing from their Conditions, their Profeſſions, their Imployments, and which places every Perſon in a certain condition of Life, of which his particular Engagements are to be the Conſequences.

The ſecond Way, is the ordering of the Events and Conjunctures, which determine every one to particular Engagements, according to the Occaſions and Circumſtances in which he happens to be.

II.

2. Theſe Engagements are of two ſorts; thoſe which are Voluntary, and thoſe which do not depend on the Will.

All theſe ſorts of Engagements of this ſecond kind, are either Voluntary, or Involuntary. For ſeeing Man is a free Agent, there are Engagements into which he enters willingly: and ſeeing he has a dependance on the Divine Providence, there are ſome Engagements under which God puts him without his own free choice. But whether the Engagements depend on the Will, or be altogether independent on it as to their Origine, Man acts freely both in the one and the other; and his whole Conduct implies always theſe two Characters; one of his Dependance upon God, whoſe Order he ought always to obey; and the other of his Liberty, which ought to move him to it. So that all theſe ſorts of Engagements are proportioned both to the Nature of Man, and to his Condition in this ſtate of Life.

III.

3. Voluntary Engagements.

Voluntary Engagements are of two ſorts. Some are formed mutually between two or more Perſons, who bind and engage themſelves reciprocally to one another by their free Will: and others are formed by the Will of one of the Parties alone, who engages himſelf to other Perſons, when the ſaid Perſons do not treat with him.

It will be eaſy to diſtinguiſh theſe two ſorts of Engagements, by ſome Examples. Thus for Voluntary and Mutual Engagements, we ſee that becauſe of the ſeveral Occaſions which Men have to communicate to one another their Induſtry and their Labour, and for carrying on the different Commerces of all Things, they enter into Partnerſhip, they let and hire, they buy and ſell, they barter, and make with one another all ſorts of Covenants.

Thus, as to the Engagements which are formed by the Will of one Party alone, we ſee that he who becomes Heir or Executor, obliges himſelf to the Creditors of the Succeſſion: That he who takes upon himſelf the Management of the Affair of an abſent perſon without his knowledge, obliges himſelf for the Conſequences of the Affair which he has begun: And in general, that all thoſe who voluntarily enter upon Imployments, oblige themſelves to the Engagements which are the Conſequences of them.

IV.

4. Engagements independent on the Will,

The Involuntary Engagements, are thoſe under which God puts Men without their own choice. Thus, thoſe who are named to the Offices which are called Municipal, ſuch as thoſe of Mayor, Sheriff, Conſul, and others of the like nature, and thoſe who are engaged in ſome Commiſſions of Juſtice, are obliged to execute them, and cannot avoid doing it, unleſs they have reaſonable Excuſes. Thus, he who is aſſigned Guardian to an Infant, is obliged independently of his Will*, to be inſtead of a Father to the Orphan who is committed to his Charge. Thus, he whoſe Affair hath been managed in his abſence, and without his knowledge, by a Friend, who hath taken care of it, is under an Obligation to that Friend, to reimburſe him of what he has reaſonably expended, and to ratify what he has well tranſacted. Thus he whoſe Goods have been ſaved in a Shipwrack by lightening the Veſſel, and throwing other Goods over board, is obliged to bear his Share of the Loſs of the Goods thrown into the Sea, in proportion to the Value of what has been ſaved for his uſe. Thus, the condition of thoſe who are Members of the Society, who are deſtitute of the Means of Subſiſtence, and unable to work for their Livelihood, lays an Obligation on all their Fellow Members to exerciſe towards them mutual Love, by imparting to them a Share of thoſe Goods which they have a right to. For every Man being a Member of the Society has a right to live in it: and that which is neceſſary to thoſe who have Nothing, and who are not able to gain their Livelihood, is by conſequence in the hands of the other Members; from whence it follows, that they cannot without Injuſtice detain it from them. And it is becauſe of this Engagement, that in Publick Neceſſities private Perſons are obliged, even by Conſtraint, to aſſiſt the Poor according to their Wants. Thus the Condition of thoſe who ſuffer any Injuſtice, and who are under Oppreſſion, is an Engagement to thoſe who have in their hands the Miniſtry and Authority of Juſtice, to imploy it for their Protection.

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[a] *Luke* x. 33.

V.

5. The Spirit of the ſecond Law in all Engagements.

We ſee in all theſe ſorts of Engagements, and in all the others which we can imagine, that God forms them, and puts Men under them, meerly to imploy them in the exerciſe of mutual Love: and that all the different Duties preſcribed by Engagements, are nothing elſe but the ſeveral Effects which this Love ought to produce, according to the Conjunctures and the Circumſtances. Thus in general, the Rules which command us to render to every man what is his due, to wrong no man, to be always faithful and ſincere, and others of the like nature, enjoin only Effects of mutual Love. For to love, is to wiſh well, and to do good; and no man loves thoſe whom he injures, nor thoſe to whom he is unfaithful and unſincere. Thus in particular, the Rules which ordain the Tutor to take care of the Perſon and Eſtate of the Minor who is committed to his Charge, command him only the Effects of that Love which he ought to have for this Orphan. Thus the Rules of the Duties of thoſe who are in Offices, and in all other ſorts of Engagements, general or particular, preſcribe unto them nothing but what the ſecond Law demands, as it is eaſy to perceive in all the particular Engagements. And it is ſo true, that it is the Commandment of Loving, which is the Principle of all the Rules of Engagements, and that the Spirit of theſe Rules is nothing elſe but the Order of that Love which we owe reciprocally to one another; that if it happens that one cannot, for example, reſtore to another what he has of his, without breaking in upon this Order; this Duty is ſuſpended until it may be performed according to this Spirit. Thus he who has the Sword of a Mad-man, or of any other Perſon, who demands it in a tranſport of Paſſion, ought not to reſtore it to him, until he be in a condition not to make a bad uſe of it; for it would not be love to him, to give him his Sword in theſe circumſtances.

It is after this manner, that the ſecond Law commands men to love one another. For the intent of this Law is not to oblige every one to have for all other perſons that inclination which is produced by the qualities which render an Object amiable; but the Love which it commands, conſiſts in wiſhing to others their true Good, and in procuring it to them, as much as is in our power. And it is for this reaſon, that ſeeing this Command is independent on the Merit of thoſe whom we ought to love, and that it excepts no body; it obliges us to Love thoſe who are the leaſt amiable, and even thoſe who hate us. For the Law which they tranſgreſs is nevertheleſs binding on us, and we ought to wiſh their true Good, and to procure it[b], as much out of hopes of reclaiming them to their Duty, as out of fear of tranſgreſſing our own.

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* *By the* Roman *Law the neareſt Relations were obliged to accept the Office of Tutor, or Guardian, when aſſigned by the Magiſtrate. But by the Laws of* England, *no Man is forced to take this Office upon him.* Inſtit. lib. 1. tit. 25. Cowel's Inſtit. lib. 1. tit. 25.

[b] Thou ſhalt not hate thy brother in thine heart. *Levit.* xix. 17. Thou ſhalt not avenge, nor bear any grudge againſt the children of thy people. *Ibid.* 18. If thou meet thine enemy's ox, or his aſs, going aſtray, thou ſhalt ſurely bring it

back to him again. If thou ſee the aſs of him that hateth thee, lying under his burden, and wouldeſt forbear to help him, thou ſhalt ſurely help with him. *Exod.* xxiii. 4, 5. If I have rewarded evil unto him that was at peace with me. *Pſalm* vii. 4. If thine enemy be hungry, give him bread to eat; and if he be thirſty, give him water to drink. *Prov.* xxv. 21. *Rom.* xii. 20. *Matt.* v. 24.

We have made here theſe Reflections, to ſhew that ſeeing it is the ſecond Law which is the Principle and Spirit of all thoſe Laws relating to Engagements, it is not enough to know, as the moſt barbarous People do, that we ought to render to every one their due, that we ought to wrong no man, that we ought to be ſincere and faithful, and the other Rules of the like nature; but it is neceſſary moreover to conſider the Spirit of theſe Rules, and the Source of their Truth in the ſecond Law, to give to them all the Extent which they ought to have. For we ſee often, that for want of this Principle, many Judges who conſider theſe Rules only as Politick Laws, without penetrating into the Spirit of them, which obliges to a more abundant Juſtice, do not give them their juſt Extent, and tolerate Infidelities and Injuſtices which they would ſuppreſs, if the Spirit of the ſecond Law were the Principle by which they acted.

VI.

6. The Order of Government for keeping Men within their Engagements.

We muſt add to theſe Remarks on what concerns Engagements, that they demand the Uſe of a Government, to reſtrain every one within the Order of thoſe that are peculiar to him. It is for this Government that God hath eſtabliſhed the Authority of the Powers that are neceſſary to maintain Society, as will appear in the tenth Chapter. And we ſhall only remark here, on the ſubject of Government, and in relation to Engagements, that there are many Engagements which are formed by this Order of Government, as between Princes and Subjects, between thoſe who are placed in Dignities and Publick Offices, and private Perſons, and likewiſe others which belong to this Order.

VII.

7. The Engagements are the Foundations of the particular Laws which relate to them.

It was neceſſary to give this general Idea of all theſe ſeveral ſorts of Engagements of which mention has been made hitherto. For ſince it is by theſe Ties that God engages Men to all their different Duties, and that he hath put into each Engagement the Foundations of the Duties which depend on it; it is in theſe Sources that we ought to find the Principles and the Spirit of the Laws, according to the Engagements to which they have relation. We have ſeen in the Engagements of Marriage and Birth, the Principles of the Laws which relate to them; and we muſt diſcover in the other Engagements which have been juſt now explained, the Principles of the Laws which are peculiar to them.

We ſhall confine our ſelves to ſuch as relate to the Civil Laws: And ſeeing the greateſt part of the Matters treated of in the Civil Law, are Conſequences of the Engagements that have been ſpoken of in this Chapter, we ſhall explain in the following Chapter ſome general Rules, which flow from the Nature of theſe Engagements, and which are at the ſame time the Principles of the particular Rules concerning the Matters which ariſe from the ſaid Engagements.

CHAP. V.

Of ſome General Rules which ariſe from the Engagements that have been mentioned in the preceding Chapter, and which are ſo many Principles of the Civil Law.

The CONTENTS.

1. *Firſt Rule. Engagements are inſtead of Laws.*
2. *Second Rule. Submiſſion to the Powers.*
3. *Third Rule. To do nothing in his particular Station that may diſturb the Publick Order.*
4. *Fourth Rule. To do wrong to no man, and to give every one his due.*
5. *Fifth Rule. Sincerity and Honeſty in voluntary and mutual Engagements.*
6. *Sixth Rule. Fidelity in what involuntary Engagements demand.*
7. *Seventh Rule. All Deceit unlawful, in all ſorts of Engagements.*
8. *Eighth Rule. Engagements where Juſtice can conſtrain the Parties.*
9. *Ninth Rule. Liberty of all ſorts of Covenants.*
10. *Tenth Rule. All Engagements contrary to Law or Good Manners are unlawful.*
11. *Tranſition to the following Chapter.*

THeſe general Rules which we have juſt now mentioned, and which are gathered from all that hath been ſaid in the preceding Chapter, and alſo in the others, are theſe which follow:

and which we ſhall explain in ſo many Articles, as Conſequences of the Principles which have been laid down. It follows then from theſe Principles.

I.

1. 1st Rule. Engagements are inſtead of Laws.

That every Man being a Member of the Body of the Society, every one ought to diſcharge in it his Duties, and his Functions, according as he is determined to them by the Rank which he holds in it, and by his other Engagements. From whence it follows, that the Engagements of every Perſon, are to him as it were his proper Laws.

II.

2. 2d Rule. Submiſſion to the Powers.

That each particular Perſon being linked to this Body of the Society of which he is a Member, he ought to undertake nothing that may diſturb the Order of it: And this implies the Engagement of Submiſſion, and Obedience to the Powers which God hath eſtabliſhed for maintaining this Order.[a]

III.

3. 3d Rule. To do nothing in his particular Station that may diſturb the Publick Order.

That the Engagement of each particular Perſon, as to what concerns the Order of the Society of which he is a part, obliges him not only to do nothing with reſpect to others which may violate this Order, but obliges him likewiſe to contain himſelf within his Rank, in ſuch a manner as that he make no bad uſe either of himſelf, or of that which belongs to him. For he is in the Society, what a Member is in the Body. Thus thoſe who without doing Injury to others, fall into ſome Diſorder which gives Offence to the Publick, whether in their Perſons, or as to their Goods, as thoſe do who fall into deſpair, thoſe who blaſpheme, or who ſwear, thoſe who ſquander away their Eſtates, and in a word, all thoſe who offend againſt Good Manners, Modeſty, or Decency, in ſuch a manner as to violate the external Order of Behaviour, are juſtly puniſhed by the Civil Laws, according to the quality of the Diſorder[b].

IV.

4. 4th Rule. To do wrong to no man, and to give every one his due.

That in all the Engagements of one Perſon to another, whether Voluntary or Involuntary, which may be the ſubject matter of Civil Laws, one owes reciprocally to one another that which is required by the two Precepts included in the ſecond Law: One, to do to others what we would that they ſhould do to us[c]; and the other, not to do to any body what we would not have others to do to us[d]. And this comprehends the Rule of doing Wrong to no Man, and that of rendring to every one their due[e].

V.

5. 5th Rule. Sincerity and Honeſty in voluntary and mutual Engagements.

That in voluntary and mutual Engagements, thoſe who treat together, owe to one another Sincerity in explaining reciprocally what it is that they engage themſelves to, Fidelity in the Execution of it[f], and every thing which the Conſequences of the Engagements into which they are entred may demand[g]. Thus the Seller ought to declare ſincerely the qualities of the Thing which he ſells, he ought to take care of it until he deliver it, and he ought to warrant it after he has delivered it.

VI.

6. 6th Rule. Fidelity in what involuntary Engagements demand.

That in Involuntary Engagements, the Obligation is proportioned to the Nature and Conſequences of the Engagement, whether it conſiſt in doing, or giving, or in any other ſort of Obligation[h]. Thus, the Tutor is obliged to govern the Perſon, and to adminiſter the Goods of the Orphan who is under his care, and to do every thing which the ſaid Government and Adminiſtration may render neceſſary. Thus, he who is called to a Publick Office, altho' it be againſt his will, ought to execute it. Thus, thoſe who without any Agreement happen to have any thing in common together, ſuch as Co-heirs and others,

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[a] Let every ſoul be ſubject unto the higher powers. For there is no power but of God. *Rom.* xiii. 1. *Tit.* iii. 1. 1 *Pet.* ii. 13. *Wiſd.* of Sol. vi. 4.

[b] Abide in thy Labour. *Ecclus.* xi. 21. Let all things be done decently, and in order. 1 *Cor.* xiv. 40. Juris præcepta ſunt hæc, honeſte vivere, &c. *l.* 10. §. 1. *ff. de juſt. & jure.* Expedit etiam Reipublicæ, ne ſuâ re quis male utatur. §. 2. *inſtit. de his qui ſui vel al. juris ſunt.*

[c] Therefore all things whatſoever ye would that men ſhould do to you, do ye even ſo to them. *Matth.* vii. 12. And as ye would that Men ſhould do to you, do ye alſo to them likewiſe. *Luke* vi. 31.

[d] Do that to no Man which thou hateſt. *Tobit* iv. 15.

[e] Alterum non lædere, ſuum cuique tribuere. *l.* 10. §. 1. *ff. de juſt. & jure.* §. 3. *Inſtit. eod.*

[f] That ye may be ſincere. *Phil.* i. 10. Lying lips are an abomination to the Lord; but they that deal truly are his delight. *Prov.* xii. 22. Keep thy word, and deal faithfully with him. *Ecclus.* xxix. 3.

[g] Alter alteri obligatur, de eo, quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.*

thers, owe reciprocally to one another what their Engagements may require.

[h] Obligationum ſubſtantia non in eo conſiſtit, ut aliquod corpus noſtrum, aut ſervitutem noſtram faciat, ſed *ut alium nobis obſtringat ad dandum aliquid, vel faciendum, vel præſtandum.* l. 3. ff. de obl. & act.

VII.

7. 7th Rule. All Deceit unlawful, in all ſorts of Engagements.

That in all ſorts of Engagements, whether Voluntary or Involuntary, it is forbidden to uſe any Infidelity, Double-dealing, Deceit, Knavery, and all other ways of doing Hurt and Wrong [i].

[i] That no man go beyond and defraud his brother in any matter. 1 *Theſſ.* iv. 6.

Quæ dolo malo facta eſſe dicuntur, ſi de his rebus alia actio non erit, & juſta cauſa eſſe videbitur, judicium dabo. *l.* 1. §. 1. *ff. de dolo.*

VIII.

8. 8th Rule. Engagements where Juſtice can conſtrain the Parties.

That ſeeing all the particular Perſons compoſe together the Society, whatever reſpects the Order of it, lays an Engagement on every one of them to do what the ſaid Order demands of him: And if he does not do it willingly, he may be compelled to it by the Authority of Juſtice. Thus, when perſons are named to Publick Offices in Towns and other places, ſuch as thoſe of Mayor, Sheriff, and other Offices or Commiſſions of the like nature, they are compelled to execute them [l]. Thus, by the *Roman* Law thoſe who were aſſigned to be Tutors, were forced to accept the Tutorſhip, and to act in it [m]. Thus, particular perſons are conſtrained to ſell what they chance to have that is neceſſary for ſome Publick Uſe [n]. Thus, it is juſt to oblige private perſons to pay Taxes and Impoſts for defraying the Publick Charge [o].

[l] Paulus reſpondit, eum qui injunctum munus à magiſtratibus ſuſcipere ſuperſedit, poſſe convenire eo nomine, propter damnum reipublicæ *l.* 21. *ff. ad municip.*

[m] Gerere atque adminiſtrare tutelam extra ordinem tutor cogi ſolet. *l.* 1. *ff. de admin. & per tut.*

[n] *Vid. l.* 11. *ff. de evict in verb.* Poſſeſſiones ex præcepto principali diſtractas. *V. l.* 12. *ff. de relig.* Poſſeſſiones quas pro Eccleſiis, aut domibus Eccleſiarum parochialium, &c. *See the Ordinance of* Philip *the Fair, in* 1303.

[o] Render therefore unto Ceſar, the things which are Ceſars. *Matth.* xxii. 21. Tribute to whom tribute is due. *Rom.* xiii. 7.

IX.

9. 9th Rule. Liberty of all ſorts of Covenants.

That ſince Voluntary Engagements between private Perſons ought to be proportioned to the different Wants which render the uſe of them neceſſary; it is free for all Perſons who are capable of Engagements, to bind themſelves by all manner of Covenants, as they think fit, and to diverſify them according to the differences of Affairs of all kinds, and according to the infinite variety of Combinations that ariſe in Affairs from the Conjunctures, and the Circumſtances [p]. Provided only that the Agreement have nothing in it contrary to the Rule which follows.

[p] Quid tam congruum fidei humanæ, quam ea quæ inter eos placuerunt ſervare. *l.* 1. *ff. de pact.* Ait Prætor, pacta conventa, quæ neque dolo malo, neque adverſus Leges, Plebiſcita, Senatuſconſulta, Edicta Principum, neque quo fraus cui eorum fiat, facta erunt, ſervabo. *l.* 7. §. 7. *ff. de pact.*

X.

10. 10th Rule. All Engagements contrary to Law or Good Manners, are unlawful.

That all Engagements are lawful only in ſo far as they are conformable to the Order of Society: And that thoſe which are contrary to it are unlawful, and puniſhable according to the degree of their oppoſition. Thus, Employments which are contrary to this Order, are Criminal Engagements. Thus, Promiſes and Covenants which violate the Laws, or Good Manners, oblige the Parties to nothing, except to the Penalties which their Miſdemeanor may deſerve [q].

[q] Pacta quæ contra leges, conſtitutioneſque, vel contra bonos mores fiunt, nullam vim habere indubitati juris eſt. *l.* 6. *Cod. de pact. Such was the Engagement of that Prince, who, that he might keep his Word, put St.* John *to death.* Matth. xiv.

We ſhall ſee in the ſeveral Matters treated of in the Civil Laws, what is the uſe of all theſe Principles; and it ſufficeth to take notice of them here, as being general Rules, on which depend an infinite number of particular Rules in this whole Detail of Matters.

XI.

11. Tranſition to the following Chapter.

We did not think proper to mix among the Engagements which have been mentioned hitherto, another kind of Tie, which unites Men more cloſely together than any one of all the Engagements, except it be thoſe of Marriage and Birth. It is the Tie of Friendſhip which produces in Society an infinite number of good effects, both by the Good Offices and Services which Friends render one to another, and by the Aſſiſtance which every one receives from the perſons who are allied to his Friends. But although Friendſhips make a Chain of Ties and Relations of a large extent, and of great uſe in Society; yet it was not proper to mix Friendſhips with Engagements, becauſe they are of a nature which is diſtinguiſhed from them by two Characters: One, that there is no Friendſhip in which Love is not reciprocal; whereas in Engagements, Love which ought to be mutual in them, is not always ſo: And the other, that Friendſhips do not make a particular kind of Engagement; but are Conſequences which ariſe from Engagements. Thus, the Ties of Kindred, of Affinity, of Offices, of Commerce, of Buſineſs, and others, are the Occaſions and Cauſes of Friendſhips: And they preſuppoſe always ſome other Engagement, which brings thoſe perſons together who become Friends.

It is this Uſe of Friendſhips, which is ſo natural and ſo neceſſary in Society, that does not allow us to paſs them quite over in Silence: And it is this difference between their Nature and that of Engagements, which hath obliged us to diſtinguiſh them. And therefore we have made them the Subject of the following Chapter.

CHAP. VI.

Of the Nature of Friendſhips, and their Uſe in Society.

The CONTENTS.

1. *The Nature of Friendſhips, and their kinds.*
2. *Difference between Friendſhip, and the Love enjoined by the ſecond Law.*
3. *The Command of the ſecond Law leads Men to Friendſhips.*
4. *Two Characters of Friendſhip; that it is mutual, and that it is free. The Conſequences of theſe Characters.*
5. *Difference between Friendſhip and Conjugal Love.*
6. *Difference between Friendſhip, and the Love of Parents and Children.*
7. *Uſe of Friendſhips in Society.*
8. *Tranſition to the following Chapters.*

I.

1. *The Nature of Friendſhips, and their Kinds.* Friendſhip is an Union that is formed between two Perſons, by the reciprocal Love which the one bears towards the other. And as there are two Principles of Love, ſo there are two Kinds of Friendſhips. One, is of thoſe Friendſhips which have for their Principle the Spirit of the firſt Laws: And the other, is of all thoſe which not being founded on that Principle, can have none other, beſides that of Self-Love. For if Friendſhip wants that attractive quality which directs the Union of Friends to the Search after the Sovereign Good, it can have no other view than a ſervile deſire of Riches, which no one can ſet his Affections on but out of a Principle of Self-Love. Thus, thoſe who without the Love of the Sovereign Good, ſeem to love their Friends, only for the eſteem they have of their Merit, or out of a deſire of doing them Good, and even thoſe who beſtow their Wealth, yea, even their Life, on their Friends, find in theſe Effects of their Friendſhip, either ſome Praiſe, or ſome Pleaſure, or ſome other Charm, in which they place their own peculiar Good, and which is always mixed with that benefit which their Friends receive from them. Whereas thoſe who love one another by the Spirit of their Union in the Sovereign Good, do not regard their own proper Good, but the common Good of both, and a Good whereof the Nature is in this different from that of all other Goods, that no one can have it to himſelf alone, unleſs he deſire it likewiſe for others, and unleſs he do ſincerely all that is in his power to help them to attain to it. Thus thoſe who are united to their Friends by this Tie, do really and in earneſt ſeek for the Goods and Advantage of thoſe whom they love; and ſeeing they deſpiſe all other Good, beſides this alone, which they love ſolely and with all their heart; they are much more diſpoſed to give their Eſtates, and their Lives, for their Friends, if there be occaſion for it, than thoſe perſons can be who love only out of a Principle of Self-Love.

This diſtinction between Friendſhips which are contracted out of a Spirit of the firſt Laws, and thoſe which are made only out of Self-Love, is not ſo exact, as that it may be ſaid, that every Friendſhip is either entirely of the one, or entirely of the other of theſe two Kinds. For in the ſmall number of thoſe in which is found the Spirit of the primary Laws, there are few of them ſo perfect, as to be altogether free from Self-Love; and we ſee ſome Friendſhips, where one of the Friends contributes on his part only Self-Love, altho' the other be moved by another Spirit: And all theſe ſorts of Friendſhips are adapted to the preſent State of Society, according to the different diſpoſitions of the Perſons whom they link together.

II.

2. *Difference between Friendſhip, and the* It is eaſy to judge by this account of the Nature of Friendſhip, that ſince it is a reciprocal Tie between two Perſons, there

Love enjoined by the ſecond Law. there is a great deal of difference betwixt Friendſhip, and the Love which is enjoined by the ſecond Law. For the Duty of that Love is independent on the reciprocal Love of the Perſon whom we are commanded to love: And altho' on his part he do not love us, and that he even hate us, yet the Law will have us to love him: But becauſe Friendſhip cannot be formed but by a reciprocal Love, it is not enjoined to any perſon in particular. For what depends on two Perſons, cannot be the ſubject of a Command to one of the two alone: And beſides, ſeeing Friendſhip cannot be formed but by the Charm which every one of the Friends finds in his Friend, no body is obliged to contract a Friendſhip where that Charm is not found. And likewiſe we ſee no Friendſhip but what hath for its Foundation the Qualities which Friends ſearch for in one another; and which is kept up only by the Good Offices, the Services, the Benefits and other Advantages which make in each Friend the Merit which attracts and nouriſhes the Eſteem and Love of the other.

It is becauſe of this neceſſary Correſpondence between Friends, that Friendſhips are contracted only between Perſons, who happening to be joined together in ſome Engagements which draw them nearer to one another, chance to have diſpoſitions proper for uniting them; ſuch as the Equality of Conditions, a Conformity of Age, of Manners, of Inclinations and Sentiments, a reciprocal Diſpoſition to love and ſerve one another, and others of the like nature. And we ſee on the contrary, that Friendſhips are contracted and kept up with difficulty, and but very rarely between perſons whom their Conditions, their Age, and the other Qualities diſtinguiſh in ſuch a manner, that the natural State of Friendſhip is not to be found in them, for want of the Correſpondencies, and of the Liberty which Friends ought to take with one another.

III.

3. The Command of the ſecond Law leads Men to Friendſhips. But altho' it be true, that Friendſhips are not commanded to any one in particular, yet they are nevertheleſs a Natural Conſequence of the ſecond Law. For that Law commanding every one to love his Neighbour, it includes the Command of mutual Love[a]: And when the particular Engagements link perſons together who are animated by the Spirit of that Law, there is formed immediately between them an Union proportioned to the reciprocal Duties of the Engagements which they are under: And if each of them finds in the other Qualities proper to unite them more cloſely together, their Union becomes a Friendſhip.

IV.

4. Two Characters of Friendſhip; that it is mutual, and that it is free. It appears from theſe Remarks on the Nature of Friendſhips, that they have two eſſential Characters, one, that they ought to be reciprocal; and the other, that they ought to be free. They are reciprocal, ſeeing they cannot be formed but by the mutual Love of two Perſons: And they are free, becauſe one is not obliged to tie himſelf to thoſe who have not the qualities that are proper to form a Friendſhip.

The Conſequences of thoſe Characters. It follows from theſe two Characters of Friendſhips, that ſeeing they ought to be reciprocal and free, a Man is always at liberty not to engage in Friendſhips, and that he ought even to ſhun thoſe which may be attended with bad Conſequences. And it follows alſo, that the moſt ſolid, and the ſtricteſt Friendſhips may be weakened and deſtroyed, if the Conduct of one of the Friends gives occaſion to it. And not only are coldneſſes and ruptures in Friendſhips not unlawful; but ſometimes they are even neceſſary, and conſequently juſt, with reſpect to that Friend who on his part fails in any Duty. Thus when one of the Friends violates the Friendſhip either by ſome act of Infidelity, or by failing in ſome eſſential Duties, or by requiring things that are unjuſt; it is free for the other not to look upon him any more as a Friend, who hath in reality ceaſed to be ſo; and according to the cauſes of the coldneſs and rupture, one may either break off the Friendſhip altogether, or diſſolve it without an open rupture; provided only, that he who has a juſt provocation given him by his Friend, do not on his part give any cauſe of diſguſt, and that in this change he preſerve ſtill, inſtead of Friendſhip, that other kind of Love which nothing can diſpenſe with.

V.

5. Difference between Friendſhip, and Conjugal Love. All theſe Characters of Friendſhip, which it is free for one to contract, and free for him to break, and which ſubſiſts only by the mutual Correſpondence of the two Friends, ſhew plainly that we cannot give the name of Friendſhip to that Love which unites the Huſband and the Wife, nor to that which ties Parents to their Children, and Children to their Parents. For theſe Ties form a Love of another nature, very far different from that which makes Friendſhip, and which is much ſtronger. And altho' it be true, that the Huſband and the Wife make choice of one another, and engage freely in Marriage; yet their Union being once formed, it becomes neceſſary, and they cannot diſſolve it.

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[a] This is my commandment, that ye love one another. *John* xv. 12.

VI.

6. Difference between Friendſhip, and the Love of Parents and Children.

We ſee likewiſe what are the differences which diſtinguiſh Friendſhip from the Love of Parents towards their Children, and of Children towards their Parents. For beſides that this Love is not reciprocal whilſt the Children remain incapable of loving, there are other Characters which demonſtrate plainly enough, that it is of a nature altogether different from that of Friendſhips. And altho' there be no choice of Perſons in this Love, yet it hath other Foundations, much more ſolid than the firmeſt and ſtricteſt Friendſhips.

What has been juſt now remarked touching the diſtinctions between Friendſhips, and the Love that is formed by the Ties of Marriage and of Birth, does not extend to the Love of Brothers, and other Relations. For altho' Nature forms a Tie between them without their own choice, which obliges them naturally to the mutual Love of one another; yet this Engagement is not attended with Friendſhip, except when they find in one another qualities whereupon to ground it. But when Proximity of Blood happens to be accompanied with the other qualities which make Friends, the Friendſhips of Brothers, and of other near Relations, are much firmer than thoſe of other Perſons.

VII.

7. Uſe of Friendſhips in Society.

It appears by theſe few general Remarks on Friendſhips, what their Nature is, and what the Principles are which depend on them; but ſeeing this is not a matter treated of in the Civil Laws, it is not proper to enter upon the detail of the particular Rules of the Duties of Friends; it ſufficeth to have obſerved on the matter of Friendſhips, ſo much thereof as has any relation to the Order of Society. And we ſee that as Friendſhips ariſe from the ſeveral Ties which bring Men together, ſo they are at the ſame time the Sources of an infinite number of Good Offices and Services, which keep up thoſe very Ties, and which contribute a thouſand ways to the Order and Uſes of Society, both by the Union of Friends among themſelves, and by the Advantages which each perſon may find in the Ties which are between his Friends and other Perſons.

VIII.

8. Tranſition to the following Chapters.

To finiſh the Plan of Society, it remains that we give an Idea of Succeſſions which perpetuate it, and alſo an Idea of the Troubles which diſturb its Order: And we ſhall ſee afterwards in what manner it is that God makes it to ſubſiſt in the preſent State.

CHAP. VII.

Of Succeſſions.

The CONTENTS.

1. *The neceſſity of Succeſſions, and their uſe.*
2. *Two ways of ſucceeding.*
3. *Succeſſions are to be diſtinguiſhed from Engagements.*

We do not ſpeak of Succeſſions here, with an intention to give the whole detail of that Matter in this place; but only to give a view of it in the Plan of Society, where it ought to be diſtinguiſhed, becauſe Succeſſions make a great part of that which paſſes in Society, and are one of the Matters which the *Roman* Laws treat of moſt copiouſly.

I.

1. The neceſſity of Succeſſions, and their uſe.

The Order of Succeſſions is founded on the neceſſity of continuing and tranſmitting the State of Society from the paſſing Generation, to that which follows; and this is done inſenſibly, by making certain Perſons to ſucceed in the place of thoſe who die, that they may enter upon their Rights, their Offices, and their Relations and Engagements, which are capable of paſſing to Poſterity.

II.

2. Two ways of ſucceeding.

This is not the proper place to explain the different ways of ſucceeding, whether by the Order of Nature, and the Diſpoſition of the Laws, which call to Succeſſions, the Deſcendants, the Aſcendants, and other Relations: Or by the Will of thoſe who die, and who name their Heirs or Executors. We ſhall ſee in the Plan of the Matters of Law, the diſtinction of theſe Ways of ſucceeding, and the Order of the particular Matters which concern Succeſſions.

III.

3. Succeſſions are to be diſtinguiſhed from Engagements. We ſhall only obſerve here, that Succeſſions are to be diſtinguiſhed from Engagements, which have been the Subject of the foregoing Chapters. For altho' Succeſſions make an Engagement, into which thoſe Perſons who ſucceed to others enter, and which obliges them to bear their Burdens, to pay their Debts, and to other Conſequences; yet it is not under the Idea of Engagements that we are to conſider Succeſſions; but they ought to be conſidered under the View of the Change which makes the Goods, the Rights, the Burdens, the Engagements of thoſe who die, to paſs to their Succeſſors. And this includes ſo great a variety of particular Matters, that they ſhall make One of the Two Parts of the Book of *The Civil Law in its Natural Order.*

CHAP. VIII.

Of three ſorts of Troubles which diſturb the Order of Society.

The CONTENTS.

1. *Troubles which diſturb the Order of Society.*
2. *Law-Suits.*
3. *Crimes and Offences.*
4. *Wars.*
5. *Tranſition to the following Chapter.*

I.

1. Troubles which diſturb the Order of Society. WE ſee in Society, three ſorts of Troubles, which diſturb the Order of it. Law-Suits, Crimes, and Wars.

II.

2. Law-Suits. Law-Suits are of two ſorts, according to the two ways in which Men fall out among themſelves, and encroach one upon another: Thoſe which reſpect only ſimple Intereſt, which are called *Civil Cauſes*; and thoſe which are conſequences of Quarrels, ſuch as Offences, Crimes; and theſe are termed *Criminal Cauſes*. It ſufficeth to obſerve here in general, that all ſorts of Law-Suits are one of the Matters which come under the direction of the Civil Laws, which preſcribe the manner in which Suits are to be begun, carried on, and ended; which is called, The Order of Judicial Proceedings.

III.

3. Crimes and Offences. Crimes and Offences are infinite, according as they reſpect either the Honour, the Perſon, or the Eſtate. And the Puniſhment of Crimes is likewiſe a matter treated of in the Civil Laws, which have made proviſion to ſuppreſs them by three ſeveral ways. One, by correcting thoſe that are guilty; the other, by repairing as much as is poſſible, the Evil which they have done; and the third, by reſtraining the wicked by the example of Puniſhments. And it is by theſe three Views, that the Laws have proportioned the Puniſhments to the Crimes, and to the ſeveral Offences.

IV.

4. Wars. Wars are an ordinary Conſequence of the differences which fall out between the Sovereigns of two Nations, who being independent on one another, and having no common Judge, do themſelves Juſtice, by the Force of Arms, when they cannot, or will not have Mediators to make Peace between them: For they take in that caſe for Laws, and for Deciſions of their Differences, the Events which God gives to Wars. There is likewiſe another ſort of Wars, which are only a bare Effect of Violence, and of the Attempts made by a Prince, or a State, upon their Neighbours. And laſtly, there are ſome Wars which are nothing but Rebellions of Subjects, who revolt againſt their Prince.

Wars have their peculiar Laws in the Law of Nations; and there are Conſequences of Wars which are decided by the Civil Law.

V.

5. Tranſition to the following Chapter. There remains only for finiſhing the Plan of Society, to conſider how it ſubſiſts in the preſent State, where the Spirit of the firſt Laws, which ought to be the only Cement of it, is ſo little regarded.

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CHAP. IX.

Of the State of Society after the Fall of Man, and how God makes it to ſubſiſt.

The CONTENTS.

1. *All the Diſorders in Society have been a conſequence of Man's Diſobedience to the firſt Law.*
2. *A diſorderly Love, the Source of Diſorders in Society.*
3. *Of Self-Love, which is the Bane of Society, God hath made a Remedy to contribute towards its Subſiſtence.*
4. *Four Foundations of the Order of Society in the preſent ſtate.*
5. *The Natural Knowledge of Equity.*
6. *The Government of God over Society.*
7. *The Authority which God gives to the Supreme Powers.*
8. *Religion.*

I.

1. *All the Diſorders in Society have been a conſequence of Man's Diſobedience to the firſt Law.*

WHatever we ſee in Society that is contrary to Order, is a natural conſequence of the Diſobedience of Man to the firſt Law, which commands him to love God. For this Law being the Foundation of the ſecond, which enjoins Men to love one another; Man could not violate the firſt of theſe two Laws, without falling at the ſame time into a ſtate which hath carried him to a breach alſo of the ſecond Law, and conſequently to diſturb the Order of Society.

The firſt Law was to unite Men in the poſſeſſion of the Sovereign Good: and they found in that Good two Perfections which were to make their common Happineſs: one, That it is capable of being poſſeſſed by all Perſons; and the other, That it may be the entire Happineſs of every one in particular. But Man having tranſgreſſed the firſt Law, and having gone aſtray from the true Happineſs, which he could find no where but in God alone, he hath ſought after it among ſenſible Goods, in which he found two Defects oppoſite to theſe two Characters of the Sovereign Good; one, that theſe Goods cannot be poſſeſſed by all; and the other, that they cannot make the Happineſs of any one. And it is a natural effect of the Love and Purſuit of the Goods which have theſe two defects, that they create Diviſions among thoſe who ſet their Hearts upon them. For ſeeing the Capacity of the Mind and Heart of Man, which is formed for the Enjoyment of an infinite Good, cannot be ſatisfied with theſe finite Goods, which cannot belong to many, nor are they ſufficient to make any one Man happy; it is a conſequence of this State into which Man has brought himſelf, that thoſe who place their Happineſs in the Poſſeſſion of Goods of this kind, happening to meet together in the purſuit of the ſame Objects, fall out among themſelves, and break through all ſorts of Ties and Engagements, according to the contrary Engagements which they are led into by the Love of that Good which they ſeek after.

II.

2. *A diſorderly Love the Source of Diſorders in Society.*

It is in this manner that Man having ſubſtituted other Goods in the place of God, who ought to be his only Good, and his only Happineſs; he has made of theſe apparent Goods his ſovereign Good, on which he has placed his Love, and on which he founds his Happineſs, which is in effect to make them his God[a]. And it is thus that by departing from this only true Good, which ought to unite Men, their going aſtray in the purſuit of other Goods has divided them[b].

It is therefore the Diſorder of Love that hath diſordered the Society: inſtead of that mutual Love, the character of which is to unite Men in the purſuit of their common Good, we ſee another Love quite oppoſite to it prevail, whoſe character hath juſtly given it the name of Self-Love; becauſe he in whom this Love reigns, ſeeks after only thoſe Goods which he makes intirely his own, and which he loves in others only in ſo far as he can draw advantage out of them to himſelf.

It is the Poiſon of this Love which benums the Heart of Man, and makes it heavy: and which by depriving thoſe whom it poſſeſſes of the View and Love of their true Good, and by confining all their Views, and all their Deſires to the particular Good to which it engages them, is as it were an univerſal Plague, and the Source of all the Evils that infeſt Society. So that it would ſeem, that ſince Self-Love undermines the Foundations of Society, it ought to deſtroy it; and this leads us to enquire in what manner it is that God ſupports Society in the Deluge of Evils which are produced in it by Self-Love.

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[a] With whoſe beauty, if they being delighted, took them to be Gods. *Wiſd. of Sol.* xiii. 3.

[b] From whence come wars and fightings among you? Come they not hence, even of your luſts, that war in your members? *James* iv. 1. Ye luſt, and have not: ye kill, and deſire to have, and cannot obtain; ye fight and war. *Ibid.* 2.

III.

3. Of Self-Love, which is the Bane of Society, God hath made a remedy to contribute towards its Subſiſtence.

We know that God hath permitted Evil to happen in the World, only becauſe he foreſaw that by his Almighty Power and infinite Wiſdom he ſhould be able to draw Good out of it, and a much greater Good than a pure State of Good Things would have been, without any mixture of Evil. Religion teaches us the infinite Good which God hath drawn out of ſo great an Evil as the State to which Sin hath reduced Mankind: and that the incomprehenſible Remedy which God has made uſe of to draw him out of it, hath raiſed him to a ſtate of greater Happineſs than that which he enjoyed before his Fall. But whereas God hath made this Change for a good Cauſe, and which proceeds only from himſelf, we ſee in his Government of Society, that from ſo bad a Cauſe as our Self-Love, and from a Poiſon ſo contrary to Mutual Love, which ought to be the Foundation of Society, God hath made uſe of it as one of the Remedies for preſerving it in being. For it is of this Principle of Diviſion that he hath made a Tie which unites Men together in a thouſand manners, and which ſupports the greateſt part of Engagements. One may be able to judge of this uſe of Self-Love in Society, and of the relation which ſuch a Cauſe hath to ſuch an Effect, by the Reflections which it will be eaſy to make on the following Remark.

The Fall of Man not having freed him from his Wants, and having on the contrary multiplied them, it hath alſo augmented the neceſſity of Labour and of Commerce, and at the ſame time the neceſſity of Engagements, and of Ties; for no Man being ſufficient of himſelf to procure the Neceſſaries and Conveniencies of Life, the diverſity of Wants engages Men in an infinite number of Ties, without which they could not live.

This State of Mankind induces thoſe who are govern'd only by a Principle of Self-Love, to ſubject themſelves to Labours, to Commerce, and to Ties which their Wants render neceſſary. And that they may reap advantage from them, and preſerve in them both their Honour and their Intereſt, they obſerve in all theſe Intercourſes Integrity, Fidelity, Sincerity: ſo that Self-Love accommodates it ſelf to every thing, that it may reap advantage from all things. And it knows ſo well how to adapt its different Steps to all its views, that it complies with all Duties, and even counterfeits all Virtues. And every one perceives in others, and, if he ſtudied himſelf, would diſcover in himſelf, thoſe refined ways which Self-Love knows to imploy for hiding and diſguiſing itſelf under the appearances even of thoſe Virtues which are moſt oppoſite to it.

We ſee then in Self-Love, that this Principle of all the Evils is, in the preſent State of Society, a Cauſe from whence it derives an infinite number of good Effects, which in their nature being true and real Goods, ought to have a better Principle. And thus we may conſider this Venom of Society, as a Remedy which God makes uſe of for ſupporting it; ſeeing that although it produces in thoſe Perſons whom it animates, only corrupted Fruits, yet it imparts all theſe Advantages to Society.

IV.

4. Four Foundations of the Order of Society in the preſent State.

All the other Cauſes which God makes uſe of for preſerving Society, are different from Self-Love in this, that whereas Self-Love is a real Evil from whence God draws good Effects, the others are Natural Foundations of Order; and of them we may obſerve four different kinds which comprehend all that maintains Society.

The firſt is Religion, which takes in every thing that we can ſee in the World, which is governed by the Spirit of the firſt Laws.

The ſecond is the ſecret Government of God over Society in the whole Univerſe.

The third is the Authority which God gives to Sovereign Powers.

The fourth is that Light which remains to Man after his Fall, and which diſcovers unto him the Natural Rules of Equity. And it is with this laſt that we ſhall begin, and aſcend gradually to the others.

V.

5. The natural Knowledge of Equity.

It is this Light of Reaſon, which by diſcovering to all Men the common Rules of Juſtice and Equity, is inſtead of a Law to them[c], which hath remained in all their Minds, amidſt the Darkneſs which Self-Love hath ſpread over them. Thus, all Men have on their Minds the Impreſſions of the Truth and Authority of theſe Natural Laws: That we muſt do Harm to no

Man: That we muſt render to every one their due: That we muſt be ſincere in our Engagements, and faithful in executing our Promiſes: and of other the like Rules of Juſtice and Equity. For the Knowledge of theſe Rules is inſeparable from Reaſon; or rather, Reaſon it ſelf is nothing elſe but the View and Uſe of all theſe Rules.

And although this Light of Reaſon, which gives a View of theſe Truths even to thoſe Perſons who are ignorant of the Principles of them, does not ſo far prevail in every one, as to be the Rule and Guide of his Conduct, yet it reigns in all Perſons in ſuch a manner as that the moſt unjuſt perſons are ſo far in love with Juſtice, as to condemn Injuſtice in others, and to hate it. And it being the intereſt of every one in particular that others ſhould obſerve theſe Rules, the Multitude agree together to reduce thoſe to Obedience who tranſgreſs the ſaid Rules, and who do harm to others. And this ſhews plainly, that God has engraven on the Minds of all Men this kind of Knowledge, and Love of Juſtice, without which Society could not laſt. And it is by the help of this Knowledge of the Natural Laws, that even the Nations which have had no Knowledge of Religion, have made their Societies to ſubſiſt.

VI.

6. The Government of God over Society.

This Light of Reaſon which God gives to all Men, and theſe good Effects which he draws from their Self-Love, are Cauſes which contribute to the ſupporting of the Society of Mankind by the help of Men themſelves. But we ought to be ſenſible, that it has a Foundation which is much more eſſential, and much more ſolid, which is the Providence of God over Mankind, and that Order in which he preſerves Society in all times, and in all places, by his Almighty Power and Infinite Wiſdom.

It is by the infinite Force of that Almighty Power, that he containing the Univerſe as a drop of Water, and as a Grain of Sand[d], is preſent every where: and it is by the mildneſs of his infinite Wiſdom, that he diſpoſes and orders all Things[e].

It is by his univerſal Providence over Mankind, that he divides the Earth among Men, and that he diſtinguiſhes Nations by that diverſity of Empires, Kingdoms, Republicks, and other States: That he regulates the Bounds and Duration of them by the Events which give them their Riſe, their Increaſe, and their End: and that amidſt all theſe Changes he forms and maintains the Civil Society in every State, by the Diſtinctions which he makes of Perſons to fill all the Imployments, and all the Places, and by the other ways in which he regulates and governs every thing[f].

VII.

7. The Authority which God gives to the Supreme Powers.

It is the ſame Providence which, for the maintaining of Society, eſtabliſhes in it two ſorts of Powers that are proper to contain Men within the Order of their Engagements.

The firſt is, that of the Natural Powers, which reſpect Natural Engagements; ſuch as the Power which Marriage gives to the Huſband over the Wife[g], and that which Birth gives to Parents over their Children[h]. But theſe Powers being confined within Families, and reſtrained to the Order of theſe Natural Engagements, it was neceſſary that there ſhould be another ſort of Power, of a more general, and more extenſive Authority. And ſeeing Nature, which diſtinguiſhes the Huſband from the Wife, and Parents from the Children, doth not in the ſame manner make a diſtinction between other Men, but renders them all equal[i]; God diſtinguiſhes ſome of them, that he may give unto them another ſort of Power, the Miniſtry of which extends to the univerſal Order of all kinds of Engagements, and to every thing that relates unto Society: and he gives the ſaid Power in different manners, in Kingdoms, in Commonwealths, and in the other States, to Kings, to Princes, and to the other Perſons whom he elevates to that Dignity[l], by Birth, by Election, and by the other Ways which he ordains or permits, that thoſe whom he deſtines to that Rank ſhould be called to it. For it is always the Almighty Providence of God, that diſpoſes of that Series and Chain of Events, which

precede

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[c] For when the Gentiles which have not the Law, do by nature the things contained in the Law, theſe having not the Law, are a Law unto themſelves. *Rom.* ii. 14.

Ratio naturalis, quaſi lex quædam tacita. *l.* 7. *ff. de bon. damn.*

[d] Behold, the nations are as a drop of a bucket, and are counted as the ſmall duſt of the balance: behold he taketh up the iſles as a very little thing *Iſa.* xl. 15.

[e] Wiſdom reacheth from one end to another mightily, and ſweetly doth ſhe order all things. *Wiſd. of Sol.* viii. 1.

[f] He that giveth breath unto the people. *Iſaiah* xlii. 5.

precede the Elevation of thoſe whom he calls to Government. Thus, it is always he who places them in the Seat of Authority: it is from him alone that they derive all the Power and Authority that they have; and it is the Miniſtry of his Juſtice that is committed to them[m]. And ſeeing it is God himſelf whom they repreſent in the Rank which raiſes them above others, he will have them to be conſidered as holding his Place in their Functions. And it is for this reaſon, that he himſelf gives the Name of Gods to thoſe to whom he communicates the Right of governing, and judging Men; becauſe it is a Right which is natural to him alone[n].

[g] The husband is the head of the wife. *Eph.* v. 22. 1 *Cor.* xi. 3. And he ſhall rule over thee. *Gen.* iii. 16.

[h] Children, obey your parents in the Lord. *Eph.* vi. 1. He that feareth the Lord, will honour his father, and will do ſervice unto his parents, as to his maſters. *Ecclus.* iii. 7.

[i] Quod ad jus naturale attinet, omnes homines æquales ſunt. *l.* 32. *ff. de reg. jur.*

[l] He ſet a Ruler over every people. *Ecclus.* xvii. 17.

[m] For power is given you of the Lord. *Wiſd. of Sol.* vi. 3. For there is no power but of God. *Rom.* xiii. 1. *John* xix. 11. For he is the miniſter of God. *Rom.* xiii. 4. The people come unto me to enquire of God. *Exod.* xviii. 15. Take heed what ye do: for ye judge not for man, but for the Lord. 2 *Chron.* xix. 6.

[n] Thou ſhalt not revile the Gods, nor curſe the Ruler of thy people. *Exod.* xxii. 28. I ſaid, ye are Gods. *Pſal.* lxxxi. 6. *John* x. 35. *Exod.* xxii. 8.

It is for the Exerciſe of this Power, that God puts into the hands of thoſe who hold the firſt place in the Government, the Sovereign Authority, and the ſeveral Rights that are neceſſary for maintaining the Order of Society, according to the Laws which he hath eſtabliſhed in it[o].

[o] Being Miniſters of his Kingdom. *Wiſd. of Sol.* vi. 4. That he may learn to fear the Lord his God, to keep all the words of this Law, and theſe Statutes, to do them. *Deut.* xvii. 19.

It is for the preſerving of this Order, that he gives them the Right to make the Laws[p], and Regulations that are neceſſary for the Publick Good, according to different times and places: and the Power of inflicting Puniſhments on Crimes[q].

[p] By me Kings reign, and Princes decree Juſtice. *Prov.* viii. 15.

[q] For he beareth not the Sword in vain: for he is the Miniſter of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 4.

It is on account of the ſame Order, that he gives them the Right to communicate, and to divide to ſeveral Perſons the Exerciſe of that Authority, which they themſelves are not able to exerciſe all alone in its ſeveral Branches: and that they have the Power of eſtabliſhing the different ſorts of Magiſtrates, Judges, and Officers that are neceſſary for the Adminiſtration of Juſtice, and for all the other Publick Functions[r].

[r] Thou ſhalt provide out of all the people, able men, ſuch as fear God, men of truth, hating covetouſneſs, and place ſuch over them, to be rulers of thouſands, and rulers of hundreds, rulers of fifties, and rulers of tens. And let them judge the people at all ſeaſons.——And Moſes choſe able men out of all Iſrael, and made them heads over the people. *Exod.* xviii. 21, 25.

It is becauſe of the ſame Order, for ſupplying the neceſſary Expences of the State within, and for defending it from without, againſt the Attempts of Strangers, that Sovereigns have the Right to raiſe the neceſſary Taxes, according to the Occaſions which may require them[s].

[s] Render unto Cæſar the things which are Cæſar's. *Matth.* xxii. 21. Tribute to whom tribute is due, cuſtom to whom cuſtom. *Rom.* xiii. 6, 7.

It is to ſettle and confirm all theſe Uſes of the Authority of Temporal Powers, that God commands all Men to be ſubject to them[t].

[t] Let every ſoul be ſubject unto the higher powers. *Rom.* xiii. 1. 1 *Pet.* ii. 13.
Put them in mind to be ſubject to principalities and powers. *Tit.* iii. 1.

VIII.

8. *Religion.* Laſtly, we ought to look upon Religion as the moſt natural Foundation of the Order of Society. For it is the Spirit of Religion that is the Principle of the true Order that ought to be in Society. But there is this difference between Religion, and all the other Foundations of Society, that whereas the others are common to all Places, the true Religion is only known and received in ſome States: and even in thoſe where it is known, the Spirit of it doth not ſo far prevail as to influence all Perſons to follow the Rules of it. But yet it is certain, that in the Places where Profeſſion is made of the true Religion, Society is in its moſt Natural State, and in the moſt proper for being maintained in good Order, by a Concurrence of Religion and Civil Policy, and by an Union in the Miniſtry of the Spiritual and Temporal Powers.

Since therefore it is the Spirit of Religion which is the Principle of the Order in which Society ought to be, and that it ought to be ſubject by the Union of Religion and Civil Policy: It is of importance to enquire how Religion and Policy agree among themſelves, and how they are diſtinguiſhed for the forming of this Order; and what is the Miniſtry of the Spiritual and Temporal Powers. And becauſe this Matter is an eſſential part of the Plan of Society, and hath a great Affinity with the Civil Laws, it ſhall be the Subject of the following Chapter.

CHAP. X.

Of Religion, and Policy: And of the Miniſtry of the Spiritual, and Temporal Powers.

The CONTENTS.

1. *Religion and Policy founded on the Order and Appointment of God.*
2. *The Spirit of Religion.*
3. *The Spirit of Policy.*
4. *Diſtinction between the Miniſtry of the Spiritual Powers, and that of the Temporal.*
5. *Their Union for the maintaining of Order.*
6. *Why the Miniſtry of theſe two Powers is placed in different hands.*
7. *The two Governments depend immediately upon God.*
8. *The Authority of the Powers of one Order, over thoſe of the other, in their reſpective Functions.*
9. *Example.*
10. *Obedience to both the Governments.*
11. *Laws of Spiritual Powers which relate to Temporal Things.*
12. *Laws of Temporal Powers, concerning Spiritual Things.*
13. *Kings are the Protectors and Defenders of the Laws of the Church.*
14. *Agreement between the Spiritual and Temporal Juriſdiction.*

I.

1. Religion and Policy founded on the Order and Appointment of God.

IT cannot be doubted, but that Religion and Policy have their common Foundation in the Order and Appointment of God; for a Prophet tells us, that it is he who is our Judge, our Lawgiver, and our King, and that it is alſo he who is the Saviour of Mankind[a]. Thus, it is he who in the Spiritual Order of Religion eſtabliſhes the Miniſtry of the Eccleſiaſtical Powers[b]. Thus, it is he who in the Temporal Order of Policy makes Kings to reign[c], and gives to Sovereigns all the Power and Authority which they have. From whence it follows, that ſeeing Religion and Policy have only the ſame common Principle of the Divine Order, they ought to agree together, and to ſupport one another mutually, and in ſuch a manner as that private Perſons may be able to pay a punctual and faithful Obedience both to the one and the other: And that thoſe who are imployed in the Miniſtry both of the one and the other, may exerciſe it according to the Spirit, and the Rules which reconcile them together. And it is likewiſe certain, that true Religion and good Policy are always united together.

II.

2. The Spirit of Religion.

It is well known, that the Spirit of Religion is to bring back Men to God, by the Light of the Truths which it teaches them, and to draw them out of the By-paths of Self-Love, in order to unite them in the Exerciſe of the two firſt Laws; and that therefore the Eſſence of Religion reſpects chiefly the inward part of the Mind and Heart of Man, the good Diſpoſitions of which ought to be the Principle of the External Order of Society.

III.

3. The Spirit of Policy.

But becauſe all Men have not this Spirit of Religion, and that many even carry themſelves ſo as to diſturb the ſaid external Order; the Spirit of Policy is to maintain the Publick Tranquillity among all Mankind[d], and to keep them in this Order, whether they have the inward diſpoſitions to it or not, by imploying for that end even Force, and Puniſhments, according as there is occaſion: And it is for theſe two different Uſes of Religion and Policy, that God hath eſtabliſhed both in the one and the other, Powers whoſe Miniſtry he hath proportioned to their Spirit, and to their Ends.

IV.

4. Diſtinction between the Miniſtry of the Spiritual Powers,

Thus, ſeeing the End of Religion is only to form good diſpoſitions in the inward part of Man, God gives to the Powers

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[a] The Lord is our Judge, the Lord is our Lawgiver, the Lord is our King, he will ſave us. *Iſai.* xxxiii. 22.

[b] As my Father hath ſent me, even ſo ſend I you. *John* xx. 21. *Matth.* x. 16. Let a man ſo account of us, as of the Miniſters of Chriſt, and Stewards of the myſteries of God. 1 *Cor.* iv. 1.

[c] By me Kings reign. *Prov.* viii. 15.

[d] That we may lead a quiet and peaceable life. 1 *Tim.* ii. 2.

and that of the Temporal.

Powers who exerciſe the Miniſtry of it, a ſpiritual Authority, which tends only to regulate the Mind, and the Heart, and to inſinuate the Love of Juſtice, without the uſe of any Temporal Force upon the outward Part[e]. But the Miniſtry of the Temporal Powers of the Civil Policy, which tends only to regulate the External Order, is exerciſed with the Force that is neceſſary for reſtraining thoſe who, not being Lovers of Juſtice, commit ſuch Exceſſes as diſturb the ſaid Order[f].

Thus, the Spiritual Powers inſtruct, exhort, bind, and looſe the Inward Part of Man, and exerciſe the other Functions that are proper to this Miniſtry. And the Temporal Powers command, and forbid in what relates to the Outward Man; maintain every one in his Rights, diſpoſſeſs Uſurpers; chaſtiſe the Guilty, and puniſh Crimes, by the Uſe of Penalties and Puniſhments, proportioned to what the Publick Peace requires.

Thus, the Spiritual Powers of Religion, the Spirit of which demands that the moſt wicked ſhould live in order to become better, have no other ways for puniſhing of Men, but by inflicting ſuch Penalties as may be proper to reclaim them to the Duties which they have violated: And the Temporal Powers, whoſe buſineſs it is to preſerve the Publick Peace, ordain the Penalties that are neceſſary for maintaining it, and puniſh even with Death, thoſe who diſturb the Order of the Society in ſuch a manner as may deſerve this Puniſhment.

V.

5. Their Union for the maintaining of Order.

But theſe differences between the Spirit of Religion, and the Spirit of Policy, and between the Miniſtry of Spiritual Powers, and that of Temporal Powers, have nothing in them that may be any hindrance to their Union; and the ſame Powers Spiritual and Temporal, which are diſtinguiſhed in their Miniſtry, are united in their common End of maintaining Order in Society, and they mutually aſſiſt one another for that purpoſe. For it is a Law of Religion, and a Duty incumbent on thoſe who exerciſe the Miniſtry of it, to recommend and to enjoin to every one Obedience to the Temporal Powers, not only out of fear of their Authority, and of the Puniſhments which they inflict, but as an eſſential Duty, and out of a Principle of Conſcience[g], and a Love of Order. And it is a Law of Temporal Policy, and a Duty of thoſe who are imployed in the Miniſtry of it, to maintain the Exerciſe of Religion, and to employ even the Temporal Authority and Force againſt thoſe who diſturb the Order of it. Thus theſe two Powers agree together, and mutually ſupport one another. And even when the Spirit of the ſpiritual Miniſtry ſeems to demand ſomething that is contrary to the Spirit of the Temporal Policy, as when the Miniſters of the Spiritual Power intercede for the Life of the greateſt Criminals, whom they condemn only to Penances, and whom the Civil Magiſtrate condemns to Death; the ſame Spirit of the Spiritual Miniſtry of Religion, which requires Princes and Judges to do their Duty, does not oblige them to uſe this Clemency: And the Temporal Judges condemn juſtly to Death, thoſe whom the Eccleſiaſtical Judges condemn only to Works of Charity, Faſting, and other Penances.

VI.

6. Why the Miniſtry of theſe two Powers is placed in different hands.

It is becauſe of theſe Differences between the Spirit of Religion, and that of Policy, that God hath ſeparated the Miniſtry of them, that the Spirit of Religion which governs the Inward Man, and which ought to inſinuate it ſelf into the Hearts of Men by the Love of Juſtice, and by a Contempt of Temporal Goods, ſhould be inſpired by other Miniſters than the Temporal Powers, who are armed with the Terror of Penalties and Puniſhments for maintaining the External Order, and whoſe Miniſtry chiefly relates to the uſe of Temporal Goods. And it was ſo eſſential to the Order of theſe two Adminiſtrations to have them diſtinct, and to have the Spiritual Power ſeparated from the Temporal, that altho' they be naturally united in God, yet when he appeared upon Earth in order to eſtabliſh

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[e] Preach the word, be inſtant in ſeaſon, out of ſeaſon, reprove, rebuke, exhort with all long-ſuffering and doctrine. 2 *Tim.* iv. 2.

Not for that we have dominion over your faith. 2 *Cor.* i. 24.

[f] For he beareth not the ſword in vain: for he is the Miniſter of God, a revenger to execute wrath upon him that doth evil, *Rom.* xiii. 4.

[g] Let every ſoul be ſubject unto the higher powers. For there is no power but of God: the powers that be, are ordained of God. Whoſoever therefore reſiſteth the power, reſiſteth the Ordinance of God. *Rom.* xiii. 1, 2. Wherefore ye muſt needs be ſubject, not only for wrath, but alſo for conſcience ſake. *Rom.* xiii. 5. 1 *Pet.* ii. 13. *Wiſd. of Sol.* vi. 4.

his ſpiritual Kingdom, he abſtained from the Exerciſe of his Power over Temporal Things. And all the uſe which he made of his Greatneſs and Power, was wholly oppoſite to the Grandeur and Power which ſuits with a Temporal Kingdom. For at the ſame time that he manifeſted the Divine Grandeur of his Spiritual Kingdom by the Light of the Truths which he taught[h], by the Glory of the Miracles which he wrought[i], and by all the remarkable Circumſtances of his Coming, which he had cauſed to be foretold by his Prophets, and which were fit to accompany the Reign of a Prince of Peace[l], who came to give unto Men other things than thoſe that ſet them at variance with one another[m]; he took not any one of the Marks of Temporal Power; he exerciſed no Function of it; nay, he refuſed to be Judge between two Brothers, when one of them intreated him to do it[n]. And to ſhew that the Uſe of the Temporal Power was to be ſeparated from his Spiritual Kingdom, he left that Power to the Temporal Princes, and he himſelf paid Obedience to them. Thus in his Birth, he made the Circumſtance of the Place where he was to be born, to depend on his Obedience to a Law of a Heathen Prince[o]. Thus during his Life, he taught his Diſciples to render unto Princes what is their due; and he himſelf paid Tribute, altho' none was due from him, for the reaſon which he gave at the ſame time when he wrought a Miracle that he might have wherewithal to pay it[p]. And at the time of his Death, he told him who exerciſed the Temporal Power, and who employed it to ſo unjuſt an uſe, that he could not have had that Power, if it had not been given him by God[q]. And he pointed out to him likewiſe the Diſtinction between his Spiritual Kingdom, and the Temporal Power of Princes[r].

It is true that on a certain Occaſion he gave a viſible mark of his Dominion over Temporals[ſ], and of a Dominion more abſolute than that which he intruſts to Princes, by working a Miracle, which did ſome damage to the Inhabitants of the Place where he wrought it. But that very Miracle, which plainly ſhewed his Omnipotent Power over Temporal Things, ſerved as a Proof that he abſtained from all other uſe of that Power, only that he might ſhew the Diſtinction between the Spiritual Kingdom which he came to eſtabliſh, and the Temporal Empire which he left unto Princes.

Laſtly, we know that when he eſtabliſhed the Miniſters of his Spiritual Kingdom, and when he gave them the Rules of their Conduct, and marked out to them the Bounds of the Power which he intruſted to them; he gave them no Power over Temporals. And we ſee likewiſe, that not any one of them took the leaſt ſhare in the Miniſtry of the Temporal Power: That on the contrary they ſubmitted themſelves to it: And that at the ſame time that they exerciſed their Spiritual Miniſtry, without any regard to the Authority of the Temporal Powers who oppoſed them in it, they taught their Diſciples Obedience, and paid it themſelves, to thoſe very Powers, in all things belonging to their Miniſtry.

VII.

7. *The two Governments depend immediately upon God.*

It follows from all theſe Truths, that the Spiritual Powers have the Exerciſe of their Miniſtry in Spiritual Things[t]: And that they do not intrude themſelves upon Temporals. And likewiſe that the Temporal Powers have the Exerciſe of their Miniſtry in Temporal Things[u], and do not encroach upon Spirituals: That the two Governments are eſtabliſhed immediately by the hand of God.

VIII.

8. *The Authority of the Powers of one Order, over thoſe of the other, in their reſpec-*

And that thoſe who exerciſe the Power in one of them, are ſubject to thoſe who exerciſe the Power of the other, in all matters depending on it. And likewiſe we ſee, that thoſe who

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[h] I am the Light of the world. *John* vi. 12. I will alſo give thee for a light to the Gentiles. *Iſai.* xlix. 6.

[i] And all the people rejoiced for all the glorious things that were done by him. *Luke* xiii. 17.

[l] The Prince of peace. *Iſai.* ix. 6.

[m] An High Prieſt of good things to come. *Heb.* ix. 11.

[n] *Luke* xii. 13.

[o] *Luke* ii. 1.

[p] *Matth.* xvii. 23.

[q] *John* xix. 11.

[r] *John* xviii. 36.

[ſ] *Matth.* viii. 28. *Mark* v. *Luke* viii. 32.

[t] And take unto thee Aaron thy brother, and his ſons with him, from among the children of Iſrael, that he may miniſter unto me in the Prieſts office. *Exod.* xxviii. 1. Amariah the chief prieſt is over you in all matters of the Lord. 2 *Chron.* xix. 11. For every high prieſt taken from among men, is ordained for men in things pertaining to God. *Heb.* v. 1.

[u] And Zebadiah the ſon of Iſhmael, the Ruler of the houſe of Judah, for all the kings matters. 2 *Chron.* xix. 11.

tive Functions. have been animated by the Spirit of God, have governed themſelves according to theſe very Rules, and have obſerved the Submiſſion that is due to each of the Powers of theſe two Orders.

IX.

9. Example. Thus, when God made choice of *Nathan* for the Spiritual Miniſtry of the Correction of *David*, the Temporal Power of this King did not withhold the Prophet from ſpeaking to him with a force ſuitable to the Authority of the Miniſtry which he exerciſed; and that Prince received likewiſe the Correction with humility[x]. But on the contrary, when the ſame Prophet had a mind to know the intention of that Prince concerning the choice of his Succeſſor, and whether he meant that it ſhould be either *Solomon*, or *Adonijah*, he approached him with the greateſt Humility and Reſpect, beſeeching him to let him know which of the two he would be pleaſed to make choice of to reign after him[y].

X.

10. Obedience to both the Governments. It would be eaſy to bring other Examples of the like nature, to ſhew how it is neceſſary to diſtinguiſh the Authority of the Spiritual Powers, from that of the Temporal Powers, and in what manner thoſe Perſons have exerciſed their Authority who have governed themſelves according to the juſt Rules, by confining themſelves to their own proper Miniſtry, without meddling with the other. But it ſufficeth for the Deſign propoſed, to have given this general Idea of the two Governments of Religion, and of Civil Policy; that we may diſcern therein the Spirit and Uſe both of the one and the other; that we may ſee in it the Principles which reconcile them, and which diſtinguiſh them; and that we may be able to judge by all theſe Views, of the manner in which they concur to ſupport the Order of Society.

XI.

11. Laws of Spiritual Powers, which relate to Temporal Things. It may perhaps here occur to the Reader's thought, that the Spiritual Powers have made Rules concerning Temporal Matters; ſuch as are in the Canon Law, thoſe relating to Contracts, Teſtaments, Preſcriptions, Crimes, the Order of Judicial Proceedings, the Rules of Law, and other Matters of the like nature.

XII.

12. Laws of Temporal Powers, concerning Spiritual Things. And that we likewiſe ſee Laws enacted by Temporal Powers in Matters purely Spiritual: Such as ſome Conſtitutions of the firſt Chriſtian Emperors, and Ordinances of our Princes touching Matters of Faith, and of Church-Diſcipline. But what is in the Canon Law relating to Temporal Matters, cannot prove that the Eccleſiaſtical Powers regulate Temporal Concerns. It appears on the contrary, that at the beginning of the Canon Law, where diſtinction is made between the Divine Laws and Human Laws, it is ſaid, that the Human Laws are the Laws of Princes: That it is by theſe Laws that the Rights to every thing which Man can poſſeſs are regulated. And that even the Goods of the Church are preſerved to it only by the Authority of theſe Laws; becauſe it is to Princes that God hath given the Miniſtry of the Government in Temporal Things[x]. Since therefore there can be nothing in the Canon Law which overturns this Rule, it follows that the Rules which we ſee in it concerning Temporal Matters, are capable of being reconciled with this Principle; which it is no hard matter to do, if we make reflexion on the Uſe which the Rules relating to Temporal Affairs have in the Canon Law. For we ſhall find that, for Example, the Rules concerning the Order in Judicial Proceedings relate to the Eccleſiaſtical Juriſdiction: That thoſe about Crimes, eſtabliſh there the Canonical Puniſhments; that is to ſay, the Puniſhments which the Church enjoins for the Penance of Criminals: That the Rules which relate to Contracts, Teſtaments, Preſcriptions, and to other Matters of the like nature, relate to them only in reference to Spirituals; as becauſe of the Prohibition of certain Commerces to Eccleſiaſticks, becauſe of the Religion of an Oath, and becauſe of the Uſe of Covenants for Churches, and particular Church-men, and becauſe of other Views of the like nature: That ſome of theſe Rules are only Anſwers of the Popes to Conſultations: And laſtly, that whatever Rules there are there which relate purely to Temporal Things among Lay-men, ought to be conſidered only as Rules binding the Subjects of the Territories of the See of *Rome*, in which the Popes are Temporal Princes: And without the ſaid Territories, they have no other Authority, than what is given them by the Princes who receive

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[x] 2 *Sam.* xii.

[y] 1 *Kings* i. 23.

the uſe of them among their Subjects. Concerning which it may be obſerved, that theſe ſorts of Conſtitutions in the Canon Law concerning Temporal Matters, ſhew plainly enough that they are naturally derived from the Temporal Authority, ſeeing the greateſt part of them have been taken out of the *Roman* Law, altho' it be true that ſome of them are contrary to it. But it is not neceſſary that we ſhould treat of that matter in this place.

[a] Quo jure defendit villas Eccleſiæ? divino, an humano? divinum jus in ſcripturis divinis habemus: humanum in legibus Regum. Unde quiſque poſſidet quod poſſidet? nonne jure humano? *Diſtinct.* 8. *can.* 2. Jura autem humana, jura Imperatorum ſunt: quare? quia ipſa jura humana per Imperatores & Rectores ſæculi Deus diſtribuit humano generi. *Ibid.*

As to the Regulations which Temporal Princes may have made touching Spiritual Matters; they have not extended their Authority to the Spiritual Miniſtry that is reſerved to the Eccleſiaſtical Powers, but they have only imployed their Temporal Authority, to put the Laws of the Church in Execution, in the External Order of the Government of the Church. And even thoſe very Ordinances which our Kings themſelves call Political Laws, tend only to maintain the External Policy of the Church, and to reſtrain thoſe who diſturb it by tranſgreſſing the Eccleſiaſtical Laws[a].

[a] *Charles* IX. *Jan.* 17. 1561.

XIII.

13. Kings are the Protectors and Defenders of the Laws of the Church. And likewiſe it appears from the Ordinances themſelves, that the Princes ordain nothing in them, but what properly belongs to their Temporal Power, and call themſelves therein the Protectors, Guardians, and Defenders of the Faith, and Executors of what the Church teaches and ordains[b].

[b] *Francis* I. in *July*, 1543.

XIV.

14. Agreement between the Spiritual and Temporal Juriſdiction. Another difficulty might be ſtarted in relation to ſome Matters, where it would ſeem as if the Spiritual and Temporal Juriſdiction encroached one upon the other; As for Example, when the Temporal Juriſdiction takes Cognizance of the Right of Poſſeſſion in Benefices: And when the Eccleſiaſtical Juriſdiction judges of Temporal Concerns between Eccleſiaſtical Perſons. But as to what concerns the Poſſeſſion of Benefices, it is a Matter purely of Temporal Juriſdiction, which alone has the Right of joining Force to Authority, for preventing Acts of Violence, and for reſtraining Uſurpers. And as to the Right which Eccleſiaſtical Perſons have to judge of Temporal Matters in Cauſes between Eccleſiaſticks, it is a Privilege which Princes have granted to the Spiritual Juriſdiction, in favour of the Church.

We have endeavoured by what has been ſaid in this and the preceding Chapters, to give a General Idea of the Plan of the Society of Mankind upon the Natural Foundations of the Order which God hath eſtabliſhed in it: And to ſhew that the firſt Principles of that Order are the two primary Laws: That the Engagements which link Men together in Society are Conſequences of theſe two primary Laws; and that they are likewiſe the Sources of all Duties, and the Foundations of the different Kinds of Laws: and we have begun to deſcend from thoſe General Principles, to the Principles which are peculiar to the Civil Laws. It remains at preſent, before we proceed to enquire into the detail of theſe Laws, and of the matters of which they treat, that we examine more minutely the Nature and Spirit of Laws in general, and the Characters which diſtinguiſh their different Kinds; that we may thereby diſcover the Foundations of many Rules that are eſſential to the Knowledge and right Uſe of the Civil Laws: and this ſhall be the Subject Matter of the two following Chapters.

CHAP. XI.

Of the Nature and Spirit of Laws, and their different Kinds.

The CONTENTS.

1. *Two ſorts of Laws; Laws Immutable, and Arbitrary Laws. The Nature of theſe Laws.*
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3. *Example of Arbitrary Laws.*
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7. *Firſt Example.*
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9. *A third Example.*
10. *Fourth Example.*

11. *The Immutable Laws implied in theſe ſorts of Arbitrary Laws.*
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20. *The Juſtice and Authority of all Laws: The Difference between that of Natural Laws, and that of Arbitrary Laws.*
21. *Remarks on the Diſtinction of Immutable Laws, which admit neither of Diſpenſation, nor Exception, and of thoſe which do admit of them.*
22. *The Foundation of Exceptions and Diſpenſations, and their Nature.*
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25. *The danger of violating a Natural Law, under pretext of preferring it to an Arbitrary Law.*
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29. *Two ſorts of Natural Rules: Examples both of one and the other ſort.*
30. *Natural Laws which ſeem ſometimes as if they were aboliſhed.*
31. *Different Effects of ſome Natural Laws.*
32. *Laws Divine and Human, Natural and Poſitive.*
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37. *Difference between the Arbitrary Laws of Religion, and the Arbitrary Laws of Human Policy.*
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39. *The Law of Nations.*
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43. *Divers ways of conceiving the Laws which compoſe the Civil Law.*
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45. *Divers ways of dividing the Laws, under divers Views.*
46. *Written Law, Cuſtoms.*
47. *Two ſorts of Principles; one, of thoſe which may be reduced into Rules, and the other of thoſe which cannot be fixed into Rules.*
48. *Remark on theſe two ſorts of Principles: Tranſition to the following Chapter.*

I.

1. Two ſorts of Laws; Laws Immutable, and Arbitrary Laws. The Nature of theſe Laws.

ALL the different Ideas which it is poſſible to conceive of the ſeveral ſorts of Laws that are expreſſed by the Names of Divine and Human Laws, Natural and Poſitive, Spiritual and Temporal, Law of Nations, Civil Laws, and by all the other Names that can be given them, may be reduced to two Kinds, which comprehend all Laws of what nature ſoever; One is, of the Laws which are Immutable; and the other, of the Laws that are Arbitrary. For there is not any one Law but what has one or other of theſe Characters; which it is of moment to conſider, not only for apprehending aright this firſt general Diſtinction of Laws into theſe two Kinds, which ought to precede the other ways of diſtinguiſhing them; but becauſe it is theſe two Characters which are the moſt eſſential part in the Nature of all Laws: And therefore the Knowledge of them is neceſſary, and of great uſe in the Study of the Civil Law.

The Immutable Laws are ſo called, becauſe they are Natural, and ſo juſt at all times, and in all places, that no Authority can either change, or aboliſh them: And the Arbitrary Laws are thoſe which a Lawful Authority may enact, change, and aboliſh, as there is occaſion.

Theſe Immutable, or Natural Laws, are all of them ſuch as are neceſſary Conſequences of the two Fundamental Laws, and which are ſo eſſential to the Engagements which form the Order of Society, that it is impoſſible to alter them, without deſtroying the Foundations of the ſaid Order: And the Arbitrary Laws are thoſe which may be differently eſtabliſhed, changed, and even quite aboliſhed, without violating the Spirit and Intent of the Fundamental Laws, and without deſtroying the Principles of the Order of Society.

II.

2. Example of Immutable Laws.

Thus, ſeeing it is a conſequence of the firſt Fundamental Law, that we ought to obey the Higher Powers, becauſe it is God that hath eſtabliſhed them; and becauſe it is a conſequence of the ſecond Fundamental Law, that we ought to do Harm to no Man, and that we ought to render to every one his Due; and becauſe all theſe Laws are eſſential to the Order of Society; they are for this reaſon Immutable Laws. And it is the ſame thing with reſpect to all the particular Rules, which are eſſential to this Order, and to the Engagements which follow from the firſt Laws. Thus, it is a Rule eſſential to the Engagement of a Tutor, that he being in the place of a Father to the Orphan who is committed to his charge, he ought to be careful in looking after the Perſon and the Eſtate of the ſaid Orphan; and it is likewiſe an Immutable Law, that the Tutor ought to take this care. Thus, it is a Rule eſſential to the Engagement of the Perſon who borrows ſomething belonging to another, that he ought to preſerve it; and it is alſo an Immutable Law, that he ought to be anſwerable for the Faults which he commits contrary to this Duty.

III.

3. Example of Arbitrary Laws.

But the Laws concerning Matters which are left indifferent by the two primary Laws, and the Engagements which are conſequences of them, are Arbitrary Laws. Thus, ſeeing it is indifferent with reſpect to the two Primary Laws, and the Order of Engagements, whether there be five, ſix, or ſeven Witneſſes to a Teſtament: whether Preſcription be acquired in twenty, thirty, or forty years: whether Money be of a higher or a leſſer Value: Theſe are only Arbitrary Laws, which regulate theſe ſorts of things, and they regulate them differently according to the Times and Places.

IV.

4. Origine of the Immutable Laws.

It appears from this firſt Idea of the Nature of Immutable Laws, that they derive their Origine from the two prime Laws, of which they are only an Extenſion: and that, for Example, the Natural Rules of Equity which have been obſerved, and the others of the like nature, are nothing elſe but what the Spirit of the ſecond Law demands in every Engagement, and what it points out to be eſſential and neceſſary to it.

V.

5. Origine of the Arbitrary Laws.

As for the Arbitrary Laws, we may remark two different Cauſes which have rendred the uſe of them neceſſary in Society, and which have been the Sources of that infinite multitude of Arbitrary Laws which we ſee in the World.

VI.

6. The firſt Cauſe of Arbitrary Laws, the Difficulties which ariſe from the Immutable Laws.

The firſt of theſe two Cauſes is the neceſſity of regulating certain Difficulties which ariſe in the Application of the Immutable Laws, when the ſaid Difficulties are ſuch as that they cannot be provided againſt but by Laws, and when the Immutable Laws do not regulate them. We ſhall be able to judge of this ſort of Difficulties by ſome Examples.

VII.

7. Firſt Example.

Thus, for a firſt Example of the Neceſſity of arbitrary Laws; it is a Natural and Immutable Law, that Fathers ought to leave their Eſtates to their Children after their Death: and it is alſo another Law which is commonly placed in the number of the Natural Laws, that one may diſpoſe of his Goods by a Teſtament. If we give to the firſt of theſe two Laws an Extent without any Bounds; a Father may diſpoſe of nothing by Teſtament: and if we extend the ſecond Law to an indefinite Liberty of diſpoſing of all by Will, as did the antient *Roman* Law; a Father may exclude his Children from having any Share in his Inheritance; and may give all his Goods to Strangers.

We ſee by theſe Conſequences, which are ſo oppoſite to one another, and which would follow from theſe two Laws taken in an indefinite Extent, that it is neceſſary to ſet ſome bounds both to the one and the other, which may reconcile them together. And if all Men did govern themſelves by Prudence, and by the Spirit of the firſt Laws, every one would be a juſt Interpreter of what the Law, by which Children ſucceed to their Parents, demands of him in particular, and likewiſe of what he is obliged to by vertue of that Law which allows every one to diſpoſe of his Effects by Teſtament. For he might proportion the Diſpoſitions of his Teſtament to the Condition of his Eſtate, and of his Family, and to the Duties which he may owe to his Children, and to other Perſons, according as he may be under Obligations either to make ſome grateful Requital, or to do ſome Act of Liberality. But becauſe all Perſons do not govern themſelves according to the Spirit of the firſt Laws, nor according to Prudence, and that ſome Perſons abuſing the Liberty of diſpoſing of their Goods by Will, or being even ignorant of the State of their Goods, and of their Affairs, violate the Duty which they owe to their Children; ſeeing it is not juſt to leave an indefinite Liberty to thoſe who may abuſe it, and that it is not poſſible to make a particular Rule for every one; it was neceſſary for reconciling theſe two Laws, and for reducing them into Rules common to all Men, to make an Arbitrary Law, which might reſtrain the liberty of diſpoſing by Will to the prejudice of Children, and which might preſerve to them a certain Portion of the Goods of their Parents, which it ſhould not be in the power of their Parents to deprive them of: and it is this Portion, fixed by an Arbitrary Law, which is termed the Legitime, or Filial Portion.

VIII.

8. *Another Example.* Thus, for another Example, it is a Natural and Immutable Law, that he who is the Owner of a Thing, ſhould always continue to have the Property of it, until he has diveſted himſelf of it voluntarily, or that he be diveſted of it by ſome juſt and legal way: and it is likewiſe another Natural and Immutable Law, that Poſſeſſors ought not always to be in danger of being moleſted in their Poſſeſſion for ever; and that he who has been in Poſſeſſion of a thing for a long time, ſhould be looked upon as the Owner of it; becauſe Men are naturally careful not to abandon to others what belongs to them, and becauſe we ought not to preſume without Proof, that a Poſſeſſor is an Uſurper.

If we extend too far the firſt of theſe two Laws, which declares that the Owner of a Thing cannot be deprived of it but by juſt Titles and Conveyances; it will follow, that whoſoever can ſhew that either he himſelf, or they from whom he derives his Right, have been Owners of an Eſtate, altho' they had been out of Poſſeſſion of it for more than an Age, will be reſtored to the ſaid Eſtate, and turn out the Poſſeſſor, unleſs, together with his long Poſſeſſion, he can ſhew a Title which hath taken away the Right of the firſt Owner. And if on the contrary, we extend too far the Rule which makes it be preſumed that the Poſſeſſors are Owners of what they poſſeſs; we ſhall be guilty of Injuſtice, by taking away the Property from all thoſe who happen not to be in Poſſeſſion.

It is evident, that the Contrariety to which theſe two Laws might lead us, one of them reſtoring the firſt Owner againſt an antient Poſſeſſor, and the other maintaining a new Poſſeſſor againſt the right Owner, required that it ſhould be regulated by an Arbitrary Law, that they who are not in Poſſeſſion, and who ſhould notwithſtanding claim the Right of Property, ſhould be bound to aſſert and prove their Right within a certain time: and that after that time the Poſſeſſors, who had not been moleſted in their Poſſeſſion, ſhould be maintained in it. And this is what has been done by the Arbitrary Laws, which ſettle the Times of Preſcriptions.

IX.

Thus, for a third Example, it is a Natural and Immutable Law, that Perſons who have not as yet attained to a firm and ſteddy uſe of their Reaſon, for want of Age, Inſtruction, and Experience, ſhould not have the Management of their Eſtates and Affairs: and that they may have it after they ſhall have acquired Reaſon and Experience enough. But ſeeing Nature doth not produce in all Men at the ſame Age that ripeneſs of Reaſon which is neceſſary for the Management of Affairs, and that it comes ſooner in ſome, and later in others; in order to apply this Law to Uſe, it has been found neceſſary to make an Arbitrary Law, for ſettling a Rule that might be common to all Men. Thus, the Civil Laws of ſome Countries have left it to the Fathers, to regulate to what Age their Children ſhould remain under the Conduct of a Tutor[a]: and in other Countries they have fixed a certain Period of Age, under which perſons were to be in that State which is called Minority, and above which they were to be reputed Majors. 9. *A third Example.*

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[a] Is under Tutors and Governors until the time appointed of the Father. *Gal.* iv. 2.

X.

10. Fourth Example.

Thus, for a laſt Example, it is a Natural Law, that he who buys ſhould not take advantage of the Neceſſity of the perſon who ſells, and that he ſhould not buy at too low a Price[b]. But becauſe it would be a thing of troubleſome conſequence in Trade, to annul all the Sales where a Thing is ſold under its true Value; it has been regulated by an Arbitrary Law, that Sales ſhould not be diſſolved on the account of the lowneſs of the Price, except in the caſe where Lands and Tenements are ſold for leſs than the half of the juſt Value. And the Laws connive, for the Publick Good, at the Injuſtice of Buyers, where the Damage done is leſs than the half of the Value, unleſs there be other particular circumſtances in the Sale which may make it neceſſary to reſcind it.

XI.

11. The Immutable Laws implied in theſe ſorts of Arbitrary Laws.

We muſt obſerve in all theſe Examples, and others of the like kind of Arbitrary Laws, which are Conſequences of the Immutable Laws, that every one of theſe Arbitrary Laws hath two Characters, which it is of importance to diſcern, and to diſtingniſh in them, and which make as it were two Laws in one. For in theſe Laws, there is one part of what they ordain which is of the Law of Nature, and there is another part of them which is Arbitrary. Thus, the Law which regulates the Filial Portion of Children includes two Diſpoſitions; one which enacts, that Children ſhould have a Share in the Inheritance of their Fathers, and this is an Immutable Law: and the other, which regulates this Portion to a Third, or a Moiety, or more, or leſs; and this is an Arbitrary Rule. For it might have been either two Thirds, or three Fourths, if the Lawgiver had thought fit to ſettle it ſo.

XII.

12. Second Cauſe of Arbitrary Laws, Matters of which the uſe has been invented.

The ſecond Cauſe of the Arbitrary Laws, was the Invention of certain Uſages, which were thought to be uſeful in Society. Thus, for Example, Fiefs have been invented, Quit-Rents, Annuities, the Right of Redemption, Subſtitutions, and other Uſages of the like Nature, the Eſtabliſhment of which was Arbitrary. And theſe Matters, which are the Invention of Man, and which may be termed for that reaſon Arbitrary Matters, are regulated by a vaſt number of Laws of the ſame nature.

Thus, we ſee in Society the Uſe of two ſorts of Matters. For there are ſome which are ſo Natural, and ſo Eſſential to our moſt common Wants, that they have been always in uſe, in all Places, ſuch as Exchange, Letting and Hiring, a Depoſitum, the Contract of Loan, and many other Covenants; Guardianſhips, Succeſſions, and many other Matters: and there is alſo the Uſe of Matters that are invented. But it is to be obſerved, that even thoſe Matters, of which Men have invented the Uſe, have always their Foundation in ſome Principle of the Order of Society. Thus, for Example, Fiefs have their Foundation, not only in the General Liberty of making all ſorts of Covenants, but alſo in the Advantage which redounds to the Publick, by engaging in the Service of the Prince, in the time of War, thoſe to whom Capital Fees and Meſne Fees have been given, and their Succeſſors.

Thus, Subſtitutions, or Entails, are founded upon the General Liberty which every one has to diſpoſe of his Eſtate, on the view of preſerving the Eſtate in Families, the Conveniency of taking away from certain Heirs, Executors, or Legataries, the Liberty of diſpoſing by Will, of which they might make a bad uſe, and other Motives of the like nature.

XIII.

13. The Natural Matters have Arbitrary Laws, and the Invented Matters have Natural Laws.

It is to be obſerved likewiſe on the ſubject of theſe matters which have been invented by Men, that although it would ſeem, that they ought to be regulated wholly by Arbitrary Laws, yet nevertheleſs they have many Immutable Laws relating to them: in the ſame manner as we ſee that the other Matters, which may be called Natural, are not only regulated by Natural and Immutable Laws, but that they have alſo Arbitrary Laws.

XIV.

14. Examples.

Thus, it is an Immutable Law in the Matter of Fees, that we ought to obſerve in them the Conditions regulated by the Title which contains the Grant of the Fee. Thus, in the Natural Matter of Tutorſhips, it is an Arbitrary Law that hath fixed the Number of Children which exempts from that Office. So that it appears by theſe Examples,

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[b] And if thou ſell ought unto thy neighbour, or buyeſt ought of thy neighbour's hand, ye ſhall not oppreſs one another. *Lev.* xxv. 14.

ples, and by others which have been already taken notice of, that in all Matters, both Natural and others, there is a Mixture of Immutable Laws, and of Arbitrary Laws:

XV.

15. Few Arbitrary Laws in Natural Matters.

But with this difference, that in the Natural Matters there are ſew Arbitrary Laws, and that the greateſt part of the Laws relating to ſuch Matters are Immutable: and that on the contrary, there is an infinite Number of Arbitrary Laws in thoſe Matters which have been invented.

XVI.

16. Many Arbitrary Laws in Arbitrary Matters.

Thus, we ſee in the *Roman* Law, that as the greateſt part of the Matters contained in it which are of uſe now-a-days, are Natural Matters, ſo the Rules concerning them are almoſt all of them Natural Laws: and that on the contrary, the greateſt part of the Matters of our Cuſtoms, being Arbitrary Matters, the greateſt part of their Rules are Arbitrary alſo, and different in divers Places: and we ſee likewiſe in the Arbitrary Matters which are regulated by the Ordinances, that almoſt all their Rules are alſo Arbitrary.

XVII.

17. Two ſorts of Arbitrary Laws; thoſe which are Conſequences of the Natural Laws, thoſe which regulate Matters that are invented.

Arbitrary Laws are therefore of two ſorts, according to the two Cauſes which have given riſe to them. The firſt is, of thoſe Arbitrary Laws which have been Conſequences of the Natural Laws; ſuch as thoſe which regulate the Filial Portion of Children, the Age of Majority, and other Matters of the like nature. And the ſecond is, of thoſe Laws that have been invented for the Regulation of Arbitrary Matters; ſuch as the Laws which ſettle the Degrees of Subſtitutions, and the Rights of Relief in Fees, and other the like matters.

XVIII.

18. Four ſorts of Books which contain the Arbitrary Laws obſerved in this Kingdom; the Roman *Law, the* Canon Law, *the Ordinances, the Cuſtoms.*

All the Arbitrary Laws of theſe two Kinds are contained in four ſorts of Books, which are made uſe of in *France*; and that is, the Books of the *Roman* Law, the Canon Law, the Ordinances, and the Cuſtoms. From whence we may diſtinguiſh under another View, four kinds of Arbitrary Laws that are in uſe in this Kingdom.

The firſt comprehends ſome Arbitrary Laws of the Body of the *Roman* Law which have been received in this Kingdom, and which derive their Authority with us from the uſe which we give them: ſuch as, for inſtance, that Law which has been already taken notice of, touching the Reſciſſion of Sales on account of Loſs ſuſtained by the Sale in more than the half of the real Value; the Laws which regulate the Formalities of Wills and Teſtaments, the Time of Preſcriptions, and the other Laws of that kind which are received either throughout the whole Kingdom, or only in ſome Provinces.

The ſecond ſort is, that of the Arbitrary Laws which are taken out of the Canon Law, and received in uſe with us. Such are many Rules relating to Church Benefices, and other Eccleſiaſtical Matters: and ſome of them even in Matters of the Civil Law.

The third is, of the Arbitrary Laws which are eſtabliſhed by the Ordinances of our Kings. Such as thoſe which regulate the Rights of the Prince's Demeſnes, the Puniſhments of Crimes, the Order of Judicial Proceedings, and many other Matters of ſeveral kinds.

The fourth ſort of Arbitrary Laws, conſiſts of thoſe which we call Cuſtoms, ſuch as we ſee in moſt of the Provinces, and which regulate ſeveral Matters; ſuch as Fieſs, the Community of Goods between Huſband and Wiſe, Dowers, the Filial Portions of Children, the Right of Redemption by one of the Family, the Right of Redemption of Fieſs, and many others. And all theſe Cuſtoms are ſo many arbitrary Laws, which, in relation to the ſame matters, are different in divers Places. And becauſe theſe Cuſtoms were a kind of Laws, which not being written, were preſerved only by Uſe; and that this Uſe was often uncertain, our Kings have cauſed to be collected together, and reduced into Writing, in each Province, and in each Place, the Cuſtoms which were there received; and have given them the Sanction of Laws and Rules.

XIX.

19. The particular Rules of the Law of Nature are no where collected but in the Body of the Roman *Law.*

We have then in *France*, as there is in all other Countries, the uſe of Natural Laws, and of Arbitrary Laws. But with this difference between theſe two ſorts of Laws, that all the Arbitrary Laws which we have, being contained in the Ordinances, and in the Cuſtoms, and in ſuch Arbitrary Laws taken out of the Body of the *Roman* Law, and of the Canon Law, as we obſerve as Cuſtoms; all theſe Laws have a certain and fixed Authority. But as for the Laws of Nature, ſeeing we have no where the Detail of them except in the Books of the *Roman* Law, and that they are placed there not in the beſt Order, and mixed with many other Laws which are neither Natural nor in uſe with us; their Authority is ſo weakened by this Mixture, that many perſons either are not willing, or not capable to diſcern that which is certainly Juſt and Natural, from that which Reaſon and our Practice do not admit of. Concerning which Matter, the Reader may obſerve what hath been ſaid of it in the Preface to this Book.

XX.

20. *The Juſtice and Authority of all Laws: the difference between that of Natural Laws, and that of Arbitrary Laws.*

It is eaſy to perceive from this Diſtinction of Natural Laws and Arbitrary Laws, and from the Remarks which have been made on theſe two kinds of Laws, what are the different Characters of their Juſtice and of their Authority. And ſeeing it is the Juſtice, and the Authority of Laws, which gives them the Force which they ought to have upon our Reaſon; it is of moment to conſider, and to diſtinguiſh what is the Juſtice and Authority of Natural Laws, and what is the Juſtice and Authority of Arbitrary Laws.

The Univerſal Juſtice of all Laws, conſiſts in the relation which they have to the Order of Society, of which they are the Rules. But there is this difference between the Juſtice of the Laws of Nature, and the Juſtice of Arbitrary Laws, that the Laws of Nature being eſſential to the two Primary Laws, and to the Engagements which are Conſequences of them, they are eſſentially Juſt: and that their Juſtice is always the ſame, at all times, and in all places. But the Arbitrary Laws being indifferent to theſe Foundations of the Order of Society, ſo that there is not any one of them which may not be altered, or aboliſhed, without overturning the ſaid Foundations; the Juſtice of theſe Laws conſiſts in the particular Advantage that is found by enacting them, according as the Times and the Places may require.

The Univerſal Authority of all Laws conſiſts in the Divine Appointment, which commands all Men to obey them. But as there is a difference between the Juſtice of Natural Laws, and the Juſtice of Arbitrary Laws; ſo likewiſe their Authority is diſtinguiſhed in a manner ſuited to the difference of their Juſtice.

The Laws of Nature being Juſtice it ſelf, they have a Natural Authority over our Reaſon. For it is given us for no other end but that we may diſcern Juſtice and Truth, and may ſubmit to it. But becauſe all Men have not always their Reaſon clear enough for diſcerning this Juſtice, or their Heart upright enough for obeying it, Civil Policy gives to theſe Laws another Empire over Men, independent on their Approbation of them, by the Authority of the Temporal Powers, who compel Men to obey them. But the Authority of the Arbitrary Laws conſiſts purely in the Force which they derive from the Power of thoſe who have a Right to make Laws, and in the Appointment of God who commands Obedience to be paid to them.

This difference between the Juſtice and Authority of Natural Laws, and that of Arbitrary Laws, hath this effect; that whereas Arbitrary Laws cannot be naturally known unto Men, they are Facts which Men may be ignorant of: but the Laws of Nature being eſſentially juſt, and the Natural Object of Reaſon; no man can ſay, that he wants the Light of Reaſon which teaches us them. For which reaſon, Arbitrary Laws do not begin to have their effect, till after they have been promulged. But the Laws of Nature have always their effect, without any Promulgation. And ſeeing they can neither be changed, nor aboliſhed, and that they have their Authority from themſelves, they are always binding upon Men, and no one can pretend Ignorance of them.

XXI.

21. *Remarks on the Diſtinction of Immutable Laws, which admit neither of Diſpenſation, nor Exception, and of thoſe which do admit of them.*

But although the Natural, or Immutable Laws be eſſentially juſt, and that they cannot be changed; yet we muſt take care not to imagine from this Idea of Natural Laws, that becauſe they are Immutable, and ſuffer no Change, that therefore they are ſuch, as that there can be no Exception to any one of the Laws which have this Character. For there are many Immutable Laws which admit of Exceptions and Diſpenſations, and yet do not loſe the Character of Immutable Laws; as on the contrary, there are many of them which admit of no Diſpenſation, nor Exception.

This Difference, which diſtinguiſhes theſe two ſorts of Laws, hath its Foundation in this, that Laws have their Juſtice and Authority, only becauſe of the relation which they bear to the Order of Society, and to the Spirit of the two Fundamental Laws: So that if it happen, that the Order of Society, and the Spirit of thoſe Fundamental Laws, require that ſome of the Immutable Laws be reſtrained either by Exceptions or by Diſpenſations, they admit of thoſe Mitigations: and if nothing can be changed without violating the ſaid Spirit, and the ſaid Order, they do not admit either of Diſpenſation, or Exception. But even the Laws which do admit of theſe Reſtrictions, do not for that reaſon ceaſe to be immutable; for it is ſtill true that they cannot be aboliſhed, and that they are always certain and irrevocable Rules, although they be leſs general becauſe of theſe Exceptions and Diſpenſations. All theſe Truths will better appear by ſome Examples.

Thus the Laws which enjoin Honeſty, Fidelity, Sincerity; and which forbid Deceit, Fraud, and all manner of Tricking, are Laws which can admit of no Diſpenſation, or Exception.

Thus, on the contrary, the Law which forbids Swearing, admits of a Diſpenſation in the caſe of a Judicial Oath, when it is neceſſary to give Teſtimony to the Truth: and an Oath is alſo made uſe of as a Corroboration of the Engagement of thoſe who are admitted into Offices.

Thus the Law which commands the Performance of Covenants, ſuffers an Exception and Diſpenſation in the caſe of a Minor, who engages himſelf raſhly to his own prejudice.

Thus the Law which ordains the Seller to warrant what he has ſold againſt the Pretenſions of all others who may claim a Right to it, allows the Parties to derogate from this Warranty, by an expreſs Agreement to diſcharge the Seller from all other Warranty beſides that againſt his own Fact and Deed: either becauſe he ſells on this conſideration at a lower Price, or for other Motives, which make it juſt that he ſhould be freed from the Warranty.

XXII.

22. The Foundation of Exceptions and Diſpenſations, and their Nature.

It is eaſy to perceive by theſe few Inſtances, that theſe Exceptions and Diſpenſations have their Foundation in the Spirit of the Laws: and that they themſelves are other Laws, which do not alter the Character of the Immutable Laws to which they are Exceptions. And that thus all the Laws are reconciled one with another, and agree among themſelves by the means of that common Spirit which is the Juſtice of every one of them. For the Juſtice of every Law is included within its proper Bounds, and none of them extends to what is otherwiſe regulated by another Law. And it will appear in all ſorts of Exceptions and Diſpenſations, which are reaſonable, that they are founded upon ſome Law. So that we muſt conſider the Laws which admit of Exceptions, as General Laws, which regulate every thing that commonly happens; and the Laws which make the Exceptions and Diſpenſations, as Particular Laws, which are peculiar to certain Caſes: but both the one and the other are Laws and Rules equally juſt, according to their Uſe and their Extent.

XXIII.

23. The Importance of diſtinguiſhing the Characters, and the Spirit of the Laws.

All theſe Reflections on the Diſtinction of Immutable Laws, and Arbitrary Laws, on their Nature, their Juſtice, their Authority, ſhew plainly of what importance it is to conſider, under all theſe Views, what is the Spirit and Deſign of all theſe Laws: to diſcern whether they have the Character of Immutable Laws, or of Arbitrary Laws: to diſtinguiſh between the General Rules, and the Exceptions to them, and to make the other Diſtinctions which have been remarked; and the ſame may be ſaid of the Diſtinctions which ſhall be mentioned hereafter. Nevertheleſs, it appears plainly enough by Experience, that although there be nothing more natural and more real, than the Foundations of all theſe Remarks, many ſeem either to be ignorant of them, or to deſpiſe them; and do not ſo much as perceive the bare difference between the Immutable Laws, and the Arbitrary Laws. So that they conſider them all without diſtinction, as having the ſame Nature, the ſame Juſtice, the ſame Authority, and the ſame Effect. For ſeeing they compoſe all of them together an infinite Medley of Rules concerning all Matters, both Natural and Invented, and that they have only one common Name of Laws, they miſtake in this Medley the Characters which diſtinguiſh them, and often take Natural Rules for bare Arbitrary Laws, eſpecially when the ſaid Rules have not the Evidence of the firſt Principles on which they depend, and that they are only remote Conſequences of them. For not perceiving in that caſe the Connection which the ſaid Rules have to their Principles, they do not diſcover the Foundation, and the Certainty of their Truth.

And ſince on the contrary, Arbitrary Laws are always clear and evident, becauſe they are written, and contain only ſenſible Diſpoſitions, which for the moſt part are comprehended without reaſoning; moſt men receive a much ſtronger Impreſſion from the Authority of Arbitrary Laws, than from Natural Rules, which do not ſo ſenſibly affect the Mind. And when it happens that Perſons, whoſe Judgment is not ſo exact, and whoſe Memories are ſtuffed with a great number of Laws of all kinds, want this View, and do not make the Reflections that are neceſſary for a right Uſe of the Laws, and for giving to every one of them its juſt effect, there is great hazard of their conſidering them under falſe Views, and of making wrong Applications of them; eſpecially when they endeavour, as moſt people do, to find out Laws, not for the ſupport of Reaſon, but of the Party whoſe Cauſe they have eſpouſed; and then they have no other View but to give to the Rules an Extent ſuited to the Senſe which may moſt ſerve their Intereſt.

It is eaſy to ſee by Experience the ways in which perſons go aſtray who thus confound the Laws: And we may perceive by barely reflecting on the different Sentiments of People touching Queſtions of all kinds, that thoſe who fall into an Error, are engaged in it for want of ſome one of theſe Views: And that thoſe who reaſon juſtly, diſcover the Truth, only becauſe they diſcern the Ways of diſtinguiſhing, of chuſing, and of applying the Rules, and that even when they do not reflect on the Natural Principles which enable them to make this Judgment.

XXIV.

24. *Example of the conſequence of diſtinguiſhing between Immutable Laws, and Arbitrary Laws.*

But altho' it be eaſy to conceive, without the help of any particular Example, of what great importance it is in the Application of the Rules, to know their Nature, their Spirit, and their Uſe; yet ſince ſome people may be apt to fancy, that of all the things neceſſary to be conſidered in Laws, there is nothing more eaſy to be perceived than the diſtinction of thoſe which are Natural and Immutable, and of thoſe which are Arbitrary; and that it may ſeem impoſſible to miſtake for the want of this View: It is of moment to ſhew, by a very remarkable Example, that there is often danger of people's erring, by reaſon of their not diſcerning theſe matters, although ſo eaſy to be done.

All thoſe who have any knowledge of the *Roman* Law, may remember that Law that is taken out of one of *Papinian*'s Deciſions, which ſays, that the Pupillary Subſtitution excludes the Mother from her Legal Portion of the Inheritance. That is to ſay, that if a Father ſubſtitutes either a Relation, or a Stranger, to his Son, to ſucceed him in caſe he dies before he arrives at the Age of Puberty; the Perſon ſo ſubſtituted ſhall ſucceed him, even altho' the Mother of this Child had ſurvived him: And by this Subſtitution, ſhe will be deprived of her Legal Portion of her Child's Inheritance[c].

This Deciſion is founded upon this Reaſoning of *Papinian*; that it is not the Son who deprives his Mother of his Goods; but that it is the Father, who by vertue of the Liberty which he had to diſpoſe of them, has made them go to the Subſtitute.

If we examine this Deciſion, it will appear that the ground of the Queſtion was the apparent Oppoſition between a Natural Law, and an Arbitrary Law: And that the Arbitrary Law, which gave leave to the Father to ſubſtitute, by an extenſion of that Liberty even to deprive the Mother of her Legal Portion, and to tranſmit the Goods to the Subſtitute, was preferred before the Natural Law, which calls the Mother to the Inheritance of her Son.

I do not here quote this Example, with deſign to leſſen the juſt Eſteem that is due to ſo celebrated a Lawyer. But it is known that he gave this Judgment, according to the Principles of that ancient Law of the *Romans*, which favoured the Liberty of diſpoſing by Teſtament, and which at firſt went to that Exceſs, that Fathers could diſinherit their Children without cauſe. It was by the Spirit of this Principle, that he invented that Subtilty, that it was not the Son who did this wrong to his Mother, but that it was the Father; *quia pater hoc ei fecit*.

Thus, this Deciſion being founded only on the Principle of this unbounded Liberty of diſpoſing of one's Eſtate by Teſtament, even to the depriving Children of their Filial Portion, which is a Principle that is neither natural, nor in uſe with us; we ought not to take for a Rule a Subtilty, which to favour this Principle, deprived the Son of his Legal Portion of the Goods of his Father, and the Mother of her Legal Portion of the Goods of her Son: For this Deciſion made all the Goods of the Teſtator to go to the Subſtitute, without allowing the Son to tranſmit any part of it to his Heirs.

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[c] Sed nec impuberis filii mater, inofficioſum teſtamentum dicit, quia pater hoc ei fecit, & ita Papinianus reſpondit. *l.* 8. §. 5. *ff. de inoff. teſt.*

We may therefore place this Subtilty among many others of the *Roman* Law which we reject, becauſe it is received with us only as written Reaſon, and becauſe Subtilties being contrary to Natural Right, are contrary to Reaſon. And altho' there be no occaſion to quote any Authority, to prove that we ought to prefer Natural Right to theſe Subtilties, yet we may found this Truth on the Authority of the ſame Lawyer, who in another Queſtion, much of the ſame nature, has decided in favour of Natural Right. It was in the Caſe of another Subſtitution, made by a Grand-father to his Grand-ſon, in caſe he ſhould die before he attained to the Age of thirty years, in which caſe he ordered, that the Goods ſhould be reſtored to a Son of this Teſtator, Uncle to the Grand-child. The caſe happened, he died before the Age of thirty, but left Children. And from this circumſtance *Papinian* decided in favour of theſe Children, that the Subſtitution was annulled; for this reaſon, that it was equitable to conjecture, that the Teſtator had not ſufficiently explained his Intention, and that altho' he had made no mention of the Caſe of his Grand-ſon having any Children, yet he did not intend to deprive thoſe Children of their Father's Inheritance[d]. Such a Conjecture as this, in the firſt Caſe of the Pupillary Subſtitution, might have made it to be preſumed, that the Father did not foreſee that the Son might die before his Mother: And it was much eaſier for the Grand-father in the ſecond caſe, to foreſee that his Grand-ſon might, before he was thirty years old, have Children, than for the Father in the firſt caſe to foreſee, that the Grand-ſon might not ſurvive his Mother. So that it might have been preſumed, that his Intention was not to call the Subſtitutes to the Succeſſion, but in caſe the Mother ſhould not be living at the time of the Son's death.

XXV.

25. The danger of violating a Natural Law, under pretext of preferring it to an Arbitrary Law.

But if it is of importance not to deſtroy Natural Equity by Subtilties, and falſe Conſequences drawn from Arbitrary Laws, as appears by this Example, and as it would be eaſy to ſhew from others; it behoveth likewiſe to take heed, that under the pretext of preferring Natural Laws to Arbitrary Laws, we do not extend a Natural Law beyond the juſt Bounds which are ſet to it by an Arbitrary Law, which reconciles it with another Natural Law, and which gives to the one and to the other their juſt Effect each: And that we do not thus violate that other Natural Law, while we think of touching only the Arbitrary Law.

XXVI.

26. Example.

Thus, for Example, it is a Natural Law, that he who has been the Author of any Damage, ought to repair it. But if we ſhould extend this Law ſo far, as to oblige the Debtor who had not paid at the Term, to make good all the Damage which the Creditor may have ſuffered for want of his Payment; as if an Eſtate had been ſeized and ſold, or if his Houſe had fallen down, becauſe he had not that Money, which he would have laid out in repairing it; ſuch an Application of this Law, which is highly juſt, and altogether natural, in obliging one to repair the Damage which he has done, would be unjuſt, becauſe it would violate an Arbitrary Law which regulates all Damages, to which the Debtor may be made liable for default of Payment, to that Reparation of Damages which is called Intereſt, and which is fixed to a certain Portion of the Sum that is due, which at preſent is about the twentieth Part: And that by violating this Arbitrary Law, one would infringe two Natural Laws which are the Foundation of it. One, which does not allow that Men ſhould be made accountable for unforeſeen Events, which are rather Effects of the Divine Providence, and Accidents, than Conſequences that can reaſonably be imputed to them. And the other, which will have the infinite Variety of the different Damages which Creditors ſuffer for want of Payment of what is due to them, to be fixed to a certain and uniform Reparation of Damages, which may be common to all the Caſes which have the ſame common Cauſe of the default of Payment at the Term, without diſtinguiſhing the Events which cauſe different ſorts of Loſſes. For beſides that the difference of the Loſſes is an effect of the difference of the Accidents, which no body is obliged to anſwer for; the diverſity of the Reparations would be a Source of as many Law-ſuits, as there would be Creditors, who ſhould pretend to diſtinguiſh themſelves by the quality of the Loſs which had been occaſioned by the Default of Payment[e].

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[d] Cùm avus filium, ac nepotem ex altero filio, hæredes inſtituiſſet, à nepote petiit, ut, ſi intra annum trigeſimum moreretur, hæreditatem patruo ſuo reſtitueret. Nepos liberis relictis, intra ætatem ſupraſcriptam vitâ deceſſit. Fideicommiſſi conditionem, conjecturâ pietatis, reſpondi defeciſſe, quod minus ſcriptum, quum dictum fuerat, inveniretur. *l.* 102. *ff. de condit. & demonſtr.*

XXVII.

27. Diſcernment of the Spirit of the Laws, neceſſary for deciding Queſtions.

We ſee again in this Example, as we have already ſeen in the others which have been mentioned to ſhew the Neceſſity of Arbitrary Laws, that there are Difficulties which make it neceſſary to fix a General Regulation by an Arbitrary Law. But there is an infinite number of other ſorts of Difficulties which ariſe every day in the Application of the Laws to Differences between particular Perſons, where it is neither neceſſary, nor poſſible, to eſtabliſh preciſe Rules: And the Deciſions of theſe kind of Difficulties depend on thoſe who are to judge of them; which requires on one part an exact Judgment and Underſtanding; and on the other, a Knowledge of the Principles, and particular Rules, that they may be able to judge of the apparent Oppoſition between the Rules on which the contrary Opinions are founded, and thoſe which give riſe to the Difficulty; and to diſcern by the Spirit of theſe Rules, the Bounds and Extent that ought to be given to them, and the Conſequences which will follow from the reſtraining too much either the one or the other, or from extending it too far. It is by theſe, and the other Views of the Principles of the Interpretation of Laws, which have been already mentioned, and of thoſe which ſhall be explained in their proper places, that we are enabled to make a true and juſt Application of the Rules.

XXVIII.

28. The Neceſſity of ſtudying the Laws of Nature. The cauſes of this Neceſſity.

What is here remarked touching the Neceſſity of knowing all the particular Laws, reſpects chiefly the Laws of Nature. For altho' it may ſeem that Reaſon teaches us the Laws of Nature, and that it is much eaſier to underſtand them well, than the Arbitrary Laws which are naturally unknown; yet it is much more difficult, and alſo of greater importance, to know thoroughly the Laws of Nature, than to know the Arbitrary Laws: Becauſe whereas theſe are within a narrower compaſs, and require only a Memory to retain them; the Natural Laws, which regulate the Matters that are of moſt common uſe, and of greateſt importance, are in a much greater number; and they are properly the Object of the Underſtanding. So that there are two Cauſes which make it neceſſary to ſtudy theſe Natural Laws with exactneſs and application.

The firſt of theſe Cauſes is, that theſe Natural Rules being very numerous, their Variety and their Multitude is the reaſon why they do not preſent themſelves all to the View of every one: And Reaſon alone is not ſufficient to enable any one to find them out, and to apply them to all Occaſions, as will appear by the bare reading of all theſe Rules in the Detail of Matters.

The ſecond Cauſe of the Neceſſity of knowing exactly the Natural Laws, is that theſe Laws are the Foundations of the whole Science of Law: And it is always by Arguments drawn from the Natural Laws, that we examine and reſolve Queſtions of all kinds, whether they ariſe from the apparent Oppoſition of two Natural Laws, or from that of a Natural Law to an Arbitrary Law, or only from the Oppoſition between two Arbitrary Laws; for from thence ariſes an infinite number of all theſe ſorts. And it is eaſy to perceive, that as it is neceſſary, for deciding of Queſtions, to reaſon from the Nature and Spirit of the Rules, from their Uſe, their Bounds, their Extent, and from other the like Views; ſo we cannot found our Reaſonings, nor form our Deciſions, but upon the Natural Principles of Juſtice and Equity.

XXIX.

29. Two ſorts of Natural Rules: Examples both of one and the other ſort.

We muſt likewiſe obſerve concerning this Neceſſity of the Study of the Natural Laws, that they are of two ſorts. One is, of thoſe of which the Mind is convinced without any Reaſoning, by the Evidence of their Truth; ſuch as theſe Rules, That Covenants are in the place of Laws to thoſe who make them; That the Seller ought to warrant what he ſells; That the Depoſitary ought to reſtore the Thing depoſited. And the other is, of thoſe Rules which have not this Evidence, and of which the Certainty is not diſcovered except by ſome Reaſoning, which ſhews their Connection with the Principles on which they depend. We ſhall ſee by Examples this ſecond ſort of Rules, and the Neceſſity of Study for the knowing of them.

If a Man who has no Children makes a Donation of his Goods, and afterwards has Children; it is a Rule that the Donation doth not any longer ſubſiſt: And the Equity of this Rule is very evident:

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[e] *See in relation to all this, the eighteenth Article of the ſecond Section of the Contract of Sale; and the beginning of the Title of Intereſt, Coſts, and Damages.*

evident. For Nature deſtines to the Children the Goods of their Fathers[f]: And it was underſtood, that he who made the Gift when he had no Children, would not have given if he had had any, or been in hopes to have any: And this made a tacit condition in his Donation, that it ſhould not ſubſiſt but in caſe he had no Children. But if it ſo falls out, that the Children born after the Donation, die before the Donor has done any thing to revoke it; there ariſes a doubt, to know if the Donation is confirmed by this Death of the Children, or if it remains null. And it is not ſo clear that the Donation is null in this caſe, as it is clear that it is null when the Children live. For ſeeing the Donation was revoked only in favour of the Children, it may be doubted whether this Motive ceaſing when the Children are no longer in being, the Law, which annulled the Donation, ought to ceaſe alſo, and if the Donation ought not to reaſſume its force: Or whether, on the contrary, the Donation being once annulled by the Birth of the Children, is not ſo for ever; ſo that the ſaid Birth of the Children brings back the Goods into the Family, to remain therein, according to the Expreſſion of the Law of the *Romans* which hath eſtabliſhed the Rule of the Revocation of Donations by the Birth of Children. For it is ſaid in that Law, that the Goods return to the Donor, that he may remain Maſter of them, and diſpoſe of them at his pleaſure[g]. Which ſeems to decide tacitly that the Donation remains null: And this Rule is of the number of thoſe whoſe Evidence is not ſo clear.

We ſhall add only a ſecond Example, out of a thouſand which we meet with in the Body of the Laws. If two perſons who are at Law together, accommodate their Difference by a friendly Agreement, no body doubts of the neceſſity of executing the ſaid Agreement. And this is a Rule that is underſtood, without any reaſoning upon it. But if it happens that the Cauſe being ripe for Judgment, Sentence is given before the Parties have tranſacted, and that they afterwards do tranſact, knowing nothing of the Sentence; it does not appear ſo clear as in the firſt caſe, whether the Agreement annuls the Sentence, or the Sentence the Agreement. For the Rule in general is, that Tranſactions ought to be executed; but in the caſe of a Tranſaction about a Law-ſuit which was already ended by a Sentence, this Rule ceaſes; becauſe people tranſact only about Differences which are not decided; and no Man departs from his Right, except out of fear, and when there is danger of being unſucceſsful in the event. Thus in the caſe where the difference does not remain any longer undecided, and where there is no more uncertainty, nor danger, the Ignorance under which the Perſon lay, in whoſe favour Sentence was given, ought not to hinder the Effect which the Authority of a Judgment gives to Truth and to Juſtice. And thus it is that the Law doth determine it in the caſe of Sentences from which there lies no Appeal. And this Rule is likewiſe of the number of thoſe which in themſelves have not ſuch an Evidence as removes all manner of doubt[h].

Theſe two Examples ſhew plainly enough the difference between the Rules whoſe Equity appears at firſt view without any reaſoning, and thoſe of which the Equity is diſcovered only by ſome Reflections. But altho' it be true in theſe Examples, and in an infinite number of the like nature, that in the caſes where Natural Equity doth not form ſo evidently the Deciſion, it would ſeem as if one might take indifferently for the Rule either the one or the other of the contrary Opinions, and that therefore the Rule which is preferred ought not to be looked upon as a Natural Law, but only as an Arbitrary Law; yet it is moſt certain, that all the Rules of this kind, of which there is ſo great a number in the *Roman* Law, and which determine to one of the oppoſite Opinions by ſome Principle of Natural Equity, are conſidered not as Laws purely Arbitrary, but as Natural Laws, and ſuch in which the Reaſon of Equity hath prevailed, and formed the Deciſion. And thus we look upon all theſe Laws as written Reaſon, that is to ſay, that which Reaſon makes choice of among the oppoſite Sentiments. And we reckon only thoſe to be pure Arbitrary Laws, whoſe Diſpoſitions are ſuch, that it cannot be ſaid, that a Law different from them would be contrary to the Principles of Equity. Thus, for Example, it is altogether indifferent to

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[f] If Children, then Heirs. *Rom.* viii. 17. *Eſd.* i. 9, 12.

[g] *See the fourth Article of the third Section of Donations.*

[h] *See the ſeventh Article of the ſecond Section of Tranſactions.*

Natural Equity, whether for the Entry of new Vaſſals any thing be due to the Lord of the Fee under the Name of Relief, or any other Right of the like nature, or that there be nothing due to him beſides bare Homage: that the Fines for Alienations be due only in Sales, or that they be due for all ſorts of Acquiſitions: that there be a Dower ſettled by Cuſtom, without any Contract, or that there be none, unleſs it be agreed upon. And likewiſe theſe ſorts of things, and others of the like nature, are differently regulated in divers Countries, and it cannot be pretended in any one of them, that theſe Rules are Natural Laws: and they are received only upon the bare Authority of Uſage, and as Laws purely Arbitrary. But the Rules which are drawn from the Deciſions collected in the Body of the *Roman* Laws, ſuch as thoſe which we have juſt now taken notice of, have the Character of Natural Laws, by reaſon of the Principles of Natural Equity from whence they are deduced.

XXX.

30. Natural Laws which ſeem ſometimes as if they were aboliſhed.

It is likewiſe neceſſary to be obſerved in relation to the Diſtinction between Natural Laws, and Poſitive, or Arbitrary Laws, that there are ſome Rules of the Natural Law which ſeem to be ſometimes aboliſhed by contrary Laws, as if they were only Arbitrary Laws. Thus, the Law which calls to the Succeſſion of a Father the Daughters in conjunction with the Sons, is a Law entirely Natural, and yet it was not obſerved in the Law which God himſelf gave to the *Jews*; for by it Daughters did not ſucceed to their Fathers, when there were Males. And it was a Queſtion worthy of being decided by God himſelf, whether Daughters who had no Brothers might ſucceed to the Eſtate of their Fathers. And God commanded, that in this caſe they ſhould ſucceed[1].

But altho' it would ſeem by this Law which thus excluded Daughters, that it may be ſaid, either that the Law of Nature does not require that Daughters ſhould ſucceed, or that the Law of Nature may be aboliſhed; it is nevertheleſs true, that it always has been, and always will be a Natural Law, that Daughters, who are of the number of Children, ſhould ſucceed to their Fathers: and likewiſe always true, that the Natural Law cannot be aboliſhed. But another Principle of Natural Equity did exclude the Daughters from ſucceeding with their Brothers, and that without any Injuſtice to the Daughters. For in lieu of the Right of Succeſſion, the Law gave them a Portion for marrying them[1], and this Condition of the Daughters had nothing in it but what was juſt, and even natural, becauſe that with their Portion they were able to match with a Family in which they might find the Advantages which they left to their Brothers. And in the Kingdom of *France* there are ſome Cuſtoms, where the Daughters who are married by their Fathers, even without a Marriage Portion, are deprived of all manner of Right to Succeſſion, altho' they do not renounce it, unleſs the Right of Succeſſion be expreſly reſerved to them; becauſe the Fathers having ſettled their Daughters in other Families by Marriage, this Eſtabliſhment is to them inſtead of all Patrimony, and of all Share in the Succeſſions. Thus, the Laws which exclude the Daughters when there are Sons, do not derogate from the Natural Law, which calls the Daughters to Succeſſions; becauſe they give them in lieu of the Right of Succeſſion, another Advantage which is equivalent to it.

XXXI.

31. Different Effects of ſome Natural Laws.

We muſt in the laſt place, make this Remark on the Subject of the Laws of Nature, that there are ſome of them, which, altho' they be owned for ſuch in all Governments, have not however, every where the ſame Extent, and the ſame Uſe. Thus there is no Government, wherein it is not owned to be agreeable to the Law of Nature, that Brothers, and other Collateral Relations, ſhould ſucceed to thoſe who leave behind them neither Deſcendants, nor Aſcendants: but this Right is very differently conſidered in divers Places. For in the Provinces of the Kingdom of *France* which are governed by their own Cuſtoms, the Right of the Heirs of Blood is ſo much conſidered as a Natural Law, that the ſaid Cuſtoms do not own any other Heirs, and they appropriate to them a part of the Eſtate, greater in ſome places, and leſſer in others, but which in all theſe Cuſtoms is called the Inheritance which cannot be taken from them; ſo that only the Remainder of the Eſtate, which is over and above the Portion reſerved to them by Cuſtom, can be diſpoſed of to their prejudice. But in the other Provinces, which have for their Cuſtom the Written Law, that is, the *Roman* Law, every one has power to deprive his Collateral Relations, and even his Brothers, of all his Goods, and to give them to Strangers. So that the Law of Nature, which calls the Heirs of Blood to Succeſſions, loſeth its uſe in theſe Provinces, when they are excluded by a Teſtament, and hath its effect only in the Succeſſions of Perſons who die Inteſtate.

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[1] *Numb.* xxvii.

[1] *Exod.* xxi. 9. xxii. 17.

It appears by the Extent which theſe Cuſtoms give to the Natural Law, which calls the Collateral Relations to Inheritances, and by the Bounds which are ſet to it by the Written Law, that they have not in all Places the ſame Idea of the Natural Law which calls Collarals to Succeſſions; whereas People have every where the ſame Idea almoſt of all the other Rules of the Law of Nature, and attribute to them the ſame Effect. As for Inſtance, all Governments receive alike the Natural Rules of Equity, which oblige the Heirs to acquit the Burdens of the Succeſſion, and Contracters to perform their Covenants, and others of the like nature.

This difference between the uniform Uſe in all Places of almoſt all the Natural Rules of Equity, and the divers ways of extending or limiting that Natural Rule which calls Collaterals to Succeſſions, proceeds from this, That there is no Rule which leads to any thing contrary to thoſe ſorts of Rules which are obſerved alike in all Places; whereas there is a Rule which leads to the reſtraining of that which calls the Collaterals to Succeſſions. For the Laws permit People to make Diſpoſitions of their Goods by a Teſtament; and the uſe of this Liberty doth neceſſarily diminiſh the Right of the Heirs of Blood. And ſince Nature doth not fix this Liberty to a certain Point, the Written Law hath extended it to the Power of diſpoſing of all one's Goods, to the prejudice of his Collateral Relations: And the Cuſtoms have reſtrained it to a certain Portion of the Goods; altho' the ſame Cuſtoms allow the depriving of the Collateral Relations of all Share in the Inheritance, by Deeds of Gift executed in the Life-time of the Donor: becauſe there is this difference between Donations executed in the Life-time of the Donor, and Diſpoſitions made in view of Death, that in theſe the Heir is only diveſted of the Goods diſpoſed of, and not the Teſtator; whereas in the former, the Donor ſtrips himſelf of what he gives away.

XXXII.

32. *Laws Divine and Human, Natural and Poſitive.*

To finiſh this Diſtinction of Immutable Laws, and of Arbitrary or Mutable Laws, it remains only to be obſerved, That this Diſtinction includes that of Divine and Humane Laws, and likewiſe that of Natural and Poſitive Laws; or rather, that theſe three Diſtinctions make but one, for there are no Natural and Immutable Laws but what come from God: and the Human Laws are Poſitive and Arbitrary Laws, becauſe Men may enact them, change them, and aboliſh them.

XXXIII.

33. *Remark on the words* Divine Laws.

Some may perhaps think, that the Divine Laws are not all of them Immutable: ſeeing God himſelf hath aboliſhed many of thoſe which he gave to the *Jews*, becauſe they were not agreeable to the State of the new Law. But it is ſtill true, that thoſe very Laws were Immutable by Man, and that the Divine Laws which regulate our preſent State, are no more ſuſceptible of any Change. Concerning which it is to be remarked, that the Dignity of this name of Divine Laws is reſerved to thoſe which concern the Duties of Religion, ſuch as the two Fundamental Laws, the Decalogue, and all the Precepts contained in the Holy Scriptures about Faith and Manners: And as to the Detail of the Immutable Rules of Equity, which relate to Matters of Contracts, Teſtaments, Preſcriptions, and other Matters treated of in the Civil Laws; altho' theſe Rules derive their Juſtice from the Divine Law, which is the Fountain of them, yet they have only the Name of Natural Laws, or of the Law of Nature; becauſe God has engraven them on our Nature, and hath made them ſo inſeparable from Reaſon, that it alone is ſufficient for underſtanding them, and that even thoſe perſons who are ignorant of the firſt Precepts, and of the Spirit of the Divine Law, know theſe Natural Rules, and make Laws of them to themſelves.

XXXIV.

34. *Diſtinction of Laws of Religion, and of Laws of Policy.*

After this firſt Diſtinction of Laws Immutable, and of Arbitrary Laws, we muſt obſerve a ſecond, which comprehends likewiſe all the Laws under two other Ideas: one of the Laws of Religion, and the other of the Laws of Civil Policy: And theſe are two Diſtinctions which muſt not be confounded;

as if all the Laws of Religion were Immutable, and all the Laws of Policy were only Arbitrary Laws. For there is in Religion many Arbitrary Laws, and in Policy many Laws that are Immutable. Thus, there are in Religion Laws which regulate certain Ceremonies relating to the External Part of Divine Worſhip, or ſome Points of Church-Diſcipline, which are Arbitrary Laws, enacted by the Authority of the Spiritual Powers: And there are in Policy Immutable Laws, ſuch as thoſe which enjoin Obedience to the Supreme Powers; thoſe which command to give to every one his due, and to do hurt to no Man; thoſe which command Honeſty, Sincerity, Fidelity, and which condemn Deceit and Cheating: and an infinite number of particular Rules, which depend on the firſt Fundamental Laws. So that it is common both to Religion, and to Policy, to have both the Uſe of Immutable Laws, and that of Arbitrary Laws; and we muſt therefore diſtinguiſh by other Views the Laws of Religion, and thoſe of Policy.

The Laws of Religion are thoſe which regulate the Conduct of Man by the Spirit of the two firſt Laws, and by the inward diſpoſitions which incline him to all his Duties both towards God, and towards himſelf, and towards others, either in private Affairs, or in what concerns the Publick Order. And this takes in all the Rules of Faith and Manners, and alſo all thoſe relating to the External Part of Divine Worſhip, and to Church-Diſcipline.

The Laws of Policy are thoſe which regulate the External Order of Society among all Men, whether they know, or are ignorant of Religion: whether they obſerve the Laws thereof, or have them in contempt.

XXXV.

35. *Religion and Policy have Laws in common, and each of them hath its proper Laws. Examples of theſe three ſorts.*

We may be able to judge by theſe firſt Remarks about Laws of Religion, and Laws of Policy, that they have Rules which are common to them both, and that both the one and the other have ſome Rules that are peculiar to each of them.

Thus the Laws which command Obedience to the Natural Power of Parents, and to the Authority of the Spiritual and Temporal Powers, according to the Extent of their Miniſtry: thoſe which enjoin Sincerity and Fidelity in Commerce: thoſe which forbid Murder, Theft, Uſury, Fraud, and other Laws of the like nature, are Laws of Religion, becauſe they are eſſential to the two primary Laws; and they are alſo Laws of Policy, becauſe they are eſſential to the Order of Society; ſo that they are common both to Religion and to Policy. But the Laws which concern Faith, and the inward diſpoſition of the Mind, and thoſe which regulate the Ceremonies of Divine Worſhip, and the Diſcipline of the Church, are Laws peculiar to Religion: And the Laws which regulate the Formalities of Teſtaments, the Time of Preſcriptions, the Value of the Publick Money, and others of the like nature, are Laws proper to Policy.

XXXVI.

36. *The Laws common to Religion and Policy, have their different Ends in the one and in the other.*

But it is to be remarked in relation to the Laws which are common to Religion, and to Policy, that they have in every one of theſe States a different Uſe from what they have in the other. For in Religion theſe Laws oblige to an upright Intention in the Heart, which may not only fulfil the Letter of the Law outwardly, but which may obſerve the Spirit and Deſign of it inwardly: and in Policy, one ſatisfies the Laws by obſerving them outwardly, and attempting nothing againſt their Prohibitions. So that although Religion and Policy have their common Principle in the Divine Appointment, and their common End of regulating and governing Men; yet they are diſtinguiſh'd by the means which they uſe for accompliſhing their End, in that Religion regulates the Inward Diſpoſition of the Mind, and the Manners of Men, in order to move them to their Duties; and Policy exerciſeth its Miniſtry only over the External Actions of Men, without medling with the Internal Diſpoſition of the Mind.

XXXVII.

37. *Difference between the Arbitrary Laws of Religion, and the Arbitrary Laws of Human Policy.*

We muſt alſo obſerve this difference between the Arbitrary Laws of Religion, and the Arbitrary Laws of Civil Policy, that theſe are commonly called Humane Laws, becauſe they are Laws which Men have eſtabliſhed, and becauſe it is Human Reaſon that is the Principle of them. But although the Arbitrary Laws of Religion be alſo eſtabliſhed by Men, yet they are not called Human Laws, but Canons and Eccleſiaſtical Conſtitutions, or Laws of the Church, becauſe they are grounded on the direction of the Holy Spirit which governs the Church.

It is not neceſſary to enlarge farther here on this diſtinction of the Laws of Religion, and of the Laws of Civil Policy.

licy. It remains only that we conſider the General Order of the Laws of Temporal Policy, that we may ſee what Rank the Civil Laws have therein.

XXXVIII.

38. Laws of Temporal Policy. The Laws of Temporal Policy are of many ſorts, according to the different parts of the Order of Society, of which they are the Rules.

XXXIX.

39. The Law of Nations. Seeing all Mankind makes one Univerſal Society, which is divided into divers Nations which have their ſeparate Governments, and ſeeing Nations have with one another different Intercourſes and Communications; it was neceſſary that there ſhould be Laws to regulate the Order of theſe Communications, both for the Princes among themſelves, and for their Subjects; which takes in the Uſe of Embaſſies, Negotiations, Treaties of Peace, and all the ways in which Princes and their Subjects carry on their Intercourſes, and keep up their Engagements with their Neighbours. And even in Wars, there are Laws which regulate the manner of declaring War, which moderate Acts of Hoſtility, which maintain the Uſe of Mediations, of Truces, of Suſpenſions of Arms, of Capitulations, of the Safety of Hoſtages, and other the like matters.

All theſe things could not be regulated but by ſome Laws: and ſeeing Nations have no Authority to impoſe Laws one upon another; there are two ſorts of Laws, which ſerve as Rules to them. One is of the Natural Laws of Humanity, Hoſpitality, Fidelity, and all thoſe which depend on theſe firſt Laws, and which regulate the manner of Behaviour which the People of different Nations are to uſe towards one another in Times of Peace, and of War. And the other is that of the Regulations which Nations agree on by Treaties, or by Uſages which they eſtabliſh, and which they mutually obſerve. And the Infractions of theſe Natural Laws, of theſe Treaties, and of theſe Uſages, are reſtrained by open Wars, by Repriſals, and by other Ways ſuited to the Ruptures, and to the Attempts.

Theſe are the Laws that are common between Nations, which may be called, and to which we commonly give the name of the Law of Nations; although this Word is taken in another ſenſe in the *Roman* Law, where they comprehend under the Law of Nations alſo Contracts, ſuch as Sales, Letting to Hire, Partnerſhip, a Depoſit, and others; and that for this reaſon, becauſe they are in uſe in all Nations[m].

The Univerſal Policy of Society which regulates the Ties and Engagements between Nations by the Law of Nations, regulates every Nation by two ſorts of Laws.

XL.

40. The Publick Law. The firſt is, of thoſe Laws which relate to the Publick Order of the Government, ſuch as the Laws which are called State-Laws, which regulate the manner in which Sovereign Princes are called to the Government, whether it be by Succeſſion, or Election: thoſe which regulate the Diſtinctions, and the Functions of the Publick Offices for the Adminiſtration of Juſtice, for the Government of the Army, for the Management of the Publick Revenue, and of thoſe Offices which are called Municipal Offices: thoſe which concern the Rights of the Prince, his Demeſnes, his Revenues: the Government of Cities, and all the other Publick Regulations.

XLI.

41. Private Law, or that which regulates the Affairs between private Perſons. The ſecond is, of thoſe Laws which concern the private Property of Perſons, and to which we give the name of Private Law: It comprehends the Laws which regulate between private Perſons Covenants, Contracts of all kinds, Guardianſhips, Preſcriptions, Mortgages, Succeſſions, Teſtaments, and other matters of the like nature.

XLII.

42. The Civil Law. It is to theſe Laws which regulate Matters between private Perſons, and the Differences which may ariſe from them, that moſt people appropriate the Name of the Civil Law. But this Idea would take in alſo under the Name of the Civil Law many Matters belonging to the Publick Law, to the Law of Nations, and even to the Canon Law; ſince it often happens that there ariſes Differences and Diſputes between private Perſons in Matters of the Publick Law; as, for Example, in the Execution of Offices, in the Levying of the Publick Taxes, and in other the like Matters: and that ſuch Diſputes between private Perſons happen alſo in Matters belonging to the Law of Nations, by the Conſequences of Wars,

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[m] *L. 5. ff. de Juſt. & jur. §. 2. in fine inſt. de jur. nat. gent. & civ.*

Repriſals, Treaties of Peace: and even in Eccleſiaſtical Matters, as touching Church Benefices, and others. And in fine, the Diſtribution of Juſtice to private Perſons, implies the Uſe of many Laws, which are general Regulations of the Publick Order, ſuch as thoſe which eſtabliſh Puniſhments for Crimes, thoſe which regulate the Order of Judicial Proceedings, the Duties of Judges, and their different Juriſdictions. So that it is a difficult matter to frame a juſt Idea, which may diſtinguiſh nicely and preciſely the Civil Laws from the Publick Law, and the other kinds of Laws.

XLIII.

43. *Divers ways of conceiving the Laws which compoſe the Civil Law.*

It is this Mixture of all theſe ſeveral ſorts of Laws which diverſifies the ways of diſtinguiſhing them: and which renders it difficult to reconcile the ſenſe which is given in the *Roman* Law to theſe Words *Civil Law*, with the meaning which we aſcribe to them: as it is alſo difficult to reconcile the Ideas which we commonly have of the Law of Nature, and of the Law of Nations, with thoſe Ideas which the diſtinctions in the *Roman* Law give us of them.

XLIV.

44 *Diviſion of Laws in the* Roman *Law.*

The *Roman* Law diſtinguiſhed Laws into the Publick Law, which concerned the State of the Republick; and Private Law, which related to the Rights of private Perſons[n]: This Private Law they divided into three parts; the firſt was of the Law of Nature, the ſecond of the Law of Nations, and the third of the Civil Law[o]. The Law of Nature they reduced to that which is common to Men and to Beaſts[p]. They extended the Law of Nations to all the Laws that are common to all People, and under it they comprehended the Contracts which are in uſe in all Nations[q]: and they reſtrained the Civil Law to the Laws which are peculiar to one People[r], which muſt exclude from the Civil Law, Contracts, and the other Matters which are common to all People, and which were comprized in the Law of Nations.

XXV.

45. *Divers ways of dividing the Laws under divers Views.*

It appears that this Diſtinction, in the manner it is explained in the *Roman* Law, ſeems different from our Uſage, which does not place in the number of the Laws to which we give the name of the Law of Nations, thoſe which regulate the Matters of Covenants; and which does not reſtrain the Law of Nature to that Idea which is given of it in the *Roman* Law. But ſince there is nothing more arbitrary than the ways of dividing, and diſtinguiſhing Things, which may be conſidered under divers Views, and ſince the different Diſtinctions may have their ſeveral Uſes, provided we do not conceive falſe Ideas of that which is eſſential to the Nature of the Things; it is of no great moment to take up time in making the Reflections which might be made on theſe different Ways of diſtinguiſhing the Laws; and it ſufficeth to have made the Remarks which are moſt material on their Nature, and their Characters, and to have given theſe general Ideas of them: by which every one may be able to form unto himſelf the Diſtinctions which ſhall appear to him to be moſt juſt, and moſt natural. And as to the Idea which we ought to form of the Civil Law, it ſufficeth to obſerve, that we never reſtrain the meaning of this word to the Laws peculiar to one City, or to one People; neither do we extend it to all the Laws which regulate the Matters from which there may ariſe differences between private Perſons. As for inſtance, we diſtinguiſh the Civil Law from the Canon Law, and even from the Cuſtoms and Ordinances: and the ſignification of this word ſeems to be fixed to the Laws which are collected in the Body of the *Roman* Law, to diſtinguiſh them from our other Laws. And we likewiſe give ſimply the name of Civil Law to the Books of the *Roman* Law: and it is by this name that they are entitled, altho' this Word is reſtrained in the ſame Books to another ſenſe, as has been juſt now remarked. Thus, the Civil Law in this ſenſe will comprehend many Matters of the Publick Law, and even Matters Eccleſiaſtical, which are collected in the Books of the *Roman* Law: and it will likewiſe include every thing contained in thoſe Books which is not in uſe with us, and which nevertheleſs is a Subject proper to be ſtudied by thoſe who apply themſelves to the Study of the *Roman* Law, becauſe of the Application that may be made of ſuch Matters to thoſe which are in uſe with us.

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[n] *L.* 1. §. 2. *ff. de juſt. & jur.* §. 4. *inſt. eod.*

[o] *L.* 1. §. 2. *in fin. ff. de juſt. & jur.* §. *ult. inſt. eod.*

[p] *L.* 1. §. 3. *ff. de juſt. & jur. inſt. de jure nat. gent. & civ.*

[q] *L.* 5. *ff. de juſt. & jure.* §. 2. *inſt. de jure nat. gent. & civ.*

[r] §. 1 & 2. *inſt. de jure nat. gent. & civ. l.* 9. *ff. de juſt. & jure.*

XLVI.

46. *Written Law, Cuſtoms.* It remains only that we take notice of one more Diſtinction of Laws, which is that which is commonly made into Written Laws, and Cuſtoms. By the Written Law is meant the Laws that are ſet down in Writing; and in *France* they give this Name particularly to the Laws that are written in the Body of the *Roman* Law. Cuſtoms are the Laws which were not originally written, but which have been eſtabliſhed, either by the Conſent of a People, and by a ſort of Agreement to obſerve them, or by an inſenſible Uſage which has given them the Authority of Laws.

We ſhall ſee in the thirteenth Capter what are the Subject Matters of all the Kinds of Laws, in what manner ſoever they are diſtinguiſhed, and what are the Matters which we have choſen out from among them to explain in this Book: and we ſhall lay down a Plan of them in the fourteenth Chapter.

XLVII.

47. *Two ſorts of Principles: One, of thoſe which may be reduced into Rules; and the other, of thoſe which cannot be fixed into Rules.* Before we make an end of this Subject of the Nature and Spirit of Laws, we muſt obſerve one Difference which diſtinguiſhes the uſe of ſome of the Principles that have been explained, from that of others, and which conſiſts in this, that there are many of theſe Principles which are of ſuch a nature, that it is eaſy and neceſſary to reduce them into fixed Rules, which may be eaſily applied; whereas the others cannot be reduced into ſuch Rules.

Theſe Principles, for inſtance, That Arbitrary Laws are as Facts which people are naturally ignorant of, and that it is not permitted to any one to be ignorant of the Natural Laws, are two Truths which may be reduced into two fixed Rules, which may be eaſily applied. One, that Arbitrary Laws are not binding, and have not their effect, till after they have been promulged: and the other, that Natural Laws have their effect without any promulgation.

But there are other Principles, which cannot be reduced in the ſame manner into fixed Rules, that may be eaſy of application. Thus, for Example, theſe Principles, That we muſt obſerve in Queſtions, what are the Cauſes from whence the Difficulties ariſe; That we ought to diſcern the Rules by which the Deciſions are to be formed, to weigh and conſider in every one of them its Uſe, and the Bounds or Extent which it ought to have, cannot be reduced into certain Rules, which may fix and determine the Deciſions that are to be given. And there are many other Principles of ſeveral ſorts, which it is not eaſy to reduce into Rules, and to fix the Uſe of them, as it will be eaſy to perceive by the bare reading of theſe Principles in the places where they have been mentioned. But they have nevertheleſs their Uſe, by the different Views which they may give in the particular Application of all the Rules.

XLVIII.

48. *Remark on theſe two ſorts of Principles. Tranſition to the following Chapter.* This difference between the Principles from whence we may gather certain Rules, and thoſe which cannot be fixed in the ſame manner, hath made it neceſſary to add here ſome Reflections on a part of the Principles which have been eſtabliſhed, in order to diſcover in them Truths, from which may be formed many Rules neceſſary for the right underſtanding of the *Roman* Laws, and for making a juſt Application of them. And becauſe theſe Rules are an important part of the Civil Law, and are placed in the firſt Title of the Preliminary Book, where they ought to be free from theſe Reflections which ſhew their Connection with the Principles on which they depend, theſe Reflections ſhall be made the Subject of the following Chapter.

And as to what concerns that other kind of Principles, which cannot be reduced into Rules, it ſufficeth to remark in general, that the right uſe of theſe ſorts of Truths ought to depend on good Senſe and Underſtanding, and on the ſeveral Views which may be had from Study, from Experience, and from the different Reflections on the Facts and Circumſtances from whence the Difficulties that are to be regulated do ariſe. And it is in this uſe of the Judgment, and in the clearneſs of the Underſtanding, enlightened by all theſe Views, that the moſt eſſential Part of the Science of Law doth conſiſt; which Science is nothing elſe but the Art of diſcerning Juſtice and Equity[f].

[f] Jus ars boni & æqui. *l.* 1. *ff. de juſt. & jure.*

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CHAP.

CHAP. XII.

Reflections on ſome Remarks in the preceding Chapter, which are a Foundation of ſeveral Rules touching the Uſe and Interpretation of Laws.

The CONTENTS.

1. *Natural Laws regulate both the time paſt, and the time to come, although never promulged; and the Arbitrary Laws regulate only the time to come, after publication.*
2. *When new Laws have a relation to old ones, they are to be interpreted one by another.*
3. *Preſumption for the uſefulneſs of a Law, notwithſtanding the inconveniences of it.*
4. *Cuſtoms and Uſages are the interpreters of Laws.*
5. *Diſuſe aboliſhes Laws and Cuſtoms.*
6. *The Laws and Cuſtoms of the Neighbouring Places, ſerve as Examples and Rules.*
7. *We muſt judge of the meaning and intent of a Law by its whole Tenor.*
8. *We muſt adhere rather to the ſenſe of the Law, than to what the terms of it may ſeem to carry contrary to it.*
9. *To ſupply the defect of Expreſſion, by the Intendment of the Law.*
10. *Laws which are interpreted favourably.*
11. *Laws which are ſtrictly interpreted.*
12. *Equity, Rigour of the Law.*
13. *Interpretation of the Benefits of Princes.*
14. *Divers Effects, or Uſes, of Laws; to ordain, to prohibit, to permit, to puniſh.*
15. *Laws reſtrain not only what is directly contrary to their Diſpoſitions, but alſo what is indirectly againſt their Intention.*
16. *Laws are made for what happens commonly, and not for one ſingle Caſe.*
17. *Extent of the Laws according to their Deſign.*
18. *There are Rules which are general and common to all Matters, others common to ſeveral Matters, and others peculiar to one.*
19. *The importance of diſtinguiſhing theſe three ſorts of Laws.*
20. *Diſcernment of the Exceptions.*
21. *Two ſorts of Exceptions, Natural and Arbitrary. Examples.*
22. *Advice concerning the Uſe of the Rules.*

I.

1. Natural Laws regulate both the time paſt, and the time to come, altho' never promulged; and the Arbitrary Laws regulate only the time to come, after Publication.

WE have ſeen that the Natural Laws are Truths which Nature and Reaſon teach Men, that they have of themſelves the Juſtice and Authority which oblige People to obey them, and that no body can pretend Ignorance of them: That on the contrary, the Arbitrary Laws are as Facts naturally unknown to Men, and which are not binding till after they have been promulged. From whence it follows, that Natural Laws regulate both the time to come, and the time paſt[a]. But Arbitrary Laws do not meddle with the time paſt, which is regulated by the preceding Laws, and have their Effect only for the time to come[b]: and it is to give them this Effect that they are put down in Writing, that they are promulged, that they are recorded, to the end that no body may pretend Ignorance of them[c]. And becauſe it is not poſſible to make them known to every one in particular, it ſufficeth to give them the force of Laws, that they be made known to the Publick. For then they become Publick Rules, which every body is bound to obſerve. And the inconveniences which may happen to ſome particular Perſons by reaſon of their not knowing them, do not balance their Uſefulneſs.

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[a] *See the twelfth Article of* §. 1. *of the Rules of Law.*

[b] *See the thirteenth and fourteenth Articles of the ſame Section.*

[c] *See the ninth Article of the ſame Section.*

II.

2. When new Laws have a relation to old ones, they are to be interpreted one by another.

But although Arbitrary Laws have not their Effect except for the time to come, yet if what they command appears to be conformable to the Law of Nature, or to ſome Arbitrary Law, that is in force, they have, with reſpect to the time paſt, the effect which their conformity and agreement with the Law of Nature, and the antient Arbitrary Laws, can give them[d]. And they ſerve likewiſe to interpret them, in the ſame manner as antient Rules are uſeful in the Interpretation of ſuch as are newly eſtabliſhed. And it is after this manner that the Laws mutually ſupport and explain one another[e].

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[d] *See the fourteenth Article of the ſame Section.*

[e] *See the ninth and eighteenth Articles of the ſecond Section of the ſame Title.*

III. We

III.

3. Preſumption for the uſefulneſs of a Law, notwithſtanding the inconveniences of it.

We have ſeen that Arbitrary Laws, whether they be eſtabliſhed by thoſe who have the Right to make Laws, or by ſome Uſage, and Cuſtom, are always founded upon ſome Uſefulneſs, either to prevent, or put a ſtop to Inconveniences, or upon ſome other View of the Publick Good: From whence it follows, that altho' the ſaid Laws may cauſe other Inconveniences, in the place of thoſe which they have removed, and that ſometimes we are ignorant what were the Motives of enacting theſe ſorts of Laws, and wherein their Uſefulneſs conſiſts, yet we ought ſtill to preſume that the Law which is in force is uſeful and juſt[f], until it be repealed by another Law; or aboliſhed by Diſuſe.

[f] *See the thirteenth Article of the ſame Section.*

IV.

4. Cuſtoms and Uſages are the Interpreters of Laws.

We have ſeen that Cuſtoms and Uſages ſerve as Laws[g]: From whence it follows, that if Cuſtoms and Uſages have the force of Laws, with much more reaſon are they to be uſed as Rules in the Interpretation of other Laws. And there is no better Rule for explaining obſcure and ambiguous Laws, than the manner in which they have been interpreted by Cuſtom and Uſage[h].

[g] *See the tenth and eleventh Articles of the firſt Section.*

[h] *See the eighteenth Article of the ſecond Section.*

V.

5. Diſuſe aboliſhes Laws and Cuſtoms.

We have ſhewn that the Authority of Cuſtoms and Uſages is founded on this reaſon, that it ought to be preſumed, that what has been obſerved for a long time, is uſeful and juſt[i]; from whence it follows, that if any Law, or Cuſtom, hath been a long time in diſuſe, it is aboliſhed[l]. And as its Authority was founded upon the long Uſage, ſo the ſame cauſe can take it away. For it ſhews that what has ceaſed to be obſerved, is no longer uſeful.

[i] *See the tenth Article of the firſt Section.*

[l] *See the ſeventeenth Article of the firſt Section.*

VI.

6. The Laws and Cuſtoms of the neighbouring Places, ſerve as Examples and Rules.

It follows alſo from the ſame Preſumption, which makes us judge that what has been long obſerved is uſeful and juſt, that if in ſome Provinces, or other Places, they want Rules for certain Difficulties in Matters which are there in uſe, but which are not ſo minutely regulated there as to determine theſe ſorts of Difficulties, and it appear that the ſaid Difficulties are regulated in other Places, where the ſame Matters are likewiſe in uſe; it is natural to follow the Example of thoſe Places, and eſpecially that of the chief Towns. Thus, we ſee in the *Roman* Law, that the Provinces conformed themſelves to the Uſage of *Rome*[m].

[m] *See the twentieth Article of the ſecond Section.*

VII.

7. We muſt judge of the meaning and intent of a Law, by its whole tenor.

We have ſeen that it is by the Spirit and Intendment of the Laws that we are to underſtand, and apply them: that in order to judge aright of the meaning of a Law, we ought to conſider what its Motive is, what are the Inconveniences againſt which it provides, and what is the Uſefulneſs which may redound from it; the Relation it hath to ancient Laws, the Changes it makes in them, and to make the other Reflections, whereby we may be able to apprehend rightly its meaning: from whence it follows in the firſt place, that in order to find out by all theſe Views the Intention and Spirit of the Laws, we muſt examine in them what it is they ſet forth, and what it is they decree, and always judge of the ſenſe and meaning of the Law, by the whole Series and Tenor of all its parts, without curtailing any thing in it[n].

[n] *See the tenth Article of the ſame ſecond Section.*

VIII.

8. We muſt adhere rather to the ſenſe of the Law, than to what the terms of it may ſeem to carry contrary to it.

It follows alſo from this Remark on the Deſign and Motive of the Law, that if it happens that ſome Terms, or ſome Expreſſions of a Law, appear to have a different ſenſe from what is otherwiſe evidently marked by the tenor of the whole Law; we muſt adhere to this true ſenſe, and reject the other, which appears from the terms, and which is found to be contrary to the intent of the Law[o].

[o] *See the third and twelfth Articles of the ſecond Section. See in that twelfth Article the Caſes where it is neceſſary to have recourſe to the Prince for the Interpretation of the Law.*

IX.

9. To ſupply the defect of Expreſſion, by the Intendment of the Law.

It follows likewiſe from the ſame Remark, that when the Expreſſions of Laws are defective, we muſt ſupply them, ſo as to make up the Senſe of the Law according to its Spirit and Intendment[p].

[p] *See the eleventh Article of the ſecond Section.*

X.

10. *Laws which are interpreted favourably.*

This is likewiſe another conſequence of the ſame Remark on the Spirit of Laws, that ſome of them are to be interpreted in ſuch a manner, as to give them the whole extent they are capable of, without violating Juſtice and Equity: and others, on the contrary, are to be reſtrained to a more limited Senſe. Thus, the Laws which relate in general to what is of Natural Liberty, thoſe which permit all ſorts of Covenants, and all thoſe which favour Equity, are to be interpreted with all the Extent that can be given them, without encroaching upon other Laws, and Good Manners [q]. For which reaſon, the Cauſes which the Laws favour in this manner, are called Favourable Cauſes.

XI.

11. *Laws which are ſtrictly interpreted.*

But the Laws which derogate from this Liberty, thoſe which prohibit what of it ſelf is not unlawful, thoſe which derogate from common Right, thoſe which make Exceptions, which grant Diſpenſations, and others of the like nature, ought to be reſtrained to the particular Caſes which they regulate, and to what is expreſly included in their Diſpoſitions [r].

XII.

12. *Equity, Rigour of the Law.*

We may place among theſe different Interpretations, which give ſome extent to Laws, or which reſtrain them, the Rules which concern the Temperaments of Equity, which may be uſed on ſome Occaſions, and the Rigour of the Law which muſt be followed on others.

But we ſhall not ſtop here to give Examples of theſe ſeveral Interpretations, nor to explain the difference between Equity and the Rigour of the Law, and that which concerns the Uſe of the one and the other. This Detail ſhall be explained in its proper place [ſ]. We ſhall only obſerve touching theſe ſorts of Cauſes which are commonly called Favourable Cauſes, ſuch as thoſe of Widows, Orphans, Churches, Marriage Portions, Teſtaments, and others of the like nature; that this Favour ought always ſo to be underſtood, as not in the leaſt to prejudice the Intereſt of Third Perſons, and that the Favour of theſe ſorts of Cauſes is not to be extended beyond the Bounds of Juſtice and Equity.

XIII.

13. *Interpretation of the Benefits of Princes.*

Upon the ſame Principle of the favourable Interpretation of ſome Laws, and the ſtrict Interpretation of others, doth depend the Rule of two different Interpretations of the Will of Princes, in the Gifts and Privileges which they grant to ſome Perſons. For when the ſaid Gifts are ſuch, as that we may give to them a full and intire Extent, without any Prejudice to other Perſons; they are always interpreted in favour of the Perſon whom the Prince had a mind to honour with this Benefit, and an Extent is given to it ſuitable to what the Liberality that is natural to Princes does demand. But if it be ſuch a Gift and Privilege as cannot be interpreted in this manner, without prejudice to other perſons, it muſt be reſtrained to what may be granted them without prejudice to others [t].

XIV.

14. *Divers Effects, or Uſes, of Laws, to ordain, to prohibit, to permit, to puniſh.*

We have ſeen what are the Foundations of the Juſtice and Authority of Laws, and that ſeeing they are the Rules of the Order of Society, they ought to diverſify the Effects of that Authority, according to the ſeveral Uſes that are neceſſary for forming that Order, and for maintaining it. This is the reaſon why many Laws ordain, ſome prohibit: why others permit, and why all puniſh and reſtrain thoſe who tranſgreſs their different Diſpoſitions; whether it be that they do not accompliſh what the Laws preſcribe; or that they do what the Laws forbid; or that they tranſgreſs the Bounds of what they permit. And according to the ways in which their Diſpoſitions, and their Deſign, are violated, they deprive thoſe of their Effects who do not fulfil what they enjoin: they puniſh thoſe who do what they forbid, or who do not that which they command: they annul that which is done contrary to the Order which they preſcribe: they repair the Conſequences of their Infractions: they take vengeance for every thing that violates their Diſpoſitions: and, in fine, they maintain their Authority by all the ways that are neceſſary for preſerving Order [u].

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[q] *See the fourteenth Article of the ſecond Section.* Prætor favet naturali æquitati. *l.* 1. *ff. de conſt. pecun.*

[r] *See the fifteenth Article of the ſecond Section.*

[ſ] *See the fourth, fifth, ſixth, ſeventh and eighth Articles of the ſecond Section.*

[t] *See the ſeventeenth Article of the ſecond Section.*

[u] *See the eighteenth and twentieth Articles of the firſt Section.*

XV.

15. Laws reſtrain not only what is directly contrary to their Diſpoſitions, but alſo what is indirectly againſt their Intention.

It follows likewiſe from the ſame Remark on the Juſtice and Authority of Laws, that they reſtrain not only what is directly oppoſite to their expreſs Diſpoſitions, but alſo what is indirectly contrary to their Intention. And whether it appear that both the Spirit and Letter of the Law be violated, or that only the Spirit of the Law be tranſgreſſed, and the Letter of it ſeemingly obſerved, the Tranſgreſſor does nevertheleſs incur thereby the Puniſhment[x].

[x] *See the nineteenth Article of the firſt Section.*

XVI.

16. Laws are made for what happens commonly, and not for one ſingle Caſe.

It is alſo another Conſequence of Laws being the Rules of the Univerſal Order of Society, that no Law is made to ſerve only for one Perſon, or for one Caſe, or for one ſingular and particular Fact; but they provide in general for what may happen: and their Diſpoſitions reſpect all the Perſons, and all the Caſes to which they extend[y]. And therefore the Wills of Princes, which are limited to particular Perſons, and to ſingular Facts, ſuch as a Pardon, a Gift, an Exemption, and others of the like nature, are Favours, Conceſſions, Privileges, but not Laws. And altho' very often they be ſingular Caſes, which are the Motives of new Laws; yet they do not regulate even thoſe very Caſes which have given Occaſion to the ſaid Laws, and which were otherwiſe regulated by preceding Laws; but they only take care to regulate for the future Caſes like unto thoſe which gave riſe to them. Thus, in *France*, the Edict about Mothers, and that about ſecond Marriages, have provided againſt the Inconveniences to come, and the preceding Caſes have been regulated according to the Diſpoſitions of the Laws that were in force before that[z].

[y] *See the twenty firſt and twenty ſecond Articles of the firſt Section.*

[z] *See the thirteenth and fourteenth Articles of the firſt Section.*

XVII.

17. Extent of the Laws according to their Deſign.

Laſtly, it is another Conſequence of the preceding Remark, that ſince Laws are general Rules, they cannot regulate the time to come, ſo as to make expreſs Proviſion againſt all Inconveniences, which are infinite in number, and that their Diſpoſitions ſhould expreſs all the Caſes that may poſſibly happen; but it is only the Prudence and Duty of a Lawgiver, to foreſee the moſt natural, and moſt ordinary Events, and to form his Diſpoſitions in ſuch a manner, as without entring into the Detail of the ſingular Caſes, he may eſtabliſh Rules common to them all, by diſcerning that which may deſerve either Exceptions, or particular Diſpoſitions[a]. And next it is the Duty of the Judges, to apply the Laws not only to what appears to be regulated by their expreſs Diſpoſitions, but to all the Caſes where a juſt Application of them may be made, and which appear to be comprehended either within the expreſs Senſe of the Law, or within the Conſequences that may be gathered from it.

[a] *See the twenty firſt and twenty ſecond Articles of the firſt Section.*

XVIII.

18. There are Rules which are general, and common to all Matters, others common to ſeveral Matters, and others peculiar to one.

We have ſeen that all the Laws derive their Source from the two Primary Laws, that many depend on others of which they are Conſequences, and that all of them regulate either in general, or in particular, the different parts of the Order of Society, and Matters of all kinds. From whence it follows, that the Laws are the more general the nearer they approach to the two firſt Fundamental Laws, and the more they deſcend to particulars, they are the leſs general. Thus, ſome Laws are common to all ſorts of Matters, ſuch as thoſe which enjoin Honeſty and Sincerity, and which forbid Deceit and Fraud, and others of the like nature. Others are common to many Matters, but not unto all: Thus, this Rule, That Covenants are in place of a Law to thoſe that make them, agrees to Sales, Exchanges, Letting and Hiring, Tranſactions, and to all the other kinds of Covenants; but has no relation to the matter of Guardianſhips, nor to that of Preſcriptions. Thus, the Rule of Reſciſſion, upon account of the party's being damaged in more than the half of the juſt price, which takes place in the Alienation of Lands by a Sale, doth not take place in an Alienation made by a Tranſaction[b].

[b] *See that diſtinction of the Laws in the fifth Article of the firſt Section.*

XIX.

19. The importance of diſtinguiſhing theſe three ſorts of Laws.

It follows from this Remark, that it is of importance in the Study and Application of the Laws, to obſerve, and to diſtinguiſh the Rules which are common to all Matters without diſtinction, thoſe which extend to ſeveral Matters, but

but not unto all, and thoſe which are peculiar only to one; that we may avoid falling into the Error, to which many perſons are liable, of extending a Rule that is peculiar to one Matter, to another where it has no uſe, and even where it would be falſe. Thus, for Example, we find this Rule in the *Roman* Law, that in ambiguous Expreſſions we muſt chiefly conſider the Intention of the Perſon who ſpeaks[c]; this indefinite Rule being found in a Title of ſeveral Rules concerning all Matters, and it not pointing out what Matter it properly belongs to; it ſeems to be general and common to all: and if we apply it indifferently to all Matters, we ſhall draw the ſame inference from it in Contracts, as in Teſtaments, where we are to interpret the ambiguous Expreſſion by the Intention of the Perſon whoſe Will it is intended to explain. However, this Application, which will be always juſt in Teſtaments[d], will be often found falſe in Contracts; for in Teſtaments, it is only one Perſon alone who ſpeaks, and his Will ought to ſerve as a Law. But in Covenants, it is the Intention both of the one and the other Party, which is the Law common to both. Thus, the Intention of the one Party, ought to anſwer to that of the other, and it is neceſſary that they underſtand one another, and that they agree together. And according to this Principle, it often happens that it is not by the Intention of the Perſon who ſpeaks that the ambiguous clauſe is to be interpreted; but rather by the reaſonable Intention of the other Party. Thus in a Sale, if the Seller hath made uſe of an ambiguous Expreſſion concerning the qualities of the Thing ſold; as if in ſelling a Houſe, he ſaid that he ſold it with its Services, without diſtinguiſhing whether they be Services which the Houſe owes, or which are due to it; and the Houſe is found to be ſubject to a Service which was not known, ſuch as a Right of Paſſage, a Service of not raiſing a Building higher, or other of the like nature, the great inconveniency of which would have either prevented the Buyer from buying at all, or from giving ſo great a Price for it, if he had known of the Service; this ambiguity of the Expreſſion of the Seller will not be interpreted by his intention, but by the intention of the Buyer, who had no reaſon to imagine that the Houſe was ſubject to any ſuch Service. And this Seller ſhall be bound for all the Effects of Warranty, purſuant to the Rules of this matter[e].

XX.

20. Diſcernment of the Exceptions. We have ſeen that ſome Laws are ſo general, and ſo certain every where, that they do not admit of any Exception: and that, on the contrary, there are many Laws to which there are Exceptions. It follows from this Rule, that we muſt not indifferently apply the general Rules to all the Caſes that ſeem to be comprehended within their Diſpoſitions, for fear we ſhould extend them to Caſes which are excepted from the Rule. And this makes it neceſſary to know the Exceptions.

XXI.

21. Two ſorts of Exceptions, Natural and Arbitrary. Examples. It is material to obſerve in reference to Exceptions, that there are two ſorts of them: Thoſe which are made by Arbitrary Laws, and thoſe which are made by Natural Laws[f]. Thus, it is an Arbitrary Law in the *Roman* Law, which excepts Military Teſtaments from the General Rules concerning the Formalities of Teſtaments; and it is alſo another Arbitrary Rule according to the Uſage of *France*, that the Reſciſſion of a Sale on account of Lands being ſold for leſs than half of the true Value, does not take place in Sales made publickly by Order of a Court of Juſtice. Thus, it is a Natural Law, that we cannot enter into Covenants that are contrary to the Laws, and to Good Manners; and this Law makes an Exception to the general Rule, that we may make all ſorts of Covenants. And it is by another Natural Law, that an Exception is made to the Rule of the Reſtitution of Minors, in the caſe of ſuch Engagements as were reaſonable for them to enter into, and where any prudent diſcreet Man would have done the ſame.

It is eaſy to perceive, that the Exceptions which are made by Arbitrary Laws, are obſerved, and learnt by bare Reading, and by Memory, and that it is by Study that we muſt learn them.

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[c] In ambiguis orationibus, maximè ſententia ſpectanda eſt ejus qui eas protuliſſet. *l. 96. ff. de reg. jur.*

[d] *It is remarkable, that this* 96th Law, ff. de reg. jur. *is taken out of the Treatiſe of* Mecian *about Deviſes in Truſt.*

[e] *See the fourteenth Article of the ſecond Section of Covenants; the fourteenth Article of the eleventh Section of the Contract of Sale; the tenth Article of the third Section of Letting and Hiring.*

[f] *See the ſixth, ſeventh, and eighth Articles of the firſt Section of the Rules of Law.*

But the diſcerning the Exceptions which are of the Natural Law, does not always depend on bare Reading, and it requires Reaſoning. For there are Natural Exceptions which we do not find written down in Laws: And even thoſe which are written, are not always joined to the Rules which they reſtrain. So that the Knowledge of Exceptions, which is ſo neceſſary, demands equally both Study in general, and a particular Attention to the Spirit and Deſign of the Laws which are to be applied; to the end we may not encroach upon the Exceptions, by giving too large an Extent to the general Rules.

XXII.

22. Advice concerning the uſe of the Rules.

We may add as a laſt Remark, and which is a Conſequence of all the others, that all the different Views which are ſo neceſſary in the Application of Laws, demand a Knowledge of their Principles, and of their Detail; and this implies the Light of Good Senſe, accompanied with Study and Experience. For without this Foundation one is in danger of making falſe Applications of the Laws: either by miſapplying them to other Matters than thoſe to which they have a relation: or by not diſcerning the Bounds which are ſet to them by Exceptions: or by giving too large an Extent to Equity againſt the Rigour of the Law, or to the Rigour againſt Equity: or for the want of the other Views which are to regulate the Uſe of Laws[*].

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[*] *See the laſt Article of the ſecond Section of the Rules of Law.*

CHAP. XIII.

A General Idea of the Subject Matters of all the Laws: Reaſons for making Choice of theſe which ſhall be treated of in this Book.

The CONTENTS.

1. *All the Subject Matters of Laws, are either of Religion, or of Temporal Policy.*
2. *Matters peculiar to Religion.*
3. *Matters peculiar to Civil Policy.*
4. *Matters common to Religion, and to Policy.*
5. *Three ſorts of Matters of Temporal Policy.*
6. *Thoſe of the Law of Nations.*
7. *Thoſe of the Publick Law.*
8. *Thoſe of Private Law.*
9. *Remark on the Ordinances, the Cuſtoms, the* Roman *Law, and the Canon Law: to ſhew what are the Matters that come within the deſign of this Book.*
10. *What theſe Matters are: Reaſons for the Choice that has been made of them.*

I.

1. All the ſubject Matters of Laws, are either of Religion, or of Temporal Policy.

AS we have already ſeen that all the different ſorts of Laws are reduced to two Kinds, which comprehend them all; one of the Laws of Religion; and the other, of the Laws of Temporal Policy; and that of theſe laſt, ſome are common both to the one and the other kind: ſo we ought likewiſe to diſtinguiſh all the Matters of Laws into two Kinds, one of the Matters of the Laws of Religion, and the other of the Matters of the Laws of Policy, ſuppoſing that among all theſe Matters, there are ſome of them that are common to both the Kinds.

II.

2. Matters peculiar to Religion.

Thus, the Matters which concern the Myſteries of Faith, the Sacraments, the inward Diſpoſition of the Mind, the Diſcipline of the Church, are Spiritual Matters, which are proper to Religion.

III.

3. Matters peculiar to Civil Policy.

And the Matters which relate to the Formalities of Teſtaments, to the diſtinctions of Goods into Paternal and Maternal, Eſtates of Inheritance and by Purchaſe, to Preſcriptions, to the Right of Redemption, to Fees, to the Community of Goods between Huſband and Wife, and others of the like nature, are Temporal Matters proper to Civil Policy.

IV.

4. Matters common to Religion, and to Policy.

But the Matters which reſpect Obedience to Princes, Fidelity in all ſorts of Engagements, Honeſty and Fair-dealing in Covenants and in Commerce, are Matters common to Religion and to Policy; in which both the one and the other eſtabliſh Laws according to their Ends; as has been already obſerved.

I ſhall not here enter upon a fuller Explanation of the Matters which belong properly to the Laws of Religion; but ſhall proceed to conſider thoſe of the Laws of Temporal Policy, and to point out thoſe that are to be treated of in this Book.

V.

5. Three ſorts of Matters of Temporal Policy.

The Matters of Temporal Policy are of three ſorts, according to the three kinds of Laws of this Policy, which have been already mentioned; *viz.* the Law of Nations, the Publick Law, and the Private Law.

VI.

6. Thoſe of the Law of Nations.

The Matters of the Law of Nations, in the ſenſe which this word has with us, as ~~has been already remarked~~, are the Ways by which the different Intercourſes and Correſpondencies are carried on between one Nation and another, ſuch as Treaties of Peace, Truces, Suſpenſions of Arms, Sincerity in Negotiations, the Safety of Ambaſſadors, the Engagements of Hoſtages, the manner of declaring and making War, the Liberty of Trade, and other Matters of the like nature.

VII.

7. Thoſe of the Publick Law.

The Matters of the Publick Law, are thoſe which concern the Order of the Government of every State, the ways of calling to the Sovereign Power Kings, Princes, and other Potentates, by Succeſſion, by Election: the Rights of the Sovereign, the Adminiſtration of Juſtice, the Militia, the Treaſury, the different Functions of Magiſtrates, and other Officers, the Government of Towns, and others of the like nature.

VIII.

8. Thoſe of Private Law.

The Matters of Private Law are the Engagements between private Perſons, their Commerces, and whatever may be neceſſary to be regulated among them, either for preventing of diſputes, or for ending them; ſuch as Contracts and Covenants of all kinds, Mortgages, Preſcriptions, Guardianſhips, Succeſſions, Teſtaments, and other Matters.

IX.

9. Remark on the Ordinances, the Cuſtoms, the Roman *Law, and the Canon Law: to ſhew what are the Matters that come within the deſign of this Book.*

In order to explain what are all the Matters that ſhall be treated of in this Book, and the reaſons of the Choice which has been made of them, it is neceſſary to make firſt of all a Remark on the ſeveral Laws that are in uſe in the Kingdom of *France*.

In *France* there are four different kinds of Laws, the Ordinances, and the Cuſtoms, which are the Laws peculiar to that Kingdom; and ſuch parts of the *Roman* Law, and of the Canon Law, as are there obſerved.

Theſe four ſorts of Laws regulate in *France* all Matters, of what nature ſoever; but their Authority is very different.

The Ordinances have an univerſal Authority over all the Kingdom, and are all of them obſerved in all parts of the Kingdom, except ſome of them whoſe Diſpoſitions reſpect only ſome of the Provinces.

The Cuſtoms have their particular Authority; and each Cuſtom is confined to the Limits of the Province, or Place where it is obſerved.

The *Roman* Law hath in the Kingdom of *France* two different Uſes; and hath for each of them its proper Authority.

One of theſe Uſes is, that it is obſerved as a Cuſtom in many Provinces, and is there in the place of Laws in ſeveral matters. Theſe are the Provinces of which it is ſaid, that they are governed by the Written Law; and for the Uſage of thoſe Provinces, the *Roman* Law has the ſame Authority, as in the other Provinces their peculiar Cuſtoms have.

The other Uſe of the *Roman* Law in *France*, extends to all the Provinces, and comprehends all Matters: and it conſiſts in this, that they obſerve over all the Kingdom thoſe Rules of Juſtice and Equity which are termed the Written Law, becauſe they are written in the *Roman* Law. Thus for the ſecond Uſe, it has the ſame Authority as Juſtice and Equity have over our Reaſon.

The Canon Law contains a great number of Rules which are obſerved in *France*, but it has likewiſe ſome which they reject. Thus, they obſerve all the Canons which concern Faith and Manners, and which are taken from Scripture, from the Councils, and from the Fathers: and they receive of it likewiſe a great many Conſtitutions which reſpect the Diſcipline of the Church. And by Uſage they have received likewiſe ſome Rules of it which relate only to Temporal Policy. But other Diſpoſitions of it they reject, either becauſe they are not received in uſe there, or that even ſome of them are contrary to the Rights and Liberties of the *Gallican* Church.

X.

10. What theſe Matters are: Reaſons for the Choice that has

Having made theſe Remarks, it is now eaſy to ſhew, what View the Author propoſed to himſelf in the Choice of the Matters which he thought proper to comprehend in this Book, and to *been made of them.*

to diſtinguiſh them from thoſe which he thought fit to exclude.

Among all the Matters which are regulated by theſe four ſorts of Laws which are in uſe in *France*, viz. The Ordinances, the Cuſtoms, the Canon Law, and the *Roman* Law, there is a great number of them which are diſtinguiſhed from all the others, in a manner which has been the reaſon of the Choice that has been made of them.

The Matters which are thus diſtinguiſhed from the others, are thoſe of Contracts, ſuch as Sales, Exchanges, Letting and Hiring, Loan, Partnerſhip, a Depoſit, and all other Covenants: Of Guardianſhips, Preſcriptions, Mortgages: Of Succeſſions, Teſtaments, Legacies, Subſtitutions: Of Proofs and Preſumptions: Of the State of Perſons: Of the Diſtinctions of Things: Of the Manner of interpreting Laws; and many other Matters, which have all of them this belonging to them in common, that the Uſe of them is more frequent, and more neceſſary than that of other Matters.

The Author conſidered that theſe Matters are diſtinguiſhed from all the others, not only in that the Uſe of them is more frequent, but particularly in that their Principles and their Rules are almoſt all of them Natural Rules of Equity, which are the Foundations of the Rules of the Matters regulated by the Ordinances and Cuſtoms, and even of ſuch Matters as are not known in the *Roman* Law: for all the Matters regulated by the Ordinances and Cuſtoms, have therein no other Laws beſides ſome Arbitrary Rules; ſo that it is upon the Natural Rules of Equity that the Principal Law and Deciſion of ſuch matters does depend. Thus, for Example, in the matter of Fees, the Cuſtoms have only regulated the different Conditions of them in divers Places: but it is by the Natural Rules of Covenants, and by other Rules of Equity, that Queſtions touching theſe Matters are decided. Thus, in the matter of Teſtaments, the Cuſtoms regulate the Formalities of them, and what Diſpoſitions Teſtators may, or may not make; but it is by the Rules of Equity, that the Queſtions are decided, touching the Engagements of Heirs, or Executors, the Interpretation of the Wills of Teſtators, and all the other Matters in which there may be any difficulty. For, as has been already obſerved in another place, it is always by theſe Rules that Queſtions of all kinds are diſcuſſed and decided.

Since therefore it is in the *Roman* Law, that theſe Natural Rules of Equity have been collected together, and that they are there collected in the manner which has been obſerved in the Preface, and which renders the Study of them ſo difficult and perplexed; it is this that engaged the Author in the Deſign of this Book, and to make Choice of theſe Matters, of which the Plan may be ſeen in the following Chapter.

CHAP. XIV.

A Plan of the Matters contained in this Book of the Civil Law in its Natural Order.

The CONTENTS.

1. *All the Matters of Law have a Natural Order.*
2. *The Foundation of this Order.*
3. *The general Diviſion of the Matters of this Deſign, into two Parts: The firſt of Engagements, and the ſecond of Succeſſions.*
4. *Theſe two Parts are preceded by a Preliminary Book, of the Rules of Law in general, of Perſons, and of Things.*
5. *Diviſion of the Matters of the Firſt Part into four Books.*
6. *Firſt Book, of Engagements by Covenant.*
7. *Second Book, of Engagements without a Covenant.*
8. *Third Book, of the Conſequences of Engagements which add to them, or corroborate them.*
9. *Fourth Book, of the Conſequences of Engagements which diminiſh them, or annul them.*
10. *Matters of the Firſt Book.*
11. *Matters of the Second Book.*
12. *Matters of the Third Book.*
13. *Matters of the Fourth Book.*
14. *The Second Part, which is of Succeſſions.*
15. *Diviſion of the Matters of the Second Part into Five Books.*
16. *Firſt Book, of Matters common to Legal and Teſtamentary Succeſſions.*
17. *Second Book, of Legal Succeſſions.*
18. *Third Book, of Teſtamentary Succeſſions.*
19. *Fourth Book, of Legacies and Donations in proſpect of Death.*
20. *Fifth Book, of Subſtitutions and Legacies in Truſt.*
21. *Matters of the Firſt Book.*

22. *Matters of the Second Book.*
23. *Matters of the Third Book.*
24. *Matters of the Fourth Book.*
25. *Matters of the Fifth Book.*
26. *The Concluſion of this Plan of the Matters: Reaſons for the Order obſerved in it.*
27. *Remark on the Matters which belong to the Publick Law.*

I.

1. All Matters of Law have a Natural Order.

ALL the Matters of the Civil Law have among themſelves a ſimple and a natural Order, which forms them into one Body, in which it is eaſy to ſee them all, and to perceive with one view in what Part every one hath its Rank. And this Order is founded on the Plan of Society which has been already explained.

II.

2. The Foundation tion of this Order.

We have ſeen in that Plan, that the Order of Society is preſerved in all Places by the Engagements with which God links Men together, and that it is perpetuated in all Times by Succeſſions, which call certain Perſons to ſucceed in the place of thoſe who die, to every thing that may paſs to Succeſſors. And this firſt Idea makes a firſt general Diſtinction of all Matters into two Kinds: One is of Engagements; and the other of Succeſſions.

All the Matters of theſe two Kinds ought to be preceded by three ſorts of General Matters, which are common to all the others, and neceſſary for underſtanding the whole Detail of the Laws.

The firſt comprehends certain General Rules which reſpect the Nature, Uſe, and Interpretation of Laws; ſuch as thoſe which have been mentioned in the twelfth Chapter.

The ſecond concerns the ways in which the Civil Laws conſider and diſtinguiſh Perſons by certain Qualities which have relation to Engagements, or Succeſſions; as for Example, the qualities of a Father of a Family, or of a Son living under the Father's Juriſdiction, of a Major, or a Minor, the qualities of a Child lawfully begotten, or of a Baſtard, and others of the like nature, which make that which is called the State of Perſons.

The third comprehends the ways in which the Civil Laws diſtinguiſh the Things which are for the uſe of Men, with reſpect to Engagements and Succeſſions. Thus, with reſpect to Engagements, the Laws diſtinguiſh the Things which enter into Commerce, from thoſe which do not enter into it; ſuch as Things Publick and Things Sacred: And with reſpect to Succeſſions a Diſtinction is made of Goods Paternal and Maternal, of Eſtates of Inheritance, and thoſe of Purchaſe.

III.

3. The general Diviſion of the Matters of this Deſign, into two Parts: The firſt of Engagements, and the ſecond of Succeſſions.

According to this Order, we ſhall divide all the Matters of this Book into two Parts. The firſt ſhall be of Engagements, and the ſecond of Succeſſions. And both the one and the other ſhall be preceded by a Preliminary Book; the firſt Title of which ſhall contain the General Rules concerning the Nature and Interpretation of Laws; the ſecond ſhall be of Perſons; and the third of Things.

IV.

4. Theſe two Parts are preceded by a Preliminary Book, of the Rules of Law in general, of Perſons, and of Things.

As to the Diſtinction of the Matters of the firſt Part, which is of Engagements, it is to be remarked, as has already been ſhewn in the Plan of Society, that Engagements are of two Kinds.

The firſt is, of thoſe which are formed mutually between two or more Perſons, by their Will and Conſent; and this is done by Covenants, when Men engage themſelves mutually and voluntarily in Sales, Exchanges, in Letting and Hiring, in Tranſactions, Compromiſes, and other Contracts and Covenants of all ſorts.

The ſecond is of ſuch Engagements as are formed otherwiſe than by mutual Conſent; ſuch are all thoſe which are made either by the Will of one Perſon alone, or without the will of either of the Parties. Thus, he who undertakes to manage the Affair of his abſent Friend, engages himſelf by his Will, without the Conſent of the abſent perſon. Thus the Tutor is engaged to his Pupil, independently of the will of the one or the other. And there are divers other Engagements which are formed without the mutual Will of thoſe who are bound by them.

All theſe ſorts of Engagements, whether they be Voluntary or Involuntary, have divers Conſequences, which are reduced to two Kinds. The firſt is of thoſe ſorts of Conſequences which add to Engagements, or which ſtrengthen them; ſuch as Mortgages, the Privileges of Creditors, Obligations in which ſeveral perſons are bound each for the whole, Suretiſhips, and others which have this Character of adding to Engagements, or of ſtrengthening them.

The ſecond Kind of the Conſequences of Engagements, is of thoſe which annul them, or which change them, or diminiſh them; ſuch are Payments, Compenſations, Novations, Reſciſſions, Reſtitutions of Matters to the firſt State they were in.

V.

5. Diviſion of the Matters of the Firſt Part into four Books.

It is to theſe two Kinds of Engagements, and to theſe two Kinds of their Conſequences, that all the Matters of this Firſt Part are reduced: and they ſhall be ranked there into Four Books.

VI.

6. Firſt Book, of Engagements by Covenant.

The Firſt ſhall be, of Covenants, which are voluntary and mutual Engagements.

VII.

7. Second Book, of Engagements without a Covenant.

The Second, of Engagements which are formed without a Covenant.

VIII.

8. Third Book, of the Conſequences of Engagements which add to them, or corroborate them.

The Third, of the Conſequences which add to Engagements, or which ſtrengthen and corroborate them.

IX.

9. Fourth Book, of the Conſequences of Engagements which diminiſh them, or annul them.

The Fourth, of the Conſequences which annul, diminiſh, or change the Engagements.

X.

10. Matters of the Firſt Book.

This Firſt Book, of Covenants, ſhall have in the beginning thereof a Title of Covenants in general. For ſeeing there are many Principles, and many Rules which are common to all the Kinds of Covenants; Order requires that we ſhould not repeat thoſe common Rules in every Covenant to which they belong, but that we ſhould gather them all together in one place. We ſhall afterwards rank under particular Titles the different Kinds of Covenants: And we ſhall add at the end of the Firſt Book, a laſt Title, of the Vices of Covenants, ſuch as Fraud, Stellionate, and others: in which we ſhall treat of the Effect which Error and Ignorance, whether it be of Fact or of Law, Force and Fear, and other Vices, have in the Covenants wherein they happen to be.

We have inſerted in this Firſt Book of Covenants, the Matter of Uſufruct, and that of Services, becauſe Uſufruct and Services are often acquired by Covenants, as by Donations, by Sales, by Exchanges, by Tranſactions, and by other Contracts. Thus, although an Uſufruct and a Service may be acquired by Teſtament, yet it is natural that theſe Matters which ought to be only in one place, ſhould be put down in the firſt place to which they have relation.

XI.

11. Matters of the Second Book.

The Second Book, which ſhall be of Engagements without a Covenant, ſhall take in thoſe which are formed without a mutual conſent; ſuch as the Engagements of Tutors, thoſe of Curators who are named either to Perſons, ſuch as Minors, Prodigals, Mad-men, and others; or to Goods, as to a vacant Succeſſion: the Engagement of Perſons who manage the Affairs of others in their abſence, and without their knowledge, and that of the Perſons whoſe Affairs have been managed: the Engagements of Perſons who chance to have ſomething in common together without a Covenant: and there are divers other ſorts of Involuntary Engagements, and ſome which are even formed by Accidents.

XII.

12. Matters of the Third Book.

The Third Book ſhall treat of the Conſequences of Engagements, whether they be Voluntary or Involuntary, which add to them, or corroborate them, and ſhall contain the ſeveral Matters which have this Character; ſuch as Mortgages, the Privileges of Creditors, the Obligations of Perſons bound jointly together each for the whole Sum, Suretiſhips, Coſts and Damages. This Book ſhall likewiſe take in the Matter of Proofs and Preſumptions, and of an Oath, which are Conſequences of all ſorts of Engagements, and which corroborate them. And altho' Proofs, and an Oath, ſerve likewiſe to diſſolve Engagements, yet this Matter, which ought not to be put in ſeveral places, ought to be inſerted in the firſt place where it comes in naturally. We ſhall likewiſe place among the Conſequences which ſtrengthen and fortify Engagements, Poſſeſſions, and Preſcriptions, which confirm the Rights which people acquire by Covenants, and by other Titles. And altho' Preſcriptions have alſo the effect to annul Engagements, yet it is natural to place them in this Book, for the ſame reaſon that Proofs are taken into it.

XIII.

13. Matters of the Fourth Book. The Fourth and Laſt Book of this Firſt Part, ſhall be, of the Conſequences, which diminiſh, change, or annul Engagements, and which ſhall contain the Matters which have this Character; ſuch as Payments, Compenſations, Novations, Delegations, Reſciſſions, and Reſtitutions.

XIV.

14. The Second Part, which is of Succeſſions. The Second Part, which is to be of Succeſſions, comprehends a great number of Matters, and different enough to make a Diviſion of them into five Books.

XV.

15. Diviſion of the Matters of the Second Part into five Books. To conceive aright the Order of theſe Five Books, we muſt conſider that there are two ways of ſucceeding: The one of Succeſſions which are called Legal, that is to ſay, regulated by the Laws, which make the Goods to paſs from thoſe who die, to the perſons whom they call to ſucceed to them: And the other, of Teſtamentary Succeſſions, which make the Goods to paſs to thoſe who are inſtituted Heirs or Executors, by a Teſtament.

XVI.

16. Firſt Book, of Matters common to Legal and Teſtamentary Succeſſions. And becauſe there are ſome Matters common to Legal Succeſſions, and to Teſtamentary Succeſſions; it being proper that theſe Matters ſhould go before, they ſhall be contained in a Firſt Book.

XVII.

17. Second Book, of Legal Succeſſions. Which ſhall be followed by a Second; in which Legal Succeſſions ſhall be explained.

XVIII.

18. Third Book, of Teſtamentary Succeſſions. And by a Third; which ſhall contain Teſtamentary Succeſſions.

XIX.

19. Fourth Book, of Legacies, and Donations in proſpect of Death. Seeing it often happens that Perſons who name Heirs, or Executors, in their Teſtaments, and thoſe alſo who will have no other Heirs beſides the Heirs of Blood, do not leave all their Goods to their Heirs, or Executors, but make particular Donations to other Perſons by Teſtaments, or Codicils, or other Diſpoſitions made in proſpect of death; theſe ſorts of Diſpoſitions ſhall be the Subject Matter of a Fourth Book.

XX.

20. Fifth Book, of Subſtitutions, and Legacies in Truſt. And laſtly, ſeeihg the Law has added to the Liberty of making Heirs, or Executors, and Legataries, that of Subſtitutions, and of Deviſes in Truſt, which call a ſecond Succeſſor in the place of the firſt Heir, or Executor, or of the firſt Legatary; this Matter of Subſtitutions, and of Deviſes in Truſt, ſhall be the Subject Matter of a Fifth Book.

XXI.

21. Matters of the Firſt Book. The firſt of theſe five Books, which ſhall be of Succeſſions in general, ſhall contain the Matters that are common to the two Kinds of Succeſſions; ſuch as the Engagements of the Quality of Heir, or Executor, the Benefit of an Inventory, the manner of accepting an Inheritance, or Succeſſion, or of renouncing it, the Partitions among Coheirs, or Co-Executors.

XXII.

22. Matters of the Second Book. The Second Book, which ſhall be of Legal Succeſſions, ſhall explain the Order of theſe Succeſſions, and the manner in which Children and other Deſcendants are called to them; as alſo Fathers, Mothers, and other Aſcendants; Brothers, Siſters, and other Collaterals. Theſe Legal Succeſſions are alſo called Succeſſions of Inteſtates: and this word is particularly made uſe of in the *Roman* Law, becauſe the Heirs at Law, who are the Heirs of Blood, do not ſucceed except when there is no Teſtament; but this is not to be underſtood of Perſons to whom a Legitime, or Child's Part is due by Law.

XXIII.

23. Matters of the Third Book. The Third Book, which ſhall be of Teſtamentary Succeſſions, ſhall contain the Matters which concern Teſtaments, their Formalities, Diſheriſon, Undutiful Teſtaments, the Legitime, or Filial Portion, the Diſpoſitions of thoſe who have contracted a ſecond Marriage.

XXIV.

24. Matters of the Fourth Book. The Fourth Book ſhall be concerning Legacies, and other Diſpoſitions made in proſpect of Death: and in that we ſhall treat of Codicils, of Donations in proſpect of death, and of Legacies.

XXV.

25. Matters of the Fifth Book. The Fifth Book ſhall contain the Matters relating to the ſeveral Kinds of Subſtitutions, and of Legacies and Inſtitutions of Heirs, or Executors, in truſt for others.

XXVI. All

XXVI.

26. The Concluſion of this Plan of the Matters: Reaſons for the Order obſerved in it.

All theſe ſeveral Matters, of which this is the Plan, are the Matters which ſhall be treated of in this Book of *The Civil Law in its Natural Order*. We have not explained here particularly the Nature of theſe Matters; becauſe we ſhall explain in every one, at the head of each Title, that which ſhall be neceſſary for the knowledge of it before reading the particular Rules.

Neither have we taken up time to give a reaſon for the Order that is particularly obſerved in the Matters of each Book. We have endeavoured by ſeveral Views to range them either according as their Nature makes them ſubſequent to one another, or according as it appeared neceſſary to us that the one ſhould go before the others, in order to their being better underſtood. Thus, for Example, in the Firſt Book of the Firſt Part, in which are explained the ſeveral ſorts of Covenants, after the Title of Covenants in general, we have placed that of the Contract of Sale becauſe that of all the Covenants, there is not any one which contains ſo many particular Matters as the Contract of Sale, and becauſe the Rules of that Contract agree to many other Covenants, and give a great deal of Light to other Matters. Thus, for other the like conſiderations, all the other Matters have been ranged in the Order which they have; but it would be too tedious, and to no manner of purpoſe, to give a reaſon in each particular Matter, for the ſituation in which it is placed. We ſhall only obſerve, that altho' the Matter touching Mortgages might have been placed in the number of Covenants, becauſe it is uſually by Covenant that the Right of Mortgage is acquired, yet it was proper to put this Matter in another place, becauſe the Mortgage is never a primary Covenant, and a principal Engagement, it being always an Acceſſory to ſome other Engagement, and often to Engagements which are contracted without any formal Covenant, ſuch as thoſe of Tutors and Guardians, and others alſo, in which the Mortgage is acquired by Law. Thus, this Matter hath naturally its Order in the Third Book: and the ſame reaſons have obliged us to place the Matter of Suretiſhips, and thoſe of Obligations, wherein ſeveral perſons are bound jointly for the whole Debt, in the ſame Rank.

XXVII.

27. Remark on the Matters which belong to the Publick Law.

We muſt obſerve in the laſt place, that beſides the Matters which are to be treated of in this Book, according to the Plan which has been juſt now drawn of them, there are others which are contained in the Body of the *Roman* Law, and which are alſo in uſe in *France*, and for which reaſon it would ſeem as if they ought to have been comprehended in this Book; ſuch as the Matters relating to the Exchequer, to Cities and Corporations, Criminal Matters, the Order of Judicial Proceedings, the Duties of Judges. But theſe Matters being regulated by the Ordinances, and being a part of the Publick Law, it was not proper to inſert them here. And becauſe there are in the *Roman* Law many eſſential Rules concerning theſe Matters, and which being Natural Rules are in force in all places, but are not expreſſed in the Ordinances; therefore the Author has collected them into one Tome, which is the Second Tome of this Work; and the Matters treated of in it, as alſo the Matters regulated by the Cuſtoms of *France*, and which are unknown in the *Roman* Law, are ranked in the following Order.

All theſe Matters of the Publick Law ought to be preceded by thoſe which ſhall be explained in this Book. For beſides that they preſuppoſe many Rules which ſhall be there explained; it is natural that ſince the Publick Law has a relation to private Perſons, that the Matters which concern private Perſons, ſhould go before thoſe which are of the Publick Law; and it is probably for theſe Reaſons, that the Matters concerning the Exchequer, and Cities or Corporations, and Criminal Matters, have been placed after the others. Thus, after the Matters of this Book which make the Firſt Tome, we have placed in the Second the Matters pertaining to the Exchequer, and to Towns, thoſe which concern the Rights of the Prince, and the Government of Towns, thoſe which reſpect Univerſities, and other Societies and Communities, and Criminal Matters: And as for the Order of Judicial Proceedings, which comprehends the manner of proceeding in Civil and Criminal Cauſes, and the Functions and Duties of the Judges; ſeeing it is a Matter which has relation to all the others, it would ſeem proper to end therewith.

As to the Matters which are peculiar to the Cuſtoms of *France*, ſuch as Fees, the Right of Redemption belonging to Families, Wardſhips, the Community of Goods between the Huſband and the Wife, the Inſtitutions of Heirs, by Contract, the Prohibition of bequeathing a part of the Goods to the Prejudice of the Heirs of Blood; the Renunciations by Daughters of their Right to Succeſſions, and every thing which the Cuſtoms have in particular relating to Succeſſions, Donations, and other Matters, it is not neceſſary to mention their Rank here, it being eaſy to judge that theſe Matters relate either to Engagements, or to Succeſſions. Thus, Fiefs were in their firſt Origine Covenants between the Lord and the Vaſſal. Thus, the Right of Redemption belonging to thoſe of the Family of the Seller, is a Conſequence of the Contract of Sale. Thus, the Matter of Wardſhips, whether of Noblemens Children or Citizens, is a kind of Uſufruct joined with a Guardianſhip. Thus, the Community of Goods between Huſband and Wife, and the Wife's Jointure, are Covenants either expreſs or tacit, which have a connection with the Matter of Dowries. Thus, the Inſtitutions of Heirs, by Contract, are a Matter which is made up partly of the Nature of Teſtaments, and partly of that of Covenants, and which hath its Rules from theſe two ſorts. Thus, every one of all the other Matters of the Cuſtoms hath its Rank fixed: and it is eaſy to perceive the Order which they have in the Plan that has been explained.

A TABLE OF THE TITLES.

☞ *This* Table *ſerves only to mark the Order of the* Titles *of all the ſeveral Matters which are treated of in this Book, and of which we have juſt now laid down the Plan. For which reaſon it is, that we have not here ſet down the Numbers of the Pages, nor the Sections of the Titles. But this is followed by another Table of the Titles of this Tome, and of their Sections, with the Numbers of the Pages where to find them.*

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It is moſt certain, that it is in the Body of the Civil Law that we have the moſt compleat, if not the only Collection of the Rules of Natural Reaſon and Equity, which are to govern the Actions of Mankind; and therefore it is, that it has been called Ratio Scripta, *Written Reaſon, as containing the moſt perfect Rules of Reaſon for deciding all differences that may ariſe among Men*

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It is moſt certain, that it is in the Body of the Civil Law that we have the moſt compleat, if not the only Collection of the Rules of Natural Reaſon and Equity, which are to govern the Actions of Mankind; and therefore it is, that it has been called Ratio Scripta, *Written Reaſon, as containing the moſt perfect Rules of Reaſon for deciding all differences that may ariſe among Men* *in their intercourſe with one another. But the* Roman *Lawyers, who were the Compilers of that Work, having inſerted therein many things peculiar to their own Form of Government, which are now obſolete, and having intermixed with the Fundamental Principles of Juſtice and Equity, ſome Niceties of the Law, which are not of ſo general uſe at preſent, and which render the Study of the Civil Law too irkſome and tedious for thoſe who do not intend to make it their Profeſſion; the Author of this Collection has removed that difficulty, by leaving out ſuch parts of the Civil Law as are not at preſent of ſo general uſe, and ſelecting all the Fundamental Maxims of Law and Equity, which muſt be the ſame in all Countries, and applying them to the moſt common Affairs of Human Life, in a plain eaſy Method, and in their Natural Order. So that the Reader here finds, under the ſame Title, all the Rules of Law which have any relation to the Subject of the ſaid Title, and which lie diſperſed under different Titles in the Body of the* Roman *Laws, and cannot be there learnt without great Study and Application.*

Beſides the Laws relating to private Property, which the Author has digeſted after this manner in the Firſt Tome of this Work, he has added a Second Tome, of the Publick Law; in which he has collected out of the Body of the Roman *Laws, all the Rules of Natural Reaſon and Equity, which are to govern the Actions of Mankind in their publick Capacity, and as they have a relation to the Civil Society of which they are Members. Here he lays down the duties of the Sovereign towards his Subjects, and of all Officers imployed under the Prince, either for the Adminiſtration of Juſtice, the Direction of the Civil Policy, the Management of the Publick Revenue, or the Government of the Army in time of War. He has collected the general Maxims that are to be obſerved for procuring plenty of all things neceſſary to human Life within the Kingdom, and for increaſing its Wealth and Riches by a Foreign Trade and Commerce. Neither has he omitted to ſet down likewiſe therein the duties of the Clergy, as they are Members of the State. And to render this Work the more perfect and compleat, beſides the Texts which he has quoted out of the Body of the Civil Law, as containing the Political Maxims of Government whereby the Commonwealth of* Rome *was raiſed to its greateſt height and ſplendour, and preſerved its power for ſo many Generations; he has moreover added a great many Texts of Holy Scripture, which contain the Precepts of the Divine*

vine Law to all thoſe who are veſted with any Branch of the Publick Authority, and to thoſe who live in ſubjection under them, and are to pay obedience to their Orders and Commands, for the good and welfare of the whole Society.

This Work no ſooner appeared in publick, than it was received with univerſal Applauſe among Men of Learning, and has been juſtly reckoned one of the Improvements of Learning which we owe to the laſt Century. There have been ſeveral Editions thereof in France *in a few years; and it has been thought to be of ſo great uſe in other Countries, that it has been tranſlated into ſeveral other Languages. I thought that it might not be of leſs ſervice here in* England *than in other Countries, and therefore was induced to render it into* Engliſh, *that all the Subjects of this Kingdom in general might have the benefit of it. There are many perſons of great Learning in* England, *who have not had opportunities of acquiring ſuch a thorough knowledge of the* French *Tongue, as to be able to underſtand perfectly the Books which are writ in that Language. And even many of thoſe who are ſufficiently Maſters of the* French *Language, ſo as to underſtand their Hiſtorians and Books of Novels, may not be ſo well acquainted either with the* French *or* Civil *Law Terms, which frequently occur in this Work, and which make a Tranſlation thereof the more neceſſary for the* Engliſh *Reader. And the ſubject matter of this Book being of ſo general uſe to all Mankind, I dare flatter my ſelf that a Tranſlation of it, when the Book comes to be more univerſally known here in* England, *will be allowed to be of real Service to the Country, and be at leaſt as well received as a Tranſlation of any* French *or* Latin *Hiſtorian whatſoever.*

Since I firſt read this Book, I have always been of Opinion that an Engliſh *Tranſlation of it would be of the greateſt ſervice here in* England; *and the rather, becauſe of late years the ſtudy of the Civil Law here in* England *has been ſo much neglected, and has met with ſo great diſcouragement, that we are in a manner become ſtrangers to it; and, under a groundleſs apprehenſion of its being an encroachment on the Law of the Land, we are like to loſe all the real advantages which may be reaped from it in ſubſerviency to our own Laws, and which all other Nations, except our ſelves, do at this day enjoy.*

In all other Countries where the Study of the Civil Law is cultivated, they have peculiar Laws and Cuſtoms of their own, of which they are as tenacious as we can poſſibly be of ours. And yet they are ſo far from baniſhing or diſcouraging the Study *of the Civil Law, under an apprehenſion of its encroaching upon their own Municipal Laws; that, on the contrary, they give the Profeſſors thereof all poſſible encouragement; they ſtudy it as a qualification for the better underſtanding of their own Laws, and make it ſubſervient to them in all reſpects, by applying the general Rules of Natural Reaſon and Equity which are contained therein, to clear up any difficulties or obſcurities, and to ſupply any defects or omiſſions that may occur in their own Municipal Laws. And this is the only uſe that is made of the Civil Law in moſt Countries at this day; not that they receive it by vertue of any Power or Authority that the* Roman *Emperors had to impoſe their Laws upon other Nations, which pretence now muſt be looked upon as very frivolous ever ſince the declenſion of the* Roman *Empire; but they receive it only as containing the moſt compleat, if not the only Collection of Rules of Natural Reaſon and Equity, which may come in aid of their own Municipal Laws, and ſerve as a Rule for deciding all Caſes wherein their own Laws and Cuſtoms are ſilent.*

And in this they do but imitate the Romans *themſelves, who were not aſhamed to take all the helps and aſſiſtances they could have from other Nations, to render their own Body of Laws the more perfect and compleat. It was with this view that they ſent perſons into* Greece, *there to collect the beſt and moſt uſeful Laws which they could pick up among the Commonwealths of that Country; which were afterwards digeſted into Twelve Tables, and were made the Ground-Work of the Body of the Civil Law. It was likewiſe for the ſame purpoſe, that they borrowed of the* Rhodians *their Laws relating to Maritime Affairs, as being the beſt Collection of Laws of that kind that were then extant, and inſerted them in the Body of their own Laws. And at this day the* Rhodian *Laws, the Laws of* Oleron, *and other Maritime Laws of other Nations, are received as the general Law for deciding all Cauſes Civil and Maritime, in aid of the Municipal Law of each Country, and without any apprehenſion that the ſaid Foreign Laws will be an infringement of their own Municipal Laws; becauſe they are received by vertue of their own Authority, and only to ſupply the defects and omiſſions of their own Laws, for deciding Caſes for which their own Laws have made no proviſion.*

In former times, when the Civil Law was more univerſally known and ſtudied here in England *than it is at preſent, the Judges and Profeſſors of the Common Law had frequent recourſe to it in caſes where the Common Law was either totally* *the natural temper and diſpoſition of the Inhabitants; yet in order to improve theſe to the beſt advantage, I cannot but think that it may be of ſervice to know what Laws the* Romans, *the greateſt and moſt flouriſhing Commonwealth that ever was, thought fit to enact for promoting Trade and Manufactures within themſelves, and for the Government of their Colonies in Foreign Parts, to preſerve them in a due ſubjection, and to make them uſeful and ſubſervient to the ſeat of the Empire from which they derived their Origin, and to which they owed their Protection; all which Laws are collected in the Body of the Civil Law, and may be uſefully applied by us on many occaſions.*

But as to what concerns the outward Policy of the State, that is, the Intercourſe which it muſt have with other States and Princes, I humbly conceive that the knowledge of the Civil Law muſt be of ſingular uſe in all Tranſactions of that kind. For the Civil Law being in ſo great eſteem and veneration among all other Nations, that they make it the Rule and Standard of Equity in all Caſes which are not expreſly provided for by their own particular Laws and Cuſtoms, what more effectual Arguments can be uſed to obtain Juſtice from them in an amicable way, than thoſe which are founded on the Principles and Maxims of the Civil Law? It is arguing with them upon their own Principles, from Maxims of their own Law, and the Law of all Nations, which is the moſt effectual way to convince them by Reaſon. And it was in conſideration of this, that our Anceſtors, in their great Wiſdom, thought proper to imploy generally in all Negotiations with Foreign Courts, and in Treaties of Peace and Commerce, Perſons who were well ſkilled in the Civil Law, and Law of Nations. And although it was neceſſary on ſome occaſions, and more particularly at ſolemn Congreſſes for treating of Peace, for the greater luſtre and ſplendor of the Embaſſy, to imploy perſons of the firſt Rank and Quality; yet, to eaſe them of the great weight of Affairs, they were always accompanied by ſome perſon of an inferior Rank, who being verſed in the Study of the Civil Law, and Law of Nations, might be aiding and aſſiſting in the Conferences which were to be held for ſettling and adjuſting the reſpective intereſts of the ſeveral Princes and States concerned. And this we ſee is the conſtant practice of all other Nations at this day, who in their Embaſſies for Treaties of Peace imploy always at leaſt one perſon who has been bred to the Law; although this is the leſs neceſſary in Foreign Countries, where all the Nobility, in their Studies at the Univerſity go through a regular Courſe of the Study of the Civil Law, and Law of Nations;

ſilent or defective. Thus, we ſee in the moſt ancient Books of the Common Law, as BRACTON, THORNTON, and FLETA, that the Authors thereof have tranſcribed, one after another, in many places, the very Words of JUSTINIAN's Inſtitutes. And ſometimes the Judges upon the Bench, in delivering their Opinions, have quoted the Rules of the Civil Law, as the foundation of their Opinions; which Mr. SELDEN, in his Diſſertation on FLETA, has clearly demonſtrated from the Annals of thoſe times. So that the Sages of the Law in thoſe days were ſenſible of the good uſe that might be made of the Reaſon of the Civil Law, in aid and ſubſerviency to the Common Law of the Land, as other Nations make uſe of it at this day.

And beſides this general advantage that is to be reaped from the Study of the Civil Law, we are not to look upon it altogether as a Foreign Commodity, with reſpect to this Iſland; ſome of the particular Laws thereof having been enacted for deciding Controverſies which aroſe here in England, and bearing date from this Country. The greateſt part of this Iſland was governed wholly by the Civil Law, for the ſpace of about three hundred and ſixty years; to wit, from the Reign of the Emperor CLAUDIUS, to that of HONORIUS; during which time ſome of the moſt eminent among the Roman Lawyers, as PAPINIAN, PAULUS and ULPIAN, whoſe Opinions and Deciſions are collected in the Body of the Civil Law, ſat in the ſeat of Judgment here in England, and diſtributed Juſtice to the Inhabitants. But after the declenſion of the Roman Empire, the Saxon, Daniſh, and Norman Cuſtoms took place in the Iſland, according as the ſaid Nations became Maſters of us, every one being fond of introducing their own Cuſtoms.

There are ſome particular Matters in which the Civil Law hath always been, and ſtill is allowed to be, the only Law in England, whereby they are to be decided. And the Courts of Juſtice which have Cognizance of the ſaid Matters, do proceed therein according to the Rules and Forms of the Civil Law. Thus, in the High Court of Admiralty, all Cauſes Civil and Maritime are there to be decided according to the Civil Law, and the Maritime Cuſtoms. Thus, in the Court of Honour or Chivalry, the Lord High Conſtable, and Earl Marſhal, who are the Judges thereof, are to proceed according to the Civil Law, as being the moſt proper Law for deciding all Controverſies ariſing upon Contracts made in Foreign Countries, deeds of Arms and of War out of the Realm, and things that pertain to War within the Realm, and other matters whereof that

Court hath the proper Cognizance. Thus, in the Univerſities, the Courts which are there held for determining Suits to which the Scholars, or Members of the Univerſity are Parties, proceed according to the Rules of the Civil Law.

And in all the Eccleſiaſtical Courts of this Kingdom, altho' the Canon Law is the Foundation of their Proceedings, yet the Canon Law being in a great meaſure founded upon the Civil Law, and ſo interwoven with it in many branches thereof, that there is no underſtanding the Canon Law aright without being very well verſed in the Civil Law; the Knowledge thereof is therefore abſolutely neceſſary for the diſpatch of all Cauſes of Eccleſiaſtical Cognizance. And the Knowledge of the Civil Law not only ſerves to explain the Canon Law; but, by the practice of all Eccleſiaſtical Courts, it is allowed to come in aid and to ſupply the Canon Law, in caſes which are there omitted. And how neceſſary and uſeful the Civil Law is in this reſpect, does plainly appear from the Commentaries of the learned Dr. LYNDWOOD *on the Provincial Conſtitutions of* Canterbury, *and of* JOHN *of* Athon *on the Legatine Conſtitutions, made for the Government and Diſcipline of the Church of* England.

Having mentioned the ſeveral Courts where the Civil Law is allowed to be not only of uſe, but of Force and Authority here in England, *by vertue of the Sanction which it has, not from the* Roman *Emperors, the firſt Authors thereof, but from our own Kings, who have ſince received it as Law in certain matters; I muſt beg leave to conſider how far the Reaſon and Equity thereof may be of ſervice in other Courts where it has not the Force and Authority of Law. And I cannot but think that in all Courts of Equity, where the Rigour of the Common Law is to be mitigated by the Rules of Equity, the Knowledge of the Civil Law muſt be of great ſervice. For, as I have already obſerved, it is there, and no where elſe, that we have the fulleſt and moſt perfect Collection of the general Rules of Natural Reaſon and Equity, applied to all the various Tranſactions and Intercourſes between Man and Man. If therefore one were to judge what is juſt and equitable in a Cauſe depending between Parties, would it not be a great help towards forming a right Judgment therein, to enquire into the general Rules of Equity touching the ſaid matter, which have been laid down and eſtabliſhed by the moſt eminent Lawyers that ever lived in any Age, and to ſee how they have applied them in the like caſes? Can it be imagined, that the Reaſonings of thoſe great Men upon Caſes of the like nature, will not give great light, and contri-*

bute very much towards forming an equitable Deciſion in matters which are to be determined upon the Principles of Equity, and not according to the Rigour of the Law? How far therefore theſe Rules of Equity, which are collected in the Body of the Civil Law, may be uſeful in the High Court of Chancery, and Court of Exchequer, whoſe Proceedings are according to Equity, is what I humbly ſubmit to the great Wiſdom and Experience of the learned Judges, and others who are beſt acquainted with the Practice of thoſe Courts.

And if this Knowledge of the Rules of Reaſon and Equity can be of ſervice in the inferior Courts of Equity, it cannot be leſs uſeful and neceſſary in the Supreme Court of Equity of the Kingdom, which is that of the Lords aſſembled in Parliament. It is to that high Tribunal that the Subjects have recourſe, in order to obtain an equitable Redreſs of the Grievances which they pretend to have had done them by the inferior Courts. And the Lords who compoſe that Auguſt Aſſembly, and who are the Supreme Judges of the Property of the Subject, cannot be ſuppoſed, by reaſon of their high Rank and Quality, and their frequent Avocations upon account of the weightier matters of Government, to apply themſelves to that minute Study of the Law which is expected from other Judges: And therefore ſeeing they have frequent occaſions to act in a Judicial Capacity, it is the more neceſſary that they ſhould be acquainted, at leaſt with the general Rules of Reaſon and Equity, which may help to guide them in the Judgments which they give in matters of private Property that come before them.

And if we conſider the ſaid Body in their Legiſlative Capacity, as having under their direction the arduous Matters of State, and eſpecially ſuch as regard the Intercourſe between us and other Nations; the knowledge of the Law of Nations, which is built upon the Civil Law, is abſolutely neceſſary in Deliberations of this kind, that no Reſolutions may be taken in ſuch matters but what are agreeable to the Principles of the Law of all Nations. And it was upon this account, that, according to the ancient Cuſtom and Uſage of Parliament, the Maſters of Chancery, who formerly were Civilians, were ſummoned, with the Judges of the Realm, to give their aſſiſtance and attendance in the Upper Houſe of Parliament. For as the Judges of the Realm were to give their counſel and advice, when required, in matters which depended on the Laws of the Land; ſo the Maſters of Chancery, who were ſkilled in the Civil Law, and the Law of Nations, were often conſulted in matters which depended on thoſe Laws.

There is likewiſe another Court, where I humbly conceive that the knowledge of the Civil Law may be of ſervice for determining matters that come before it; and that is, the King's Privy Council; which is a Court of Juſtice in ſome reſpects, as it is in others a Council with which His Majeſty is graciouſly pleaſed to adviſe and conſult in matters relating to the Publick. It is a Court of Juſtice, wherein His Majeſty is pleaſed finally to determine ſome matters of private Property; as particularly, all matters of Prizes taken from an Enemy in time of War; in which the Appeal lies from the High Court of Admiralty to the King in Council. And theſe Cauſes are to be judged by no other Law but the Civil and Maritime Law. The Privy Council is likewiſe a Court of Juſtice, for the final determination of all Appeals that come from the Engliſh *Plantations in* America, *from the Iſles of* Jerſey *and* Guernſey, *and other places. In all which Cauſes the Rules of Equity collected in the Body of the Civil Law, muſt be of ſervice to judge of the Equity of the Sentences which are complained of; but more eſpecially in the Cauſes which come from the Iſles of* Jerſey *and* Guernſey, *where the Proceedings in their Courts of Judicature have a great conformity with the Civil Law. And the Cuſtoms of* Normandy, *which are the Law by which thoſe Iſlands are governed, are not only illuſtrated and explained by the Civil Law; but many times the aid of the Civil Law is there invocated as a Rule for deciding Caſes which are not expreſly regulated by their own Cuſtoms, as appears from the Commentaries of* ROUILLE, TERRIEN, *and others, on the ſaid Cuſtoms.*

Having ſeen in what caſes the Civil Law may be uſeful, if not neceſſary, for determining ſome matters that come before the Privy Council as a Court of Juſtice; I muſt beg leave to conſider how far it may be uſeful in the other matters that come under the deliberation of that Auguſt Aſſembly, as a Council to His Majeſty for the Affairs of State. It is by their counſel and advice that His Majeſty ſteers the Helm of the Government. It is there that all Treaties of Peace and Commerce with Foreign States and Potentates are examined and conſidered. As to what regards the internal Policy of the State, for maintaining peace and quiet in the Society, for procuring plenty of all things neceſſary to Human Life, for encouraging Manufactures within our ſelves, and promoting a beneficial Trade with our Neighbours; altho' all theſe things depend in a great meaſure on the Frame and Conſtitution of our own Government, on the Soil and Climate of the Country, on its Situation for Trade, and on *the natural temper and diſpoſition of the Inhabitants; yet in order to improve theſe to the beſt advantage, I cannot but think that it may be of ſervice to know what Laws the* Romans, *the greateſt and moſt flouriſhing Commonwealth that ever was, thought fit to enact for promoting Trade and Manufactures within themſelves, and for the Government of their Colonies in Foreign Parts, to preſerve them in a due ſubjection, and to make them uſeful and ſubſervient to the ſeat of the Empire from which they derived their Origin, and to which they owed their Protection; all which Laws are collected in the Body of the Civil Law, and may be uſefully applied by us on many occaſions.*

But as to what concerns the outward Policy of the State, that is, the Intercourſe which it muſt have with other States and Princes, I humbly conceive that the knowledge of the Civil Law muſt be of ſingular uſe in all Tranſactions of that kind. For the Civil Law being in ſo great eſteem and veneration among all other Nations, that they make it the Rule and Standard of Equity in all Caſes which are not expreſly provided for by their own particular Laws and Cuſtoms, what more effectual Arguments can be uſed to obtain Juſtice from them in an amicable way, than thoſe which are founded on the Principles and Maxims of the Civil Law? It is arguing with them upon their own Principles, from Maxims of their own Law, and the Law of all Nations, which is the moſt effectual way to convince them by Reaſon. And it was in conſideration of this, that our Anceſtors, in their great Wiſdom, thought proper to imploy generally in all Negotiations with Foreign Courts, and in Treaties of Peace and Commerce, Perſons who were well ſkilled in the Civil Law, and Law of Nations. And although it was neceſſary on ſome occaſions, and more particularly at ſolemn Congreſſes for treating of Peace, for the greater luſtre and ſplendor of the Embaſſy, to imploy perſons of the firſt Rank and Quality; yet, to eaſe them of the great weight of Affairs, they were always accompanied by ſome perſon of an inferior Rank, who being verſed in the Study of the Civil Law, and Law of Nations, might be aiding and aſſiſting in the Conferences which were to be held for ſettling and adjuſting the reſpective intereſts of the ſeveral Princes and States concerned. And this we ſee is the conſtant practice of all other Nations at this day, who in their Embaſſies for Treaties of Peace imploy always at leaſt one perſon who has been bred to the Law; although this is the leſs neceſſary in Foreign Countries, where all the Nobility, in their Studies at the Univerſity go through a regular Courſe of the Study of the Civil Law, and Law of Nations;

by which means they lay ſuch a Foundation, as to be able afterwards from the Principles thereof to aſſert and defend the Intereſts of their Country, whenever their Prince is pleaſed to imploy them in Affairs of that kind.

In matters of Intercourſe between one Nation and another, we have no other Law to go by but the Law of Nations. And this Law of Nations is chiefly grounded on the Rules and Maxims of Equity which are laid down in the Civil Law, and which have been received by moſt Nations as the Rules of Juſtice between one Nation and another. So that to underſtand the Law of Nations thoroughly, and to be able to comprehend the reaſoning of the Authors who treat thereof, it is abſolutely neceſſary to have ſome knowledge of the Civil Law, as one may eaſily perceive by looking into GROTIUS, PUFFENDORF, *and other Authors who have wrote on that ſubject.*

Among other advantages which may be reaped from the Study of the Civil Law, I muſt not omit to take notice how ſerviceable it may be in the Government of the Engliſh *Plantations. For if we conſider them with reſpect to the Trade and Commerce which they drive in* Negroes, *the Civil Law furniſhes them with an ample detail of Rules for regulating that Commerce, both as to the buying and ſelling of Slaves, as a Merchandize, the property which their Maſters have in them, and the redreſs which the Slaves ought to have in caſe of any cruel or barbarous uſage from their Maſters. If we view the ſaid Colonies with regard to their own Government within themſelves; the Civil Law ſupplies us with many Preſidents of excellent Laws made by the* Roman *Emperors, for ſecuring the Inhabitants of their Colonies againſt the Oppreſſions and Extortions of their Governors. If we conſider the ſaid Colonies with reſpect to their Settlements, and the Intercourſes which they are obliged to have with the neighbouring Nations, it is by the Principles of the Civil Law, and the Law of Nations, that they muſt aſſert and maintain their Rights and Privileges.*

And I muſt obſerve here in relation to the Engliſh *Colonies upon the Continent of* America, *that there is a very great affinity between them and the Colonies of the* Spaniards, *and other Nations, who have made Settlements among the* Indians *in thoſe parts. For the Grants made by our Kings of Tracts of Land in that Country, for the planting of Colonies, and making Settlements therein, appear to have been made in imitation of the Grants made by the Kings of* Spain, *to the Proprietors of Lands in the* Spaniſh *Colonies, upon the very ſame conditions, and in* *conſideration of the ſame Services to be performed by the Grantees. So that the Government of the* Spaniſh *Colonies, and the Rights of the Proprietors of Lands therein, depending chiefly on the Rules of the Civil and Feudal Law; as may be ſeen by the learned Treatiſe of* SOLORZANUS, De Indiarum Jure, *the Knowledge of the ſaid Laws muſt be of ſervice likewiſe for determining any Controverſies that may ariſe touching the Duties, or Forfeitures, of the Proprietors of Lands in our* Engliſh *Colonies.*

I have made theſe few Remarks, only to ſhew in what particulars the Civil Law is, and may be, of uſe here in England, *and how we may reap the ſame advantages from it which other Nations do, without any danger to our own Municipal Laws. Our Anceſtors were ſo ſenſible of the great importance thereof, both in private and publick Affairs, that, beſides the publick Profeſſors eſtabliſhed in the Univerſities for teaching this Science, and who have Salaries allotted them by the beneficence of our Princes, many of the private Founders of Colleges have in their Endowments ſet apart particular Fellowſhips, as an Encouragement to perſons to ſtudy it.*

Having thus ſhewn the neceſſity and uſefulneſs of the Study of the Civil Law in this Kingdom, I ſhall in the next place give an account of the chief motive which induced me to undertake the Tranſlation of this Work, thereby to render it more familiar to every Engliſh *Reader. I was ſurprized to find, in a Country where all Arts and Sciences do flouriſh and meet with the greateſt encouragement, that one of the nobleſt of the human Sciences, and which contributes the moſt to cultivate the Mind, and improve the Reaſon of Man, as that of the Civil Law does, ſhould lie ſo much diſregarded, and meet with ſo little encouragement. And I obſerved, that the little regard which has of late years been ſhewn in this Kingdom to the Study thereof, has been in a great meaſure owing to the want of a due knowledge of it, and to the being altogether unacquainted with the beauties and excellencies thereof; which are only known to a few Gentlemen who have devoted themſelves to that Profeſſion; others who are perfect Strangers to that Law being under a falſe perſuaſion, that it contains nothing but what is foreign to our Laws and Cuſtoms. Whereas when they come to know, that the Body of the Civil Law, beſides the Laws peculiar to the Commonwealth of* Rome *which are there collected, contains likewiſe the general Prin-*

ciples of Natural Reaſon and Equity, which are the Fundamental Rules of Juſtice in all Engagements and Tranſactions between Man and Man, and which are to be found no where elſe in ſuch a large extent as in the Body of the Civil Law, they will ſoon be ſenſible of the infinite value of ſo great a Treaſure.

The excellency therefore of this Work is, that the Author has, with a great deal of labour and pains, reduced into a narrower compaſs all thoſe general Principles of Natural Reaſon and Equity, and applied them to the particular matters to which they belong, digeſting them into a proper method and order for the eaſe of the Reader. So that perſons who have neither opportunity, nor leiſure, to read over the whole Body of the Civil Law, may find here the marrow and ſubſtance of it, which will be ſufficient for the generality of Readers. But as for thoſe who intend to make the Civil and Canon Law their Profeſſion, although the reading of this Book will be a great help and eaſe to them in the proſecution of their Studies; yet I would by no means adviſe them to reſt ſatisfied with this Collection of Rules out of the Civil Law, but to read over diligently and carefully in the Original, all the Books of the Body of the Civil Law, the Inſtitutes, *the* Pandects, *the* Code, *and the* Novels; *without which no man can attain to a perfect knowledge either of the Civil or Canon Law. For, as I have already mentioned, the Civil Law is the ground-work upon which the Canon Law is built, and without the knowledge of it no man can pretend to be a good Canoniſt.*

I muſt here caution the Engliſh *Reader, that he is not to expect to find barely in this Collection thoſe general Rules and Maxims of Natural Reaſon and Equity which I have before mentioned, and which are received as Law in all Countries. He will beſides meet with many particular Rules of the Civil Law, which are received as Law in* France, *and which are different from the Law and Uſage of* England. *For the Author of this Collection having propoſed to himſelf to extract out of the Body of the Civil Law all the Rules thereof which were agreeable to the Law of* France, *or which might any way ſerve to illuſtrate the ſame; and my intention being to give the Reader a true and perfect Tranſlation of the whole Work, I did not think my ſelf at liberty, either to alter, or to leave out any part thereof. And even as to thoſe Rules of the Civil Law which do not exactly tally with the*

Laws and Uſage of this Country; altho' they are not to be looked upon as Law with us, yet it may be of ſervice to us to know what were the ſentiments of the greateſt Lawyers that flouriſhed under the Roman *Empire in ſuch matters wherein we happen to differ from them; becauſe it is chiefly from the knowledge of the Laws of other States that we can learn to ſupply what is wanting, or reform what is amiſs in our own.*

Neither is it to be expected, that in this Tranſlation I ſhould make ſo large a digreſſion, as to point out all the minute differences between the Rules of the Civil Law collected in this Book, and the Laws and Uſage in England; *which would be to exceed too far the bounds of a Tranſlation, and ſwell the Work into too great a Bulk. I have therefore thought it moſt adviſable, to confine the Remarks which I have added, to the moſt material differences that occur between the Civil Law and ours, and more particularly, in the matters which come under the Cognizance of our Courts in* England, *which have the Civil and Canon Law for their Rule and Guide. Theſe Remarks I have inſerted under the reſpective Titles and Sections to which they belong; and in order to preſerve the Original intire, I have diſtinguiſhed them from the Remarks made by the Author, by inſerting them between two Crotchets. I have likewiſe thought proper, in the ſeveral Remarks which I have added, to quote the Authorities on which they are founded; which will add the greater weight to the Remarks themſelves, and ſerve as a guide to the Reader where to find the ſeveral matters there mentioned, more fully explained in our* Engliſh *Law Books.*

In this Tranſlation I have ſet down at the end of each Article the Latin *Texts of Law, in the very words as they are tranſcribed out of the Books of the Civil Law; it being no ways neceſſary to put them into* Engliſh, *becauſe the ſubſtance of them is contained in the* Engliſh *Article, to which the* Latin *Texts are ſubjoined, as the Authorities in Law upon which the* Engliſh *Article is grounded. And beſides, the preſerving the* Latin *Texts of Law in their Original, will have this advantage, that it will give the Reader who has not had an opportunity of looking into the Body of the Civil Law, a taſte of the beauty and elegance of the Style of the* Roman *Lawyers; who expreſs themſelves with that clearneſs and perſpicuity, and yet with that brevity and conciſeneſs, that the Reader is ſurprized to find ſo much matter couched in* *ſo few words, and is equally charmed with the ſtrength of their Reaſoning, and the beauty of their Expreſſion. For there is no* Roman *Author whatſoever of greater Authority for the purity of the* Roman *Language, than the Books of the* Pandects *of the Civil Law, the Authors whereof lived and wrote in the times that the* Roman *Language was in its greateſt perfection.*

THE

THE CIVIL LAW IN ITS NATURAL ORDER.

PRELIMINARY BOOK.

Which treats of the Rules of Law in general, Perſons, and Things.

The ſubject matter of this Book.

We have given the name of *Preliminary* to this Book, becauſe it contains three kinds of matters, which being common to all the others treated of in this Work, and neceſſary for underſtanding them aright, ought to be placed firſt in order. And indeed, the matters contain'd in this Book, are, as it were, the firſt Elements of the Law; for before we deſcend to a particular enquiry into the Rules of the Law, it is neceſſary, in the firſt place, to know in general, the nature and ſeveral kinds of theſe Laws, and the ways of underſtanding and applying them juſtly. And this ſhall be the ſubject matter of the firſt Title of this Book.

And becauſe in the examination of the ſeveral matters treated of in the Body of the Law, and in particular Laws, we muſt always conſider the perſons whom the ſaid matters and Laws relate to. And becauſe there are in all perſons certain qualities, with reſpect to which they are conſidered and diſtinguiſhed by the Laws, and which have a particular relation to all the matters treated of in the Body of the Law; theſe qualities, and theſe diſtinctions of perſons, ſhall be conſider'd in the ſecond Title of this Book.

And the third Title ſhall contain the ways in which the Laws conſider and diſtinguiſh the ſeveral kinds of things, by the qualities which fit them for the uſe

uſe and commerce of perſons; and according as theſe uſes, and this commerce of things enter into the order eſtabliſh'd by the Laws.

TITLE I.

Of the Rules of Law in General.

The matters treated of in this Title. THE Rules which ſhall be explain'd under this Title, concern in general the nature, uſe, and interpretation of Laws. And ſeeing theſe Rules are common to all the matters contain'd in the Body of the Law, and are of conſtant uſe, I would adviſe the reader not to content himſelf with a bare and ſimple reading them over, but to peruſe them diligently from time to time, and to have recourſe to them always upon occaſion. It will not be improper for him to read likewiſe at the ſame time, the xi^th^ and xii^th^ chapters of the Treatiſe of Laws.

SECTION I.

Of the ſeveral ſorts of Rules, and of their nature.

Of the ideas form'd by the words, Laws, *and* Rules. WE underſtand commonly by theſe words *Laws*, and *Rules*, that which is juſt, that which is commanded, that which is regulated. But whereas the Laws ought to be written, to the end that the writing may fix the ſenſe of the Law, and determine the mind to conceive a juſt idea of that which is eſtabliſh'd by the Law, and that it be not left free for every one to frame the Law as he himſelf is pleas'd to underſtand it; we may therefore diſtinguiſh two ideas which the words *Law*, and *Rule*, form in our minds. One is the idea of what we conceive to be juſt, without making any reflection on the terms of the Law: The other is the idea of the terms of the Law; and according to this ſecond idea, we give the name of *Rule*, or *Law*, to the *expreſſion of the Lawgiver*.

We ſhall always uſe the word *Laws*, and that of *Rules*, without any diſtinction, both in the one and the other of the two ſenſes above-mentioned, not only in this Preliminary Book, but likewiſe in the following part of the Work, as we ſhall have occaſion to mention them. For there are many written Laws, ſuch as are all arbitrary, or poſitive Laws; and there are many natural Rules of Equity, which are not ſet down in writing.

It is not neceſſary, after what has been ſaid of Laws, and Rules, in the Treatiſe of Laws, to define anew in this Title, what a Law is, and what a Rule: it will be ſufficient here to give an idea of the Rules of Law, in the ſenſe which comprehends the written Rules; becauſe it is in the knowledge of all the written Rules, that the whole Science, and Study of the Law does conſiſt.

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18. *Several effects of Laws.*
19. *Laws reſtrain whatever is done in fraud of them.*
20. *Laws annul or reſtrain what is done contrary to their prohibition.*
21. *Laws are general, and not made for one caſe, or one perſon.*
22. *Sequel of the foregoing Rule.*
23. *Equity is the univerſal Law.*

I.

THE Rules of Law are ſhort and clear expreſſions of that which Juſtice requires, in the reſpective caſes. And each Rule hath its peculiar uſe for thoſe whom its proviſion may concern. *1. Definition of Rules.*

Thus, for example, it may happen, through ſeveral accidents, that the Buyer is diſpoſſeſs'd of what he has bought, or moleſted in his Poſſeſſion, by thoſe who pretend to be Owners of it, or to have ſome other right to it: and the Juſtice that is common to all theſe kinds of accidents, which requires the Seller to put a ſtop to all evictions, and other troubles, is contain'd in the expreſſion of this Rule, *That every Seller ought to warrant that which he has ſold.*[a]

[a] Regula eſt, quæ rem quæ eſt breviter enarrat. *l.* 1. *ff. de reg. jur.* ex jure quod ex regula fiat. Per regulam igitur brevis rerum narratio traditur. *d. l.* Rei appellatione & cauſæ, & jura continentur. *l.* 23. *ff. de verb. ſign.*

II.

2. Two ſorts of Rules, Natural, and Arbitrary.

Laws, or Rules, are of two ſorts; one is of thoſe which flow from the Law of Nature and Equity; and the other is of ſuch as derive their origine from the poſitive Law, which are otherwiſe called human and arbitrary Laws, becauſe they have been eſtabliſh'd by Men[b]. Thus, it is a Rule of the Law of Nature, that a Donation may be revoked, becauſe of the ingratitude of the Donee: and it is a Rule of the poſitive Law, that Donations which are to have their effect in the life-time of the Donor and Donee, ought to be inrolled.[b]

[b] Omnes populi, qui legibus & moribus reguntur, partim ſuo proprio, partim communi omnium hominum jure utuntur. Nam quod quiſque populus ipſe ſibi jus conſtituit; id ipſius proprium civitatis eſt. *l.* 9. *ff. de juſt. & jur.* Quod verò naturalis ratio inter omnes homines conſtituit, id apud omnes peræquè cuſtoditur, *d. l.* 9. jus pluribus modis dicitur. Uno modò cùm id, quod ſemper æquum ac bonum eſt, jus dicitur: ut jus naturale. Altero modo, quod omnibus, aut pluribus in quæque civitate utile eſt, ut eſt jus Civile, nec minus jus rectè appellatur in civitate noſtra, jus honorarium. *l.* 11. *ff. de juſt. & jur.* See the xith Chap. of the Treatiſe of Laws.

III.

3. Which are the Natural Rules.

The Rules of the Law of Nature, are thoſe which God himſelf hath eſtabliſh'd, and which he communicates to Mankind by the Light of Reaſon. Theſe are the Laws which have in them a Juſtice that cannot be changed, which is the ſame at all times, and in all places; and whether they are ſet down in writing or not, no human Authority can aboliſh them, or make any alteration in them. Thus, the Rule which obliges the Depoſitary to preſerve, and to reſtore the thing committed to his keeping; that which obliges one to take care of the thing he has borrowed; and other Rules of this kind, are all of them natural and immutable Rules, which are obſerv'd in all places[c].

[c] Naturalia jura, quæ apud omnes gentes peræquè obſervantur, divina quadam providentia conſtituta, ſemper firma, atque immutabilia permanent. §. 11. *inſt. de jur. nat. gent. & civ.* Quod naturalis ratio inter omnes homines conſtituit. *l.* 9. *ff. de juſt. & jur.* id quod ſemper æquum ac bonum eſt, jus dicitur, ut jus naturale. *l.* 11. *eod.* Civilis ratio naturalia jura corrumpere non poteſt. *l.* 8. *ff. de cap. min.*

IV.

4. Which are the Arbitrary Rules.

Arbitrary Rules are all thoſe that have been eſtabliſhed by Men, and which are ſuch, that without offending natural Equity, they may either preſcribe one thing, or a thing quite different. Thus, for inſtance, it was free for Men to eſtabliſh, or not to eſtabliſh the uſe of Fiefs. Thus, a longer or ſhorter term of years might have been fixed for Preſcriptions; and a greater or leſſer number of Witneſſes to a Teſtament. And this diverſity, which is not fixed by Nature, makes theſe Laws to derive their Authority from the arbitrary Regulation, made by the Lawgiver who has eſtabliſh'd them; and conſequently renders them liable to changes.[d]

[d] Ea verò quæ ipſa ſibi quæque civitas conſtituit, ſæpe mutari ſolent. §. 11. *inſt. de jur. nat. gent. & civ.*

V.

5. Another diviſion of Rules.

The Rules of Law, whether natural or arbitrary, are of three kinds. Some of them are general, which agree to all matters; others are common to ſeveral matters, but not to all; and many are peculiar only to one matter, and have no relation to others. For example, theſe Rules of natural Equity, *That we muſt do wrong to no Man*, *That we ought to render to every one what is his due*, are general, and belong to all ſorts of matters. This Rule, *That Agreements made between Parties, are to them in the place of Laws*, is common to ſeveral matters; for it agrees to all kinds of Contracts, Covenants, or Pacts; but it has no relation to Teſtaments, nor to ſeveral other matters. And the Rule for making void a Sale, in which any one of the parties is damag'd more than half of the juſt price, is a Rule peculiar only to the Contract of Sale[e]. So that in the uſe and application of the Rules of Law, it is neceſſary to diſcern in every one, its Limits and its Extent.

[e] *Example of general Rules.* Juris præcepta ſunt hæc honeſtè vivere, alterum non lædere, ſuum

cuique tribuere. *l.* 10. §. 1. *ff. de juſt. & jure.* §. 3. *inſt. eod. Example of rules common to many matters,* Contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depoſ. As to particular Rules, each Title hath its own.* v. l. 2. Cod. de reſc. vend.

VI.

6. Two ways of abuſing the Rules. All theſe Rules ceaſe to have their effect, not only when they are drawn beyond their limits, and apply'd to matters to which they have no manner of relation, but likewiſe when in the application of them to the matters to which they belong, they are either falſly or wrongfully apply'd, contrary to the true intent of them. Thus, the Rule for making void all Sales, in which any one of the parties is damag'd above the half of the juſt price, would be ill applied to a Sale made by way of accommodation in a Tranſaction[f].

[f] Simul cùm in aliquo vitiata eſt [regula] perdit officium ſuum. *l.* 1. *in f. ff. de reg. jur.*

VII.

7. Exceptions are Rules. Exceptions are Rules which limit the extent of other Rules; and they preſcribe contrary to the general Rule, out of a particular view, which renders either juſt, or unjuſt; that which the general Rule, being underſtood without any manner of exception, would on the contrary have render'd either unjuſt, or juſt. Thus, for example, the general Rule, That we may make all manner of Contracts, is limited by the Rule which forbids thoſe that are contrary to Equity and good Manners. Thus, the Prohibition to alienate things that are ſacred, is limited by the Rule which allows them to be ſold for neceſſary cauſes, certain formalities being obſerv'd in the Sale[g].

[g] Quid tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, ſervare, *l.* 1. *ff. de pact.*

Omnia quæ contra bonos mores, vel in pactum, vel in ſtipulationem deducuntur, nullius momenti ſunt. *l.* 4. *C. de inut. ſtip. l.* 7. §. 7. *ff. de pact. l.* 6. *de Cod. eod.* Sancimus nemini licere ſanctiſſima atque arcana vaſa, vel veſtes, cæteraque donaria, quæ ad divinam religionem neceſſaria ſunt—— vel ad venditionem, vel hypothecam, vel pignus trahere—— excepta cauſa captivitatis, & famis. *l.* 21. *C. de Sacro-ſanct. Eccl. v. l.* 14. *& auth. hoc jus eod.*

VIII.

8. Two ſorts of Exceptions. Exceptions, as well as Rules, are of two kinds. Some of them are of the Law of Nature, and others of the poſitive Law: as appears by the Examples in the foregoing Article, and by all the other Exceptions, every one of which may be reduced to one or other of theſe two kinds.[h]

[h] This is a conſequence of the preceding and ſecond Articles of this Section.

IX.

9. Laws ought to be known. All Laws ought either to be known, or at leaſt laid open to the knowledge of all the world, in ſuch a manner, that no one may with impunity offend againſt them, under pretence of ignorance. Thus the natural Rules being Truths that are unchangeable, the knowledge of which is eſſential to Reaſon, no body can pretend ignorance of them, ſince they cannot ſay that they are deſtitute of common Reaſon, which makes theſe Rules known. But arbitrary Laws have not their effect, till the Lawgiver has done all that is poſſible to make them known; and this is done by the ways that are commonly practiſed for the publication of theſe kinds of Laws; and after they are promulged in due form, it is preſumed that they are known to every body, and they oblige as well thoſe who pretend ignorance of them, as thoſe who know them[i].

[i] Leges ſacratiſſimæ, quæ conſtringunt hominum vitas, intelligi ab omnibus debent. Ut univerſi præſcripto, earum manifeſtiùs cognito, vel inhibita declinent, vel permiſſa ſectentur. *l.* 9. *Cod. de legib.*

Conſtitutiones Principum nec ignorare quemquam, nec diſſimulare, permittimus. *l.* 12. *Cod. de jur. & fact. ign.*

Omnes verò populi legibus tam à nobis promulgatis, quàm compoſitis reguntur. §. 1. *in fin. in proœm. inſt.*

Nec in ea re ruſticitati venia præbeatur, *cùm naturali ratione* honor hujuſmodi perſonis *debeatur. l.* 2. *C. de in jus voc.*

X.

10. Two ſorts of Arbitrary Laws, Written Laws, and Cuſtoms. Arbitrary Laws are of two ſorts. The one is of thoſe that have been originally enacted, written, and promulged, by thoſe that had the Legiſlative Authority; and ſuch are, in *France*, the Edicts and Ordinances of the Kings. The other, is of ſuch Laws, of whoſe Origin and firſt Eſtabliſhment there is nothing appears, but which are received by univerſal approbation, and by the conſtant uſe that the people has made of them time out of mind; and theſe are the Laws, or Rules, to which we give the name of Cuſtoms[k].

[k] Conſtat autem jus noſtrum quo utimur, *aut ſcripto, aut ſine ſcripto,* ut apud Græcos, *τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι,* i. e. *legum ſunt ſcriptæ aliæ, aliæ non ſcriptæ.* Scriptum autem jus eſt lex, plebiſcitum, ſenatuſconſultum, Principum placita,

magiſtratuum edicta, reſponſa prudentum. §. 3. *inſt. de jur. nat. gent. & civ.*

Sine ſcripto jus venit, quod uſus approbavit. Nam diuturni mores, conſenſu utentium comprobati, legem imitantur. §. 9. *eod.*

XI.

11. The foundation of the Authority of Customs. Cuſtoms derive their Authority from the univerſal Conſent of the People who has receiv'd them, when it is the People that has the Power of making Laws, as in Commonwealths. But in Kingdoms that are ſubject to a Sovereign Prince, no Cuſtoms receiv'd by the People come to have the force of Laws, but by the Authority of the Prince. Thus, in *France*, the Kings have cauſed to be fixed, and reduced into writing, and eſtabliſhed into Laws, all the Cuſtoms, reſerving to the reſpective Provinces, the Laws which they have, either by the ancient Conſent of the Inhabitants of the ſaid Provinces, or of the Princes who governed them[l].

[l] Id cuſtodiri oportet, quod moribus & conſuetudine inductum eſt. *l.* 32. *ff. de legib.* inveterata conſuetudo pro lege, non immeritò, cuſtoditur. Nam cùm ipſæ leges, nulla alia ex cauſa nos teneant, quàm quòd judicio populi receptæ ſunt: meritò & ea quæ ſine ullo ſcripto populus probavit tenebunt omnes. Nam quid intereſt ſuffragio populus voluntatem ſuam declaret, an rebus ipſis, & factis? *d. l.* 32. §. 1. *ff. de legib.* tam conditor, quàm interpres legum ſolus Imperator juſtè exiſtimabitur: nihil hac lege derogante veteris juris conditoribus, quia & eis hoc majeſtas imperialis permiſit. *l. ult. in fin. cod. de leg. & conſt. prin.* Communis reipublicæ ſponſio. *l.* 1. *& l.* 2. *ff. de legib.*

Although theſe laſt words be ſpoken of Laws, and not of Cuſtoms, yet they agree to Cuſtoms as much, or rather more, than to Laws. See the Ordinance of *Charles* VII. of the year 1453, Art. 125. and of *Lewis* XII. of the year 1510. Art. 49. for reducing the Cuſtoms into writing.

XII.

12. Natural Laws regulate what is paſt, and what is to come. The Laws of Nature being highly juſt, and their Authority always the ſame, they determine equally all that is to come, and all that is paſt, which remains undecided[m].

[m] Sed naturalia quidem jura quæ apud omnes gentes peræquè obſervantur, divina quadam providentia conſtituta, ſemper firma, atque immutabilia permanent. §. 11. *inſt. de jur. nat. gent. & civ.* id quod ſemper æquum ac bonum eſt. *l.* 11. *ff. de juſtit. & jur.*

XIII.

13. Arbitrary Laws regulate only what is to come. Altho' the Juſtice of arbitrary Laws is founded upon the publick Good, and upon the Equity of the Motives which give riſe to them; yet ſeeing they derive their Authority only from the Power of the Lawgiver, who determines us to what he preſcribes; and ſince they have not their effect, till after they have been made known to the people by publication, they regulate only what is to come, and have nothing to do with what is paſt[n].

[n] Leges & conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari. *l.* 7. *C. de legib.*

XIV.

14. The effect of new Laws, with reſpect to what is paſt. The Affairs which happen to be depending, and undecided at the time when new Laws are enacted, are judged by the tenor of the preceding Laws; unleſs, for ſome particular reaſons, the new Laws mark expreſly, that they ſhall take place even in things that are paſt. Or that without any ſuch expreſſion, the new Laws be ſuch as ought to ſerve for a Rule to what is paſt; as if the new Laws ſerve only to revive a former Law, or a Rule of natural Equity, which had been alter'd by ſome abuſe; or that they regulate Queſtions, for the deciding of which there was no Law, nor any Cuſtom in being. Thus, for inſtance, when the King ordained that the price of Offices ſhould be diſtributed according to the order of Mortgages, that Law ſerved as a Rule for the Cauſes that were undecided in the Provinces, where they had no Cuſtom to the contrary, to ſerve them as a Rule[o].

[o] Leges & conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari: niſi nominatim & de præterito tempore, & adhuc pendentibus negotiis cautum ſit. *l.* 7. *C. de legib. & conſt. princ. l.* 7. *C. de nat. liber.* Sancimus nemini licere ſacratiſſima atque arcana vaſa, vel veſtes, cæteraque donaria, quæ ad divinam religionem neceſſaria ſunt, cùm etiam veteres leges ea quæ juris divini ſunt, humanis nexibus non illigari ſanxerint, vel ad venditionem, vel hypothecam, vel pignus trahere. Sed ab his, qui hæc ſuſcipere auſi fuerint, modis omnibus vindicari. *Hoc obtinente, non ſolùm in futuris negotiis, ſed etiam judiciis pendentibus.* l. 21. C. de Sacro-ſanct. Eccl. l. 23. in f. eod.

Quicumque adminiſtrationem, in hac florentiſſima urbe gerunt, emere quidem mobiles res, vel immobiles, vel domos extruere, non aliter poſſunt, niſi ſpecialem noſtri numinis, hoc eis permittentem divinam reſcriptionem meruerint— *Quæ etiam ad præterita negotia referri ſancimus.* Niſi tranſactionibus vel judicationibus ſopita ſint. *l. un. C. de contr. jud.* Quoniam inter alias Captiones præcipuè commiſſoriæ pignorum, legis creſcit aſperitas —— Si quis igitur tali contractu laborat, hac ſanctione reſpiret. *Quæ cum præteritis præſentia quoque repellit,* & futura prohibet. *l. ult. C. de pact. pign. & de lege com. in pr.*

XV.

15. Another effect of new As new Laws regulate what is to come, ſo they may, as occaſion requires, change

Laws, as to what is paſt. change the conſequences that former Laws would have had. But this is always without prejudice to the right that any perſons had already acquired. Thus, for example, before the Ordinance of *Orleans*, one might have made Subſtitutions in ſeveral degrees, without any bounds, and that Ordinance did limit the Subſtitutions that ſhould be made thereafter, to two degrees beſides the Inſtitution. But whereas that Ordinance did not for the future hinder the effect of the Subſtitutions which had been made before, the Ordinance of *Moulins* did reduce to the fourth degree, beſides the Inſtitution, the Subſtitutions which had been made before the Ordinance of *Orleans*. And at the ſame time, it excepted the Subſtitutions of which the right was already fallen and acquired, although it was beyond the fourth degree[p].

[p] Futuris certum eſt dare formam negotiis. *l.* 7. *C. de legib.* See the Ordinance of *Orleans*, Art. 59. and that of *Moulins*, Art. 57.

XVI.

16. Of the time when new Laws begin to be in force. Arbitrary Laws begin to have their effect for the time to come, either from the day of their publication, or only after the delay which they appoint. Thus, ſome Laws that make changes which would be attended with great inconveniences, were they ſuddenly put in execution; ſuch as the Prohibition of ſome Commerce, the Augmentation, or Diminution of the value of the current Coin, and the like, leave for ſome time things in the ſame condition in which they were, and fix the time at which they ſhall begin to be put in execution[q].

[q] This is a conſequence of the foregoing Rules, and a natural effect of the authority and prudence of the Lawgiver.

XVII.

17. Two ways by which Laws are repealed. Arbitrary Laws, whether they are eſtabliſh'd by the Authority of a Lawgiver, or by Cuſtom, may be aboliſhed or changed two ways; either by an expreſs Law, which repeals them, or makes ſome alteration in them; or by a long diſuſe, which changes, or aboliſhes them[r].

[r] Mutari ſolent, vel tacito conſenſu populi, vel alia poſtea lege lata. §. 11. *inſt. de jur. nat. gent. & civ.* rectiſſimè etiam illud receptum eſt, ut leges non ſolùm ſuffragio legiſlatoris, ſed etiam tacito conſenſu omnium per deſuetudinem abrogentur. *l.* 32. *inf. ff. de legib.*

XVIII.

18. Several effects of Laws. The Uſe and Authority of all Laws, whether natural or arbitrary, conſiſts in commanding, forbidding, permitting, and puniſhing[s].

[s] Legis virtus hæc eſt, imperare, vetare, permittere, punire. *l.* 7. *ff. de legib.*

XIX.

19. Laws reſtrain whatever is done in fraud of them. Laws reſtrain and puniſh, not only what is evidently contrary to the ſenſe of their words, but likewiſe every thing that is directly, or indirectly againſt their intent, although it ſeem to have nothing contrary to the terms of the Law, and alſo every thing that is done in fraud of the Law, and to elude it[t]. Thus, the Laws which forbid the giving or bequeathing any thing to certain perſons, annul the Donations or Bequeſts made to other perſons interpoſed, that they may tranſmit the Bounty to thoſe who are incapable of receiving it in their own names.

[t] Non dubium eſt in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem. Nec pœnas inſertas legibus evitabit, qui ſe contra juris ſententiam, ſæva prærogativa verborum, fraudulenter excuſat. *l.* 5. *C. de legib.* Contra legem facit, qui id facit, quod lex prohibet; in fraudem verò, qui ſalvis verbis legis, ſententiam ejus circumvenit. *l.* 29. *ff. eod.* fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit, & quod diſtat *ῥητὸν ἀπὸ διανοίας* *i. e.* dictum à ſententia, hoc diſtat fraus, ab eo quod contra legem fit. *l.* 30. *eod.*

XX.

20. Laws annul or reſtrain what is done contrary to their Prohibition. If a Law forbids, either in general to all perſons, or in particular to ſome ſort of perſons, certain Contracts, or a certain Commerce, or contains other Prohibitions, of what kind ſoever; whatever ſhall be done contrary to theſe Prohibitions, with all its conſequences, ſhall either be annulled, or reſtrained, according to the quality of the Prohibition, and that of the Contravention; and that even although the Law make no mention of the nullity, and that it leave the other Penalties undetermined[u].

[u] Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt, lege contrahere prohibente. Quod ad omnes etiam legum interpretationes, tam veteres, quàm novellas trahi generaliter imperamus. Ut legiſlatori, quod fieri non vult, tantùm prohibuiſſe ſufficiat. Cæteraque quaſi expreſſà, ex legis liceat voluntate colligere. Hoc eſt, ut ea quæ lege fieri prohibentur, ſi fuerint facta, non ſolùm inutilia, ſed pro infectis etiam habeantur. Licet legiſlator fieri prohibuerit tantùm, nec ſpecialiter dixerit,

inutile eſſe debere, quod factum eſt. Sed & ſi quid fuerit ſubſecutum, ex eo, vel ob id, quod interdicente lege factum eſt, illud quoque caſſum, atque inutile eſſe præcipimus. *l. 5. C. de legib. The Law would be very imperfect, if it ſhould not annul what is done contrary to its Prohibitions, and if it ſhould let the contravention of them go unpuniſhed.* Minus quàm perfecta lex eſt, quæ vetat aliquid fieri, & ſi factum ſit, non reſcindit. *Ulp. T. 1. §. 2. v. l. 63. ff. de rit. nup.*

XXI.

21. *Laws are general, and not made for one caſe, or one perſon.* Laws are never made for one particular perſon, nor limited to one ſingle caſe: but they are made for the common Good; and preſcribe in general, what is moſt uſeful in the ordinary Occurrences of human Life[x].

[x] Lex eſt commune præceptum. *l. 1. ff. de legib.* Jura non in ſingulas perſonas, ſed generaliter conſtituuntur. *l. 8. ff. eod.*

Jura conſtitui oportet, ut dixit Theophraſtus, in his quæ *ἐπὶ τὸ πλεῖστον, i. e.* ut plurimùm accidunt, non quæ *ἐκ παραλόγου, i. e.* ex inopinato. *l. 3. & ſeq. ff. eod.* Ea quæ communiter omnibus proſunt, iis quæ ſpecialiter quibuſdam utilia ſunt, præponimus. *Novel. 39. cap. 1.* See the following Article.

XXII.

22. *Sequel of the foregoing Rule.* Seeing the Laws take in, in general, all the caſes to which their intention may be applied, they do not expreſs in particular the ſeveral caſes to which they may have relation. For this particular enumeration, as it is impoſſible, ſo it would be to no purpoſe. But they comprehend in general all the caſes to which their intention may ſerve as a Rule[y].

[y] Neque leges, neque Senatuſconſulta ita ſcribi poſſunt, ut omnes caſus, qui quandoque inciderint, comprehendantur: ſed ſufficit, ea quæ plerumque accidunt, contineri. *l. 10. ff. de legib.* non poſſunt omnes articuli ſigillatim aut legibus, aut Senatuſconſultis comprehendi: ſed cùm in aliqua cauſa ſententia eorum manifeſta eſt, is qui juriſdictioni præeſt, ad ſimilia procedere, atque ita jus dicere debet. *l. 12. eod.* ſemper quaſi hoc legibus ineſſe credi oportet, ut ad eas quoque perſonas, & ad eas res pertinerent, quæ quandoque ſimiles erunt. *l. 27. eod. v. l. 12. C. eod. l. 32. ff. ad legem Aquiliam.*

XXIII.

23. *Equity is the univerſal Law.* If any caſe could happen that were not regulated by ſome expreſs and written Law, it would have for a Law the natural Principles of Equity, which is the univerſal Law that extends to every thing[z].

[z] Hæc æquitas ſuggerit, etſi jure deficiamur. *l. 2. §. 5. in fine. ff. de aqua & aqua pluv. arc.*

Ratio naturalis quaſi lex quædam tacita. *l. 7. ff. de bon. damnat.*

Sufficit firmare ex ipſa naturali juſtitia. *l. 13. §. 7. ff. de excuſ. tut.*

SECT. II.

Of the Uſe, and Interpretation of Rules.

Reaſons why it is neceſſary to interpret Laws.

BY the Uſe of Rules, is meant here the manner of applying them to the Queſtions that are to be decided; and the Application of the Rules does often require their Interpretation.

It happens in two ſorts of caſes, that it is neceſſary to interpret the Laws. One is, when we find in a Law ſome obſcurity, ambiguity, or other defect of Expreſſion; for in this caſe it is neceſſary to interpret the Law, in order to diſcover its true meaning. And this kind of Interpretation is limited to the Expreſſion, that it may be known what the Law ſays. The other is, when it happens that the ſenſe of a Law, how clear ſoever it may appear in the words, would lead us to falſe Conſequences, and to Deciſions that would be unjuſt, if the Laws were indifferently applied to every thing that is contained within the Expreſſion. For in this caſe, the palpable Injuſtice that would follow from this apparent ſenſe, obliges us to diſcover by ſome kind of Interpretation, not what the Law ſays, but what it means; and to judge by its meaning, how far it ought to be extended, and what are the bounds that ought to be ſet to its ſenſe. And this kind of Interpretation depends always on the temperament that ſome other Rule gives to the Law which we ſhould be in danger of miſapplying, if we did not explain it. For it is this temperament that gives to the ſaid Law its uſe, and its verity. But this matter will be better underſtood by Examples. And in order to make them the more uſeful for ſuch as have leaſt knowledge and experience, we ſhall ſet down one Example ſo clear, that it will convince every body at firſt ſight, that we ought not always to take the Law in the literal ſenſe; and we ſhall ſubjoin another, in which it will not be ſo very eaſy to diſcern this truth.

Examples.

There is no Rule in Law more evident and certain than this, that a Depoſitary ought to reſtore the thing depoſited to the perſon who intruſted him with it, whenever he ſhall pleaſe to call for it; but if the Owner of Money depoſited has loſt the uſe of his reaſon when he calls for his Money, every body muſt own that it would be a great

Injuſtice in the Depoſitary to give it him back. For who does not ſee, that there is another Rule which forbids the giving to a mad Man a thing that may periſh in his hands, or which he may make a bad uſe of; and that to reſtore it to him would be to do him prejudice? Thus, it is by this ſecond Rule, that we interpret and limit the ſenſe of the other.

This is another moſt certain Rule, that the Heir ſucceeds to the Rights of the deceaſed; but this Rule would be ill applied to the Heir of a Partner, who ſhould pretend to ſucceed to the deceaſed in his quality of Partner, for that does not deſcend to the Heir. And this is founded upon another Rule, which requires that Partners ſhould chooſe one another reciprocally: and by this Rule it would be unjuſt that the Heir of a Partner ſhould be Partner, unleſs he were approved of by the other Partners, and they likewiſe approved of by him. Thus, this ſecond Rule obliges us to interpret the ſenſe of the other, and to reſtrain it. And we ſee in this ſecond Example, that it is not ſo eaſy in it as in the firſt, to diſcover the principle upon which this Interpretation is grounded, and which gives to each of theſe Rules its juſt effect, by limiting the ſenſe of the firſt.

It appears by theſe Examples, and will appear likewiſe in all the others, where it is neceſſary to interpret the ſenſe of a Law, that this Interpretation which gives to the Law its juſt effect, is always founded upon ſome other Rule, which requires another thing than what appeared to be regulated by the ſenſe of the Law not rightly underſtood.

The view of Equity is the firſt way to interpret the Laws.

It follows from this Remark, that for the right underſtanding of a Rule, it is not enough to apprehend the apparent Senſe of the words, and to view it by it ſelf; but it is neceſſary likewiſe to conſider if there are not other Rules that limit it. For it is certain, that every Rule having its proper Juſtice, which cannot be contrary to that of any other Rule; each Rule hath its own Juſtice within its proper bounds. And it is only the connexion of all the Rules together that conſtitutes their Juſtice, and limits their Uſe. Or rather, it is natural Equity, which, being the univerſal Spirit of Juſtice, makes all the Rules, and aſſigns to every one its proper uſe. From whence we muſt infer, that it is the knowledge of this Equity, and the general view of this Spirit of the Laws, that is the firſt foundation of the Uſe, and particular Interpretation of all Rules.

The Intention of the Lawgiver, in arbitrary Laws, fixes the temperament of Equity.

This Principle of interpreting the Laws by Equity, does not only reſpect the Laws of Nature, but reaches likewiſe to the arbitrary Laws, they being all of them founded upon the Laws of Nature, as has been obſerved in the xith chapter of the Treatiſe of Laws. But to this Principle of Equity we muſt add, in ſo far as concerns the Interpretation of arbitrary Laws, another Principle which is peculiar to them, and that is, the Intention of the Lawgiver, which determines how far the arbitrary Laws regulate the Uſe and Interpretation of this Equity. For in this kind of Laws, the temperament of Equity is reſtrained to what is agreeable to the Intention of the Lawgiver, and is not extended to whatever might have appeared to be equitable, before the arbitrary Law was enacted. Thus, for inſtance, it is juſt and equitable, that he who has courteouſly lent his Money, without taking a Note for it, and the Debtor denies that he borrowed the Money, ſhould be admitted to prove the Loan, if he has other proofs than a Note, which he omitted to take. And the ſame Equity requires alſo the ſame Uſage in the other kinds of Covenants. But becauſe it is for the publick Good, and agreeable to Equity, not to leave room for too great a facility of bringing falſe proofs, and becauſe it is ſufficient to advertiſe thoſe who lend, or who make other agreements, to take a Note in writing; the Ordinance of *Moulins*, and that of 1667, which have forbid the proofs of Covenants without writing, when they exceed the ſum of one hundred Livres, have by that regulation ſet juſt Bounds to the liberty of receiving proofs of Covenants. And if ſome proofs are received contrary to the letter of that Ordinance, as in the caſe of a neceſſary *Depoſitum*, ſuch as that which is made in the caſe of Fire; it is becauſe the intention of the Ordinance doth not extend to this caſe, where it has been neceſſary to make the Depoſit, and impoſſible to take a Receipt in writing.

Another Example.

Thus, for another inſtance of the effect of the will of the Lawgiver, in what relates to the interpretation of arbitrary Laws by natural Equity, the ſame Equity requires, that a Buyer ſhould not take any advantage of the neceſſity of a Seller, to purchaſe a thing at too low a price. And upon this Principle

ciple, it would ſeem to be juſt, to annul all Sales in which the price falls ſhort of the true value of the thing, either a third, or fourth part, or even leſs, according to the circumſtances. But the inconveniences that would attend the making void all Sales in which the parties ſhould be found to ſuſtain ſuch damages, gave occaſion to a Law, which reſtrains the liberty of annulling Sales on account of the lowneſs of the price, to the Sales of Immoveables, in which the damage ſuſtained ſhould exceed the half of the juſt value of the thing ſold. And this Law puts a ſtop to all other uſe, and all other application of Equity, as to any damage ſuſtained in the price of any thing ſold.

Several views neceſſary for the Interpretation of Laws. In order to make a right uſe of this fundamental Principle for the Interpretation of Laws, which is Equity, it is not enough to obſerve in each Rule what the light of Reaſon finds to be equitable in its Expreſſion, and in the extent which it ſeems to have; but we muſt join to this a general View of univerſal Equity, that we may diſcern in the caſes which are to be regulated, whether there are not other Rules that demand a Juſtice altogether different, to the end we may not pervert any Rule from its true uſe, and that we may apply to the matters of fact, and to their circumſtances, the Rules that agree to them. And if they are natural Laws, we are to reconcile them by the extent and limits of their truth; or if they are arbitrary Laws, we are to fix their Equity by the Intention of the Lawgiver.

The Reader muſt take heed that he do not confound theſe kinds of interpreting Laws, which we have been juſt now ſpeaking of, with thoſe Interpretations that are reſerved to the Sovereign, of which mention ſhall be made in the xiith Article of this Section. And it will be eaſy to perceive the difference between theſe two kinds of Interpretations, by the Rules which ſhall be explained in this Section.

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I.

ALL Rules, whether natural or arbitrary, have their Uſe, ſuch as it is aſſign'd to every one of them by univerſal Juſtice, which is the Spirit of them all. Thus, the application of the Laws is to be made, by diſcerning what it is that this Spirit demands; which in *1. The Spirit of Laws.*

natural Laws is Equity; and in arbitrary Laws is the Intention of the Lawgiver. And it is in this diſcerning Faculty that the Science of the Law does chiefly conſiſt[a].

[a] In omnibus quidem maximè tamen in jure, *æquitas ſpectanda. l. 90. ff. de reg. jur.* In ſumma æquitatem ante oculos habere debet Judex. *l. 4. §. 1. ff. de eo quod certo loco.*

Benignius leges interpretandæ ſunt, quo voluntas earum conſervetur. *l. 18. ff. de legib.* mens legiſlatoris. *l. 13. §. 2. ff. de excuſ. tutor.* Scire leges non hoc eſt verba earum tenere, ſed *vim* ac *poteſtatem. l. 17. ff. de legib.* Ratio naturalis quaſi lex quædam tacita. *l. 7. ff. de bon. damnat.* Jus eſt ars boni & æqui. *l. 1. ff. de juſt. & jur.*

II.

2. Natural Laws are miſapplied, when conſequences are drawn from them contrary to Equity.

If it happens that a natural Rule being applied to ſome caſe which it ſeems to include, there follows from ſuch application, a Deciſion contrary to Equity; we muſt from thence conclude, that the Rule is not rightly applied, and that it is by ſome other Rule that this caſe ought to be judged. Thus, for inſtance, the Rule which directs that the perſon who has lent any thing to another for ſome uſe, may take it back again whenever he pleaſes, would produce a conſequence contrary to Equity, if the Lender were allowed to take back the thing lent, during the time that the Borrower is actually imploying it to the uſe for which he borrowed it, and from whence it cannot be taken without ſome damage to the Borrower. For this Rule ceaſes to take place in this caſe, becauſe of another Rule, which requires, that the Lender ſhould ſuffer the Borrower to reap the advantage of the favour he beſtows on him, and that he ought not to turn his kindneſs into an injury[b].

[b] Ubi æquitas evidens poſcit, ſubveniendum eſt. *l. 183. ff. de reg. jur.* In omnibus quidem, maximè tamen in jure æquitas ſpectanda. *l. 90. eod.* Intempeſtivè uſum commodatæ rei auferre non officium tantùm impedit, ſed & ſuſcepta obligatio inter dandum accipiendumque. *l. 17. §. 3. ff. commod.* See Article 1, of Section 3. of the Loan of Things that are to be reſtored in Specie.

III.

3. Arbitrary Laws are miſapplied, when conſequences are drawn from them contrary to the Intention of the Lawgiver.

If an arbitrary Law being applied to a caſe which it ſeems to include, there follows a conſequence contrary to the Intention of the Lawgiver, the Rule ought not to be extended to that caſe. Thus, for example, the Ordinance of *Moulins*, which annuls indifferently all Subſtitutions for the want of Publication, without ſpecifying the perſons with reſpect to whom they are to be null, does not render them ſuch with reſpect to the Executor who is burthened with the Subſtitution; becauſe the Executor was obliged by another Rule, to cauſe publication of it to be made, as being charged with the execution of the diſpoſitions of the Teſtator; and he ought not to reap any benefit by his own negligence, or his diſhoneſty[c].

[c] Et ſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l. 13. §. 2. ff. de excuſ. tut.* See the Ordinance of *Moulins*, Art. 57. and that of *Henry* II. in the year 1553, Art. 4. De Sophiſtica legum interpretatione & cavillatione. *v. l. 12. §. 3. C. de ædif. priv.*

IV.

Of the Rigour of the Law.

We muſt not take for Injuſtices contrary to Equity, or to the Intention of the Lawgiver, thoſe Deciſions which ſeem to have ſome Hardſhip in them, which is call'd the Rigour of the Law, when it is evident that that Rigour is eſſential to the Law from which it flows, and that no temperament can be applied to the ſaid Law without annulling it. Thus, for example, if a Teſtator having indited his Teſtament, and having read it over in the preſence of Witneſſes, he takes the pen in his hand to ſign it, and dies in the very inſtant; or after that the Teſtator has ſign'd it, they forget to get it ſign'd by one of the Witneſſes; or that there is wanting to the Teſtament any one of the Formalities required by Law, or by Cuſtom; this Teſtament will be abſolutely null, whatever certainty we may have of the Will of the Teſtator, and however favourable the Contents of his Teſtament may be; becauſe theſe Formalities are the only way which the Law allows of for proving the Will of a Teſtator. Thus the Rigour which annuls all Teſtaments in which are wanting the Formalities required by Law, is eſſential to thoſe very Laws, and to mitigate the Rigour of them, would be to annul them quite[d].

[d] Quod quidem perquam durum eſt, ſed ita lex ſcripta eſt. *l. 12. §. 1. ff. qui & à quib. man.*

The Caſe mentioned in this Article, holds good in the English *Law, as to Teſtaments which contain Deviſes of Lands and Tenements; but in other Teſtaments which relate only to Perſonal Eſtates, our Law does not require ſo many Formalities, they being upon the ſame foot as military Teſtaments were among the* Romans.

V.

5. The mitigation of the Rigour of the Law.

If the Hardſhip or Rigour of a Law be not a neceſſary conſequence of the Law, and inſeparable from it, but that the Law may have its effect by an Interpretation which mitigates the ſaid

Rigour, and by ſome temperament which Equity, that is, the Spirit of the Law, requires; we muſt in this caſe prefer Equity to the Rigour which the Letter of the Law ſeems to demand, and follow rather the Spirit and Intendment of the Law, than the ſtrict and rigid way of interpreting it[e]. Thus, in the caſe of a Teſtator, who deviſes his Eſtate in this manner, that if his Wife, whom he leaves big with Child, be brought to bed of a Son, he ſhall have two thirds of his Eſtate, and his Wife one third; and if the Child in the Mother's Womb, happen to be a Daughter, the Mother and the Daughter ſhall divide the Eſtate equally between them; if the Mother happens to bring forth both a Son and a Daughter, the Rigour of the Law ſeems to exclude the Mother, becauſe ſhe is not called to any part of the Succeſſion, in the caſe that has happened. However, the Father having declared his Will that the Mother ſhould have a ſhare of his Eſtate, whether ſhe were brought to bed of a Son, or a Daughter, and having given her the half of what he left to his Son, and as much as he left to his Daughter, it is equitable that the Will of the Teſtator ſhould be executed in the beſt manner it can; and therefore the Son ought to have the half of the Eſtate, and the Mother and Daughter each of them a fourth part[f]. Thus, for another inſtance, if a Father and a Son die at the ſame time, as in a Fight, ſo that it is not poſſible to know which of them ſurvived the other; and if the Widow, Mother to the Son, claims againſt the Heirs of the Father, that part of the Father's Eſtate which would have fallen to the Son, if it were certain that he had outlived his Father; the Rigour of the Law would, in this caſe, exclude the Mother, becauſe the Father and the Son having died at the ſame time, and there being no evidence that the Son was the longeſt liver, he cannot be ſaid to have ſucceeded as Heir to his Father. And ſo the Eſtate of the Father would go to his own Heirs, and not to the Heirs of the Son. But Equity requires, that in this doubt it ſhould be preſumed in favour of the Mother, that it was the Father who died firſt. And this is likewiſe the natural Order[g].

VI.

6. When we ought to follow either Equity, or the Rigour of the Law.

It follows from the foregoing Rules, that we cannot lay it down as a general Rule, either that the Rigour of the Law ought to be always followed, contrary to the Temperament of Equity, or that it ought always to yield to Equity. But this Rigour becomes an Injuſtice, in the caſes in which the Law will admit of an equitable Interpretation; and it is, on the contrary, a juſt Rule, in the caſes where ſuch an Interpretation would deſtroy the Law[h]. Thus, the word *Rigour of the Law*, is taken either for a Hardſhip that is unjuſt and odious, and no ways conformable to the Spirit of the Laws, or for a Rule that is inflexible; but which has nevertheleſs its Juſtice. And we muſt be careful never to confound the uſe of theſe two Ideas; but we ought to make a right diſcernment, and to apply either the juſt Severity, or the Temperament of Equity, according to the preceding Rules, and thoſe which follow.

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[e] Placuit in omnibus rebus præcipuam eſſe juſtitiæ æquitatiſque, quàm ſtricti juris, rationem. *l.* 8. C. *de judic.* Benigniùs leges interpretandæ ſunt, quo voluntas earum conſervetur. *l.* 18. *ff. de legib.* Etſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l.* 13. §. 2. *ff. de excuſ. tut.* Hæc æquitas ſuggerit, etſi jure deficiamur. *l.* 2. §. 5. *in f. ff. de aqua & aqua pluv. arc.* Ubicumque judicem æquitas moverit. *l.* 21. *ff. de interrog.*

Naturalem potiùs in ſe, quàm civilem habet æquitatem. Siquidem civilis deficit actio, ſed natura æquum eſt. *l.* 1. §. 1. *ff. ſi is qui teſt. lib.* Benigniorem interpretationem ſequi, non minus juſtiùs eſt, quàm tutiùs. *l.* 192. §. 1. *ff. de reg. jur.*

Semper in dubiis benigniora præferenda ſunt. *l.* 56. *eod.* Rapienda occaſio eſt, quæ præbet benignius reſponſum. *l.* 168. *eod.*

[f] Si ita ſcriptum ſit, ſi filius mihi natus fuerit, ex beſſe hæres eſto, ex reliqua parte uxor mea hæres eſto. Si verò filia mihi nata fuerit, ex triente hæres eſto, ex reliqua parte uxor hæres eſto: & filius & filia nati eſſent, dicendum eſt aſſem diſtribuendum eſſe in ſeptem partes, ut ex his filius quatuor, uxor duas, filia unam partem habeat. Ita enim ſecundùm voluntatem teſtantis, filius altero tanto ampliùs habebit quàm uxor: item uxor altero tanto ampliùs quàm filia. Licet enim ſubtilis juris regulæ conveniebat, ruptum fieri teſtamentum, attamen cùm ex utroque nato teſtator voluerit uxorem aliquid habere, ideò ad hujuſmodi ſententiam humanitate ſuggerente decurſum eſt. *l.* 13. *ff. de lib. & poſt.*

We have alter'd the caſe of this Law, with reſpect to the Daughter, becauſe this Law, which is part of the old Law, did not give her her Legitime, or Child. Part.

[g] Cùm bello pater cum filio periiſſet, materque filii, quaſi poſtea mortui, bona vindicaret, agnati verò patris, quaſi filius ante periſſet, Divus Hadrianus credidit patrem priùs mortuum. *l.* 9. §. 1. *ff. de reb. dub.*

It is to be remarked, as to this ſecond Inſtance, that it is to be underſtood only of ſuch Eſtates as Mothers have a right to ſucceed to, purſuant to the Ordinance of Charles IX. *commonly called,* The Edict of Mothers.

[h] This Article is a conſequence of the foregoing Rules.

VII.

7. We are not at liberty to follow indifferently either the Rigour of the Law, or Equity.

It is never free and indifferent for us to chooſe either the Rigour of the Law, or Equity, ſo as to be at liberty in one and the ſame caſe to apply either the one or the other indifferently and without injuſtice. But in every fact, we muſt determine our ſelves either to the one, or to the other, according to the circumſtances, and to what the Spirit of the Law requires. Thus, we muſt judge according to the Rigour of the Law, if the Law admits of no mitigation; or according to the Temperament of Equity, if the Law will bear it[l].

[l] This Article is alſo a conſequence of the preceding Rules.

VIII.

8. The Rigour of the Law, when it is neceſſary to be followed, hath its Equity.

Altho' the Rigour of the Law ſeems to be diſtinct from Equity, and to be even oppoſite to it; it is nevertheleſs true, that in the caſes in which this Rigour ought to be follow'd, another view of Equity makes it juſt. And as it never happens that what is Equitable is contrary to Juſtice; ſo likewiſe it never happens, that what is juſt is contrary to Equity. Thus in the example of the iv^th Article, it is juſt to annul the Teſtament in which the Formalities requir'd by Law are wanting; becauſe an act of ſuch conſequence ought to be accompanied with ſerious circumſtances, and ſure proofs of its truth. And this Juſtice hath its Equity in the publick Good, and in the intereſt which even Teſtators themſelves have, eſpecially ſuch as are ſick, that that may not be eaſily taken for their Will, which it is not very certain they have declared ſo to be[l].

[l] This Article is likewiſe a conſequence of the foregoing Rules.

IX.

9. Interpretation of obſcurities and ambiguities in a Law.

The obſcurities, ambiguities, and other defects of expreſſion, which may render the ſenſe of a Law dubious, and all the other difficulties of underſtanding aright, and applying juſtly the Laws, ought to be reſolved by the ſenſe that is moſt natural, that has the greateſt relation to the Subject, that is moſt conformable to the intention of the Lawgiver, and moſt agreeable to Equity. And this is diſcover'd by the ſeveral views of the nature of the Law, of its motive, of the relation it has to other Laws, of the exceptions that may limit it, and by other reflections of this kind, which may diſcover the ſpirit and ſenſe of the Law[m].

[m] In ambigua voce legis, ea potiùs accipienda eſt ſignificatio quæ vitio caret. Præſertim cùm etiam voluntas legis, ex hoc colligi poſſit. *l. 19. ff. de legib.*

Quoties idem ſermo duas ſententias exprimit, ea potiſſimùm excipiatur quæ rei gerendæ aptior eſt. *l. 67. ff. de reg. jur.* Prior atque potentior eſt quàm vox, mens dicentis. *l. 7. in ff. de ſuppell. leg.* Benigniùs leges interpretandæ ſunt, quo voluntas earum conſervetur. *l. 18. ff de legib.* Scire leges non hoc eſt verba earum tenere, ſed vim ac poteſtatem. *l. 17. eod.* See Art. 1, 2, and 3 of this Section, and thoſe which follow.

X.

10. A Law is to be interpreted by its motives, and by the tenour of it.

For underſtanding aright the ſenſe of a Law, we ought to conſider well all the words of it, and its Preamble, if there be any, that we may judge of the meaning of the Law, by its motives, and by the whole tenour of what it preſcribes; and not to limit its ſenſe to what may appear different from its intention, either in one part of the Law taken ſeparately, or by a defect in the Expreſſion. But we muſt prefer to this foreign ſenſe of a defective Expreſſion, that which appears otherwiſe to be evident by the Spirit of the whole Law. Thus, it is to tranſgreſs againſt the Rules and Spirit of Laws, to make uſe, either in giving of Judgment, or Counſel, of any one part of a Law taken ſeparately from the reſt, and wreſted to another ſenſe than what it has when it is united to the whole[n].

[n] Incivile eſt niſi totâ lege perſpectâ, unâ aliquâ particulâ ejus propoſitâ, judicare, vel reſpondere. *l. 24. ff. de legib.* Verbum *ex legibus*, ſic accipiendum eſt, tam ex legum ſententia, quàm ex verbis. *l. 6. §. 1. ff. de verb. ſign.* Etſi maximè verba legis hunc habent intellectum, tamen mens legiſlatoris aliud vult. *l. 13. §. 2. ff. de excuſ. tut.* See the preceding Articles. See upon the word *Preamble*, the 134^th Law, §. 1. *ff. de verb. obl.*

XI.

11. How an omiſſion in a Law may be ſupplied.

If there happens to be omitted in a Law any thing that is eſſential to it, or that is a neceſſary conſequence of its diſpoſition, and that tends to give to the Law its entire effect, according to its motive; we may in this caſe ſupply what is wanting in the expreſſion, and extend the diſpoſition of the Law to what is included within its intention, altho' not expreſſed in the words[o].

[o] Quod legibus omiſſum eſt, non omittetur religione judicantium. *l. 13. ff. de teſtib.*

Quoties lege aliquid unum vel alterum introductum eſt, bona occaſio eſt, cætera quæ tendunt ad eamdem utilitatem, vel interpretatione, vel certè juriſdictione ſuppleri. *l. 13. ff. de legib.* Supplet prætor

tor in eo quod legi deeſt. *l.* 11. *ff. de præſcr. verb.* Licet orationis ſub divo Marco habitæ verba deficiant, is tamen qui poſt contractas nuptias nurui ſuæ curator datur, excuſare ſe debet, ne manifeſtam ſententiam ejus offendat. *l.* 17. *C. de excuſ. tut.* Edicti quidem verba ceſſabunt: Pomponius autem ait, ſententiam Edicti porrigendam eſſe ad hæc. *l.* 7. §. 2. *ff. de juriſd.* See in this Section the 21st, 22d, and 23d Articles, which ſerve as examples of this.

XII.

12. In what caſes we muſt have recourſe to the Prince for the interpretation of a Law.

If the words of a Law expreſs clearly the ſenſe and intention of the Law, we muſt hold to that. But if the true ſenſe of the Law cannot be ſufficiently underſtood by the interpretations that may be made of it, according to the Rules that have been juſt now explained; or that the ſenſe of the Law being clear, there ariſe from it inconveniencies to the publick Good; we muſt in this caſe have recourſe to the Prince, to learn of him his intention, as to what is liable to *Interpretation*, *Explanation*, or *Mitigation*; whether it be for underſtanding the Law, or mitigating its Severity [p].

[p] Leges ſacratiſſimæ quæ conſtringunt hominum vitas, intelligi ab omnibus debent, ut univerſi præſcripto earum manifeſtiùs cognito, vel inhibita declinent, vel permiſſa ſectentur. Si quid verò in iiſdem legibus latum fortaſſis obſcuriùs fuerit, oportet id ab imperatoria interpretatione patefieri, duritiamque legum, noſtræ humanitati incongruam, emendari. *l.* 9. *C. de leg.* Inter æquitatem, juſque interpoſitam interpretationem, nobis ſolis & oportet & licet inſpicere. *l.* 1. *eod.* Si enim in præſenti leges condere ſoli imperatori conceſſum eſt, & leges interpretari, ſolo dignum imperio eſſe oportet. *l. ult. eod. Nov.* 143. De his quæ primò conſtituuntur, aut interpretatione, aut conſtitutione optimi principis certius ſtatuendum eſt. *l.* 11. *ff. eod.*

Thus the Parliament made Remonſtrances to Charles *the Seventh, touching the* Declarations, Interpretations, Modifications, *which were to be made to the ancient Ordinances, upon which followed that of* 1446.

Thus the Ordinance of Moulins, *Art.* 1. *and that of* 1667. *Tit.* 1. *Art.* 3. *and Art.* 7. *enjoin the Parliaments, and the other Courts, to make their Remonſtrances to the King, touching what appeared in the Ordinances to be contrary to the Advantage or Conveniency of the Publick; or to want* Interpretation Declaration, or Mitigation. *See the* 33d *Article of the Ordinance of* Philip VI. *in the year* 1349. *impowering the Council, and the Chamber of Accompts, to make the Declarations and Interpretations that ſhould be wanted on the ſaid Ordinance.*

De *interpretatione* Canonum Eccleſiaſticorum, ſi quid dubietatis emerſerit. *v. l.* 6. *de Sacroſanct. Eccl.* De *dubietate*, quæ in Canonibus emerſerit. *v. l.* 6. *C. de Sacroſanct. Eccl.*

XIII.

13. We muſt follow the Law, altho' its motive be unknown.

If the true meaning of a Law being well known, altho' we are ignorant of its motive, there ſeems to ariſe from it ſome inconvenience that cannot be avoided by a reaſonable Interpretation, we muſt preſume that the Law has nevertheleſs its Uſefulneſs, and its Equity, founded upon ſome view of the publick Good, which ought to make us prefer the ſenſe and authority of the Law to the reaſonings that may be brought againſt it. For otherwiſe many Laws very uſeful, and well eſtabliſhed, would be overthrown, either by ſome other views of Equity, or by ſubtilty of Reaſoning [q].

[q] Non omnium quæ à majoribus conſtituta ſunt ratio reddi poteſt. *l.* 20. *ff. de legib.* & ideo rationes eorum quæ conſtituuntur, inquiri non oportet, alioquin multa ex his quæ certa ſunt, ſubvertuntur. *l.* 21. *eod.* Diſputare de principali judicio non oportet. *l.* 3. *C. de crim. Sacril.* Multa jure civili contra rationem diſputandi, pro utilitate communi receptà eſſe, innumerabilibus rebus probari poteſt. *l.* 51. §. 2. *ff. ad l. Aquil.*

XIV.

14. Laws which are favourably extended.

The Laws which are in favour of that which the publick Good, Humanity, Religion, the Liberty of making Contracts, and Teſtaments, and other ſuch like Motives render favourable, and thoſe which are made in favour of any Perſons, are to be interpreted in as large an extent as the favour of theſe Motives, joined with Equity, is able to give them, and they ought not to be interpreted ſtrictly, nor applied in ſuch a manner as to be turned to the prejudice of thoſe perſons in whoſe favour they were made [r].

[r] Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ ſalubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione, contra ipſorum commodum producamus ad ſeveritatem. *l.* 25. *ff. de legib.* Aliam cauſam eſſe inſtitutionis quæ benigne acciperetur. *l.* 19. *ff. de lib. & poſt.* propter publicam utilitatem—— ſtrictam rationem inſuper habemus, quæ nonnunquam in ambiguis religionum quæſtionibus omitti ſolet. Nam ſummam eſſe rationem quæ pro religione facit. *l.* 43. *ff. de relig. & ſumpt. funerum.* Quod favore quorumdam conſtitutum eſt, quibuſdam caſibus ad læſionem eorum nolumus inventum videri. *l.* 6. *C. de legib.* legem enim utilem reipublicæ—— adjuvandam interpretatione. *l.* 64. §. 1. *ff. de condit. & dem. See an Example of the laſt part of this Rule in the ninth Article of the third Section of the Contract of Sale; and another in the third Law,* §. 5. *ff. de carb. ed. The reſt needs no Example.*

XV.

15. Laws which are reſtrained.

The Laws which reſtrain our natural Liberty, ſuch as thoſe that forbid any thing that is not in itſelf unlawful, or which derogate in any other manner from the general Law; the Laws which inflict Puniſhments for Crimes and Offences, or Penalties in civil Matters; thoſe which preſcribe certain Formalities; the Laws which appear to have any hardſhip in them; thoſe which permit Diſinheriting, and others the like, are to be interpreted in ſuch a manner, as not to be applied beyond what is clearly expreſſed in the Law, to any conſequences to which the Laws do not extend. And on the contrary, we ought to give to ſuch Laws all the temperament of Equity and Humanity, that they are capable of[f].

[f] *This is a conſequence of the preceding Rules.* Interpretatione legum pœnæ molliendæ ſunt, potiùs quàm aſperandæ. *l.* 42. *ff. de pœn.* In pœnalibus cauſis benigniùs interpretandum eſt. *l.* 155. *§. ult. ff. de reg. jur.* In levioribus cauſis proniores ad lenitatem judices eſſe debent, in gravioribus pœnis, ſeveritatem legum, cum aliquo temperamento benignitatis, ſubſequi. *l.* 11. *ff. de pœn. Vid. l.* 32. *eod.* Aliam cauſam eſſe inſtitutionis quæ benigne acciperetur: exhæredationes autem non eſſent adjuvandæ. *l.* 19. *ff. de lib. & poſt.* Si ita libertatem acceperit ancilla, ſi primum marem peperit, libera eſto: & hæc, uno utero marem & fœminam pepeℓiſſet, ſiquidem certum eſt quid priùs edidiſſet, non debet de ipſius ſtatu ambigi, utrum libera eſſet, necne. Sed nec filiæ, nam ſi poſtea edita eſt, erit ingenua. Sin autem hoc incertum eſt, nec poteſt nec per ſubtilitatem judicialem manifeſtari, in ambiguis rebus humaniorem ſententiam ſequi oportet. Ut tam ipſa libertatem conſequatur, quàm filia ejus ingenuitatem. Quaſi per præſumptionem priore maſculo edito. *l.* 10. *§.* 1. *ff. de reb. dub.* Quod contra rationem juris receptum eſt, non eſt producendum ad conſequentias. *l.* 14. *ff. de legib.* In quorum finibus emere quis prohibetur, pignus accipere non prohibetur. *l.* 24. *ff. de pign. Altho' the Example of this Slave be quoted in this Law* 10. *§.* 1. *ff. de reb. dub. upon the Subject of* Teſtaments, *yet it may be alſo applied here.*

XVI.

16. Laws which are not to be extended beyond what their words expreſly mention.

If any Law or Cuſtom happens to be eſtabliſhed upon particular conſiderations, contrary to other Rules, or to the general Law, it ought not to be drawn to any conſequence beyond the caſes which the words of the Law mark expreſly. Thus the Ordinance which forbids the receiving proof of Contracts exceeding the value of one Hundred Livres, and the proof of facts different from what appears to have been agreed on, does not extend to facts of another nature, where a Contract does not come into queſtion[t].

[t] Quod contra rationem juris receptum eſt, non eſt producendum ad conſequentias. *l.* 141. *ff. de reg. jur. l.* 14. *ff. de legib. V. l.* 39. *eod.*

XVII.

17. The Grants of Princes are favourably interpreted.

The Favours and Grants of Princes are to be favourably interpreted, and ought to have all the reaſonable extent that the preſumption of the Liberality that is natural to Princes can give them; provided that they are not extended in ſuch a manner as to cauſe prejudice to other perſons[u].

[u] Beneficium imperatoris, quod à divina ſcilicet ejus indulgentia proficiſcitur, quàm pleniſſime interpretari debemus. *l.* 3. *ff. de conſt. princip.* Si quis à principe ſimpliciter impetraverit ut in publico loco ædificet, non eſt credendus ſic ædificare, ut cum incommodo alicujus id fiat. *l.* 2. *§.* 16. *ff. ne quid in loco publ. fiat. V. l.* 2. *C. de bon. vac.*

XVIII.

18. Laws are interpreted one by the other.

If the Laws in which there is ſome doubt, or other difficulty, have any relation to other Laws which may help to clear up their ſenſe, we muſt prefer to all other interpretations that which they may have from the other Laws. Thus, when new Laws have reference to old ones, or to antient Cuſtoms, or antient Laws to modern ones, they are interpreted one by the other, according to their common intention, in ſo far as the latter Laws have not abrogated the former[x].

[x] Non eſt novum, ut priores leges ad poſteriores trahantur. *l.* 26. *ff. de legib.* Sed & poſteriores leges ad priores pertinent: niſi contrariæ ſint. Idque multis argumentis probatur. *l.* 28. *eod.*

XIX.

19. Laws are interpreted by the Practice.

If the difficulties which may happen in the Interpretation of a Law, or Cuſtom, are explained by an antient Uſage, which has fixed the ſenſe of the Law, and which is confirmed by a conſtant ſeries of uniform Decrees; we muſt ſtick to the ſenſe declared by the conſtant Practice, which is the beſt Interpreter of Laws[y].

[y] Si de interpretatione legis quæratur, in primis inſpiciendum eſt quo jure civitas retro in ejuſmodi caſibus uſa fuiſſet: optima enim eſt legum interpres conſuetudo. *l.* 37. *ff. de legibus.* Nam imperator noſter Severus reſcripſit in ambiguitatibus, quæ ex legibus proficiſcuntur, conſuetudinem, aut rerum perpetuò ſimiliter judicatarum authoritatem, vim legis obtinere debere. *l.* 38. *eod.*

XX.

20. In what caſes the Cuſtoms of neighbouring Places, and of the chief Towns, ſerve as Rules to the other places.

If any Provinces or other Places, want certain Rules for ſolving difficulties in matters that are there in uſe, and the ſaid difficulties are not regulated by the Law of Nature, or by any written Law, but depend on Cuſtom and Uſe, they ought in this caſe to regulate themſelves by the Principles that follow from the Cuſtoms of thoſe very places. And if that does not determine the difficulty, they ought to follow what is regulated in ſuch matters by the Cuſtoms of the neighbouring places, and eſpecially by thoſe of the principal Towns[z].

[a] De quibus cauſis ſcriptis legibus non utimur, id cuſtodiri oportet, quod moribus & conſuetudine inductum eſt. Et ſi quâ in re hoc deficeret, tunc quod proximum, & conſequens ei eſt. Si nec id quidem appareat, tunc jus quo urbs Roma utitur, ſervari oportet. *l. 32. ff. de legib.*

XXI.

21. *Laws are extended to whatever is eſſential to their Intention.* All Laws extend to every thing that is eſſential to their Intention. Thus, the Laws allowing Males to marry at the age of fourteen years compleat, and Females at the age of twelve, it is a conſequence of theſe Laws, that thoſe who marry, can bind themſelves, altho' Minors, to the performance of the Articles agreed on in Marriage, which relate to the Wife's Portion, her Jointure, the Community of Goods, and other matters of the like nature. Thus, Judges being eſtabliſhed to adminiſter Juſtice, their Authority extends to every thing that is neceſſary for the exerciſe of their Functions; ſuch as the Right of inflicting Penalties on thoſe who contravene the Orders of Juſtice: And it is the ſame thing as to all the other conſequences of their Miniſtry [a].

[a] Hæc æquitas ſuggerit, etſi jure deficiamur. *l. 2. §. 5. in f. ff. de aqua, & aqua pluviæ arcend.*

Edicti quidem verba ceſſabunt: Pomponius autem ait, ſententiam edicti porrigendam eſſe ad hæc. *l. 7. §. 2. ff. de juriſd.* Cui juriſdictio data eſt, ea quoque conceſſa eſſe videntur, ſine quibus juriſdictio explicari non potuit. *l. 2. eod.*

By the Law of England *Minors can make no legal Settlements on their Marriages.* Coke 1. Inſt. f. 34ª. 38ª. *And therefore an Act of Parliament is requiſite to impower them ſo to do, and to confirm and ratify the Settlements that are ſo made. By which means, the Legiſlative Power takes care of the Intereſt of Minors, that they be not wronged in any tranſaction of this ſort before they attain to the years of diſcretion, when they may be able to judge for themſelves, and ſtipulate ſuch conditions as they think fit.*

XXII.

22. *The Laws which* permit *any thing, are extended from more to leſs.* In the the Laws which *permit* any thing, we draw the conſequence from the greater to the leſſer. Thus, thoſe who have a right to give away their Goods for nothing, have much more a right to ſell them. And in like manner, thoſe who have a right to appoint Executors by a Teſtament; have with much greater reaſon a right to bequeath particular Legacies [b].

[b] Non debet cui plus licet, quod minus eſt, non licere. *l. 21. ff. de reg. jur.* Cujus eſt donandi, eidem & vendendi, & concedendi jus eſt. *l. 163. ff. de reg. jur.* Qui poteſt invitis alienare, multo magis & ignorantibus, & abſentibus poteſt. *l. 26. ff. de reg. jur. See the two following Articles.*

XXIII.

23. *The Laws which* forbid, *extend from the leſſer to the greater.* In the Laws which *forbid* any thing, we draw the conſequence from the leſſer to the greater. Thus, Prodigals, who are not allowed to have the Management of their own Eſtate, are with much greater reaſon rendered incapable of alienating it. Thus, thoſe who are declared to be unworthy of ſome Office, or ſome Honour, are much more unworthy of a greater Office, and of a more conſiderable Honour [c].

[c] Qui indignus eſt inferiore ordine, indignior eſt ſuperiore. *l. 4. ff. de Senatorib.* Eſt enim perquam ridiculum, eum qui minoribus pœnæ cauſa prohibitus ſit, ad majores aſpirare. *l. 7. §. ult. ff. de interd. & releg. l. 5. ff. de ſerv. export. See the following Article.*

XXIV.

24. *An Exception to the two preceding Rules.* This extenſion of Laws from the leſſer to the greater, and from the greater to the leſſer, is limited to the things which are of the ſame kind with thoſe that are mentioned in the Law, or which are ſuch that its Motive ought to be extended to them, as in the Examples of the foregoing Articles [d]. But we muſt not draw the conſequence either from the greater to the leſſer, or from the leſſer to the greater, when they are things of a different kind, or ſuch as the Spirit of the Law is not applicable to [e]. Thus, the Law which permits perſons who have attained to the years of Marriage, altho' Minors, to bind themſelves by contracts of Marriage, and to engage their Eſtates for the performance of the Covenants that are conſequences of the Marriage, would be wrongfully applied to other ſorts of Contracts, altho' of leſs importance. Thus, the liberty which an adult perſon has in his Minority, to deviſe his whole Eſtate by Will, would not be rightly extended to the liberty of making over any part of it by a Deed of Gift that ſhould take effect in his life-time. Thus, the Power which belongs to a Lord of a Manor, who has a Royalty, or ample Juriſdiction for the Adminiſtration of Juſtice within his own Lordſhip, by the ſpecial Grant of the Sovereign, would be wrongfully applied to ſuch as have Grants only of an inferior Juriſdiction, and in Cauſes of leſſer moment. Thus, the Power of a Lord Chief Juſtice will not infer that of a Conſtable or Bailiff. Thus, the Laws which brand perſons with Infamy, would not be rightly extended to the Confiſcation of

Goods, altho' Honour is much more valuable than any Goods.

XXV.

25. *Tacit Prohibitions.* If any Law ſhould put a ſtop to the Enquiry into any Abuſe, by pardoning it for the time paſt; this would be in effect to forbid it for the time to come[f].

XXVI.

26. *How Perſons acquire Rights by the effect of Laws.* When a Right comes to any perſon by the diſpoſition of a Law, this Right is acquired by the effect of the Law; whether the perſon knows, or does not know the Law; and likewiſe whether he knows, or is ignorant of the fact on which depends the Right which the Law gives him. Thus, the Creditor whoſe Debtor happens to die, acquires a Right againſt the Heir, or Executor, altho' he knows nothing of the Death of his Debtor, and even altho' he is ignorant that the Law binds the Heirs, or Executors, or Adminiſtrators for the payment of the Debts of the perſons to whom they ſucceed. Thus, the Son is Heir to his Father, altho' he is ignorant of his Right to ſucceed, and knows nothing of the Death of his Father. And it is a conſequence of this Rule, that the Rights of this nature, which perſons acquire by the effect of the Law, paſs to their Heirs, Executors, or Adminiſtrators, if they themſelves happen to die before they have uſed or known their Right[g].

XXVII.

It is free for perſons that are capable of uſing their Rights, to renounce what the Laws have eſtabliſhed in their favour. Thus, one that is of Age, and under no incapacity, ſuch as Madneſs, or Interdiction, may renounce a Succeſſion which falls to him by Law. Thus, perſons who have privileges granted them either by Laws or by particular Graces, are at liberty not to make uſe of them[h]. But this liberty of renouncing one's Right, does not extend to the caſes in which third perſons have an intereſt, nor to thoſe where the renouncing of one's Right would be contrary to Equity, or good Manners, or prohibited by ſome Law. 27. *How one may renounce a Right acquired by a Law.*

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[d] In eo quod plus ſit, ſemper ineſt & minus. *l.* 110. *ff. de reg. jur.* Cum quis poſſit alienare, poterit & conſentire alienationi. *l.* 165. *eod.*

Lex Julia, quæ de dotali prædio proſpexit, ne id marito liceat obligare, aut alienare, pleniùs interpretanda eſt, ut etiam de ſponſo idem juris ſit, quod de marito. *l.* 4. *ff. de fundo dot.*

[e] *Thus, in the antient Roman Law, the licence which Fathers had to take away the Lives of their Children, did not extend to the licence of depriving them of their Liberty, and making them Slaves.* Libertati à majoribus tantùm impenſum eſt, ut patribus, quibus jus vitæ in liberos neciſq; poteſtas olim erat permiſſa, libertatem eripere non liceret. *l. ult. C. de patr. poteſt. Thus in the ſame Roman Law, it was lawful for a Man to give to his Concubine, but not to his Wife.* V. l. 58. & tot. Tit. ff. de donat. inter vir. & uxor. *Thus by the ſame Law, a Husband was allowed to ſell the Lands which he got with his Wife in Marriage, if ſhe conſented to it; but he could not mortgage them, not even with her conſent.* Lex Julia fundi dotalis Italici alienationem prohibebat fieri à marito non conſentiente muliere: hypothecam autem, nec ſi mulier conſentiebat. *l. un.* §. 15. *C. de rei ux. act.*

[f] Cùm lex in præteritum quid indulget, in futurum vetat. *l.* 22. *ff. de legib. The Law would be very imperfect, if when it forgives what is paſt, it ſhould not prohibit it for the time to come. Thus, the Edict of* 1606, *which put a ſtop to the Enquiry after thoſe who had taken Intereſt for Money lent, and converted it into Rents, did not fail to forbid the taking of all ſuch Intereſt for the future.* V. Nov. 154.

[g] Cùm evidentiſſimè lex duodecim tabularum hæredes huic rei (æri alieno defuncti) faciat obnoxios. *l. ult. C. de hered. act.* Item vobis acquiritur quod ſervi veſtri ex traditione nanciſcuntur: ſive quid ſtipulentur, ſive ex donatione, vel ex legato, vel ex qualibet alia cauſa acquirant. Hoc enim, vobis ignorantibus, & invitis obvenit. §. 3. *inſt. per quas perſ. nob. acq.*

Si infanti, id eſt, minori ſeptem annis, in poteſtate patris, vel avi vel proavi conſtituto, vel conſtitutæ, hæreditas ſit derelicta, vel ab inteſtato delata à matre, vel linea ex qua mater deſcendit, vel aliis quibuſcumque perſonis, licebit parentibus ejus ſub quorum poteſtate eſt, adire ejus nomine hæreditatem, vel bonorum poſſeſſionem petere. Sed, ſi hoc parens neglexerit, & in memorata ætate infans deceſſerit, tunc parentem quidem ſuperſtitem omnia ex quacumque ſucceſſione ad eumdem infantem devoluta jure patrio, quaſi jam infanti quæſita, capere. *l.* 18. *C. de jur. deliber. V. l.* 5. *ff. ſi pars hered. pet. l.* 30. §. 6. *ff. de acq. vel. om. hær.* Prætor ventrem mittit in poſſeſſionem. *d. l.* §. 1. *& tit. de ventr. in poſſ. mit.* Teſtamento jure facto, multis inſtitutis hæredibus, & invicem ſubſtitutis; adeuntibus ſuam portionem, etiam invitis cohæredum repudiantium accreſcit portio. *l.* 6. *C. de impub. & al. ſubſt.* Illud ſciendum eſt, ſi mulier prægnans non ſit, exiſtimatur autem prægnans eſſe, interim filium hæredem eſſe ex aſſe, quanquam ignoret ſe ex aſſe hæredem eſſe. *l.* 5. *ff. ſi pars hær. pet. d. l.* §. 1. *l.* 30. §. 6. *ff. de acq. vel om. hær.* Ignorans hæres ſit. *l.* 3. §. 10. *ff. de ſuis & leg. V. l. un. C. de his qui ante ap. tab.*

We are to underſtand this Rule in the manner that it is expreſſed, of Rights acquired by the diſpoſition of a Law, and not in general of what is acquired by other ways, which the Laws authorize; as when a Legacy is acquired by the Will of a Teſtator. On this Rule depends that other which is received in the Cuſtoms of France, *That* Death puts the Living into Poſſeſſion; *which ſignifies, that the Heirs of Blood acquire their Right to the Succeſſion, altho' they be ignorant of the death of him to whom they ſucceed; becauſe it is the Law that calls them to the Succeſſion. But Legatees, and Executors of Teſtaments, being called only by the Will of the Teſtator, and not by the Law, their Right is not the ſame; which difference ſhall be explained in its proper place, when we come to treat of Succeſſions.* V. l. 1. C. de his qui ante ap. tab.

[h] Regula est juris antiqui, omnes licentiam habere, his quæ pro ſe indulta ſunt, renuntiare. *l.* 51. *C. de Epiſc. & Cler. l.* 29. *C. de pact.*

Licet ſui juris perſecutionem, aut ſpem futuræ perceptionis, deteriorem conſtituere. *l.* 46. *ff. de pact.* v. *l.* 4. §. 4. *ff. ſi quis caut. l.* 8. *ff. de tranſact.* Venditor fundi Geroniani, fundo Botroiano quem retinebat, legem dederat, ne contra eum piſcatio Thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, ſervitus imponi privata lege non poteſt: quia tamen bona fides contractus, legem ſervari venditionis expoſcit: perſonæ poſſidentium, aut in jus eorum ſuccedentium per ſtipulationis, vel venditionis legem obligantur. *l.* 13. *ff. comm. præd. See the next Article, and the* 2d *Article of the* 4th *Section of the Vices of Covenants.*

XXVIII.

28. The diſpoſitions of particular perſons cannot hinder the effect of the Law.

The Laws have their effect independently from the will of particular perſons. And no perſon can hinder, either by Contracts, or by Teſtament, or otherwiſe, the Laws from regulating what concerns ſuch things. Thus, a Teſtator cannot hinder, by any precaution whatever, the Laws from having their effect againſt any diſpoſition he may make in his Teſtament contrary to Law. Thus, Contracts that are made againſt Law, have no manner of effect [i].

[i] Jus publicum privatorum pactis mutari non poteſt. *l.* 38. *ff. de pact. l.* 20. *ff. de religioſis.* Privatorum conventio juri publico non derogat. *l.* 45. §. 1. *ff. de reg. jur.*

Frater, cùm heredem ſororem ſcriberet. alium ab ea, cui donatum volebat, ſtipulari curavit, ne Falcidiâ uteretur: & ut certam pecuniam, ſi contra feciſſet præſtaret. Privatorum cautione, legibus non eſſe refragandum conſtitit. Et ideo ſororem jure publico, retentionem habituram, & actionem ex ſtipulatu denegandam. *l.* 15. §. 1. *ff. ad leg. falc.* Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt lege contrahere prohibente. *l.* 5. *C. de legib. The firſt Novel, Chap.* 2. *towards the cloſe, permits Teſtators to deprive their Executors of the Falcidian Portion: but this very permiſſion implies, that without it ſuch a diſpoſition would have been of no force, as being contrary to the Law, which requires that the Executor ſhould have at leaſt the Falcidian Portion, which is the fourth Part of the Eſtate.*

We muſt not give to the Rule explained in this Article an extent which may have any thing in it contrary to the preceding Article.

XXIX.

29. Diſcernment neceſſary for the right uſe of the Rules.

From all the Rules which have been explained under this Title, we may infer this as a laſt Rule; that there is great danger of miſapplying the Rules of Law, if we have not a very ample knowledge of all the particular Rules, and of the ſeveral Views that are neceſſary for interpreting and applying them aright [l].

[l] Omnis definitio in jure civili periculoſa eſt. Parum eſt enim, ut non ſubverti poſſet. *l.* 202. *ff. de reg. jur.*

Thus, we ought to take care never to apply a Rule beyond its juſt extent, nor to matters to which it has no manner of relation. Thus, we ought to be apprized of the Exceptions which limit the Rules. Thus, we ought either to keep to the Letter of the Law, or interpret it according to the Rules explained under this Title, and to obſerve the other Remarks that have been made in it.

TITLE II.

Of PERSONS.

In what manner the Civil Law diſtinguiſhes Perſons.

ALtho' the *Roman* Laws own a ſort of Equality which the Law of Nature eſtabliſhes among all Men [a]; yet they diſtinguiſh Perſons by certain Qualities, which have a particular relation to the matters of the Civil Law, and which make that which is called the *State of Perſons.* Theſe are the Qualities which are treated of in the *Roman* Law, under the Title *De Statu hominum.* But we do not find either in this Title, or in any other, what it is that properly makes the State of Perſons. We ſee only that there are different Qualities, ſuch as theſe of being a Freeman, and a Slave, a Father, and a Son; and other Qualities, which are ſaid to make the State of Perſons. But we do not there find any thing that points out to us what is common to all theſe Qualities, which might help us to conceive a juſt and preciſe Idea of the character neceſſary to a Quality, ſo as to be able to ſay that it concerns, or doth not concern, the State of a Perſon.

[a] Quod ad jus naturale attinet, omnes homines æquales ſunt. *l.* 32. *ff. de reg. jur.*

It is this that has engaged us to conſider in all theſe Qualities, what it is they have in common among them, and what it is that diſtinguiſhes them from the other Qualities, which have not the ſame effect. And it appears that the diſtinction of theſe Qualities which make up the State of Perſons, from thoſe which have no manner of relation to it, is a natural conſequence of the Order of Society, and of the Order of the Matters treated of in the *Roman* Laws. For as we have ſeen in the Plan of theſe Matters, that the *Roman* Laws have for their Object, Engagements, and Succeſſions; we ſhall likewiſe ſee that the Qualities which theſe Laws conſider in order to diſtinguiſh the State of Perſons, have alſo a particular relation to Engagements and Succeſſions; and that they have all of them this in common, that they render Perſons capable, or incapable, of all manner of Engagements, or of ſome only, or of Succeſſions. Thus, as to Engagements, Perſons that are of full age, are capable of all Engagements, voluntary and others, of Contracts, Guardianſhips, and publick Imployments; and Minors are incapable of ſeveral ſorts of Engagements, and particularly of thoſe which do not turn to their advantage. Thus, for Succeſſions, Children lawfully begotten are capable of inheriting, and Baſtards are incapable of it; and it will appear in all the other Qualities that make up the State of Perſons, that they give ſome capacity, or incapacity. So that it may be ſaid, that the State of Perſons conſiſts in this capacity, or incapacity, which it is eaſy to diſcern by theſe Qualities; for they are of ſuch a nature, that every one of them is as it were in a parallel line to another that is its oppoſite; and there is always one of the two oppoſites to be met with in every Perſon. Thus there is no body but who is either a Major or a Minor; Legitimate, or Illegitimate. And it is the ſame thing with reſpect to all the other Qualities, as will appear in the ſequel of this Title.

What is the State of Perſons.

Two ſorts of Qualities which make the State of Perſons.

The diſtinctions made among perſons by the Qualities which regulate their State, are of two ſorts. The firſt is of ſuch as are Natural, and regulated by the qualities which Nature it ſelf marks, and diſtinguiſhes in every perſon. Thus, it is Nature that diſtinguiſhes the two Sexes, and thoſe who are call'd Hermaphrodites. The ſecond ſort is of ſuch diſtinctions as are eſtabliſh'd by human Laws. Thus, Slavery is a State that is not Natural[b], but which Men have eſtabliſhed. And according to the different diſtinctions of theſe two kinds, every perſon has his State regulated by the Order of Nature, and that of the Law.

A Remark on the State of Perſons, with reſpect to the Roman *Law, and our Practice.*

The Reader muſt obſerve that we have inſerted in this Title ſome diſtinctions of Perſons, that are not mentioned in the *Roman* Law, among thoſe which make up the State of Perſons. For example, it is ſaid in the *Roman* Law, that Madneſs does not change the State of the Perſon[c]; and we ſee likewiſe there, that in the Title of the State of Perſons, no mention is made of Majority, and Minority. But nevertheleſs, Madneſs, and Minority, are qualities that belong to the State of Perſons, even according to the Principles of the *Roman* Law it ſelf. For in the firſt Book of the Inſtitutes, where diſtinctions are made between Freemen and Slaves, between Fathers and Sons, Minors are there likewiſe conſidered[d], as alſo thoſe who are in a ſtate of Madneſs[e]. And in effect, theſe perſons are under an Incapacity, which makes it neceſſary for them to be placed under the Guardianſhip of a Tutor, or Curator. Thus, that Rule among the *Romans*, that Madneſs does not change the State of the Perſon, ſignifies that it does not change the State, which is made up by the other Qualities, and that it does not hinder, for example, a Madman from being a Freeman, and a Father. And in fine, according to the uſage among us, if it were made a queſtion, with reſpect to our practice, whether a perſon were mad or not, we ſhould call that Queſtion, a caſe relating to the State of the Perſon; as we give this name to all the Law-Suits in which the chief matter in debate, is concerning the State of Perſons.

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[b] Servitus eſt conſtitutio juris gentium, qua quis dominio alieno contra naturam ſubjicitur. *l.* 4. §. 1. *ff. de ſtat. hom.*

[c] Qui furere cœpit, & ſtatum, & dignitatem in qua fuit, & magiſtratum, & poteſtatem videtur retinere: ſicut rei ſuæ dominium retinet. *l.* 20. *ff. de ſtat. hom.*

[d] Tranſeamus nunc ad aliam diviſionem perſonarum. Nam ex his perſonis, quæ in poteſtate non ſunt, quædam vel in tutela ſunt, vel in curatione: quædam neutro jure tenentur. *inſt. de tut.*

[e] Furioſi quoque & prodigi licet majores viginti quinque annis ſint, tamen in curatione ſunt. §. 3. *inſt. de curat.*

SECT. I.

Of the State of Perſons by Nature.

Diſtinctions of Perſons by Nature.

THE diſtinctions which make the State of Perſons by Nature, are founded upon the Sex, the Birth, and the Age of every perſon; including under the diſtinctions made by the Birth, thoſe which depend on certain defects and imperfections, in the conformation of the parts of the Body, which ſome perſons have from their Birth; ſuch as that of both Sexes in Hermaphrodites, the Incapacity of begetting Children, and ſome others. And altho' ſome of theſe defects may happen by accident, after the Birth; yet in what manner ſoever we conſider them, the diſtinctions which theſe defects make of Perſons, do ſtill belong to the Order of diſtinctions made by Nature, and they have their place in this Section.

The

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I.

1. Diſtinction of Perſons by the Sex. THE Sex, which diſtinguiſhes the Man from the Woman, makes this difference between them, with reſpect to their State, that Men are capable of all manner of Engagements, and Functions, unleſs it happen that any one is excluded from them by particular obſtacles; and Women are incapable, upon the bare account of their Sex, of ſeveral ſorts of Engagements, and Functions. Thus, Women cannot exerciſe the Office of a Magiſtrate, nor be Witneſſes to a Teſtament, nor plead at the Bar, nor be Guardians, except to their own Children. And this makes their condition in many things leſs advantageous, and likewiſe in others leſs burdenſome, than that of Men[a].

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[a] Fœminæ ab omnibus officiis civilibus vel publicis remotæ ſunt. Et ideo nec judices eſſe poſſunt, nec magiſtratum gerere, nec poſtulare, nec pro alio intervenire, nec procuratores exiſtere. *l.* 2. *ff. de reg. jur.* Mulier teſtimonium dicere in teſtamento non poterit. *l.* 20. §. 6. *ff. qui teſt. facere poſſ.* Fœminæ tutores dari non poſſunt, quia ad munus maſculorum eſt. Niſi à principe filiorum tutelam ſpecialiter poſtulent. *l. ult. ff. de tut.* In multis juris noſtri articulis, deterior eſt conditio fœminarum, quàm maſculorum. *l.* 9. *ff. de ſtat. hom.*

By the ancient Roman *Law, in the Law of the twelve Tables, Women were under perpetual Guardianſhip, which was afterwards aboliſhed,* v. in fragm. 12. tab. tit. 18. §. 6. Ulp. Tit. 11. §. 18. *And by the ſame Law, Women did not inherit, not even to their own Children, nor their Children to them; which was likewiſe abrogated.* Inſt. de Senat. Tert. *And by the Decree of the Senate called,* The Velleian Decree, *Women could not be Sureties for other perſons.* Tit. ff. & Cod. ad Senat. Vell. *Which has been aboliſhed in the greateſt part of the Provinces of this Kingdom, by the Edict of the Month of* Auguſt, 1606, *which has forbidden the uſage of expreſſing in the Obligations of Women, their renouncing the* Vellcian *privilege, and which has declared their Obligations to be valid, without the ſaid renunciation.*

By our Cuſtom married Women are under the power of their Husbands. And this is agreeable both to the natural and divine Law. Thy deſire ſhall be to thy Husband, and he ſhall rule over thee, *Gen.* iii. 16. Wives, ſubmit your ſelves unto your own Husbands, as unto the Lord. For the Husband is the head of the Wife, *Eph.* v. 22, 23. 1 *Cor.* xi. 3. 1 *Pet.* iii, 1. *It is becauſe of this power that the Husband hath over his Wife, that, by our Cuſtom, ſhe cannot bind her ſelf without the authority of her Husband, except in certain caſes. Thus, a Wife who is a publick Merchant, and drives a Trade ſeparate from that of her Husband, may oblige her ſelf without his expreſs authority. For it is with the conſent of the Husband, that ſhe carries on that Trade. Thus, in ſome Provinces in* France, *Wives may oblige themſelves without the authority of their Husbands, as to the Goods which they have beſides thoſe which are part of their Marriage Portion.* See the 4th Section of the Title of Dowries.

It is likewiſe becauſe of this power which the Husband has over the Wife, that in ſome Provinces, married Women cannot oblige themſelves in any reſpect, not even with the conſent and authority of the Husband, for fear leſt he ſhould uſe his authority to force his Wife to part with all her Dower, or at leaſt with ſome ſhare of it.

The Husband had not this authority over his Wife by the Roman *Law, where the Wife remained ſtill in the power of her Father, unleſs he emancipated her when he gave her in Marriage.* l. 5. Cod. de cond. inſert. tam leg. quam fid. l. 7. Cod. de nupt. l. 1. Cod. de bon. quæ lib. l. 1. §. 1. ff. de agn. lib. l. 1. §. ult. ff. de lib. exhib. *And inſtead of this power of the Husband over the Wife, and the effects which we give it, the* Roman *Law enjoined only a dutiful reſpect, and ſuch ſervices as were inſeparable from this duty.* Cujus matrimonio conſenſit, in officio mariti eſſe debet. *l.* 48. *ff. de op. lib.* Recepta reverentia quæ maritis exhibenda eſt. *l.* 14. *in fin. ff. ſol. matr. For we muſt not conſider as an uſage of the* Roman *Law, which is to be applied to ours, that ancient way of celebrating Marriage among the* Romans, *which by their ancient Law placed the Wife under the power of the Husband, in the ſame manner as Children are in the power of the Father, and which made her even ſucceed as Heireſs to her Husband.* v. Tit. 22. Ulp. §. 14. & tit. 9. *But as to our Cuſtom, which makes the conſent of the Husband neceſſary, to validate the Obligation of his Wife, in the places, and in the caſes, where ſhe can be bound, it was not the ſame in the* Roman *Law. For on the contrary, we ſee in the* 6th *Law,* Cod. de revoc. donat. *that in the caſe of a Deed of Gift made by a Wife to her Son, in the abſence of her Husband, ſhe being deſirous afterwards to revoke the Donation, alledged, that it was done in her Husband's abſence; but it is there ſaid, that the Husband's abſence did not hinder the effect of the Donation, and that the Wife had power to diſpoſe of her own Eſtate, without the Husband's conſent.* Deſine poſtulare, ut donatio quam perfeceras, revocetur prætextu mariti & liberorum abſentiæ; cùm hujus firmitas ipſorum præſentiâ non indigeat. *d. l.*

We ſhall not here enlarge any farther on the power, and authority of the Husband, either by the Roman *Law, or by our Cuſtom. But we have been obliged to make theſe Remarks on the differences between our Cuſtom, and the* Roman *Law, with reſpect to the State of Women; becauſe they are the foundation of the Rules which we obſerve for the capacity, or incapacity of Women, as to Engagements.*

By the Law of England, *a Wife is under the Power and Juriſdiction of her Husband, and cannot enter into* *any Engagement without his conſent. Unleſs it be a Woman who by the permiſſion of her Husband, drives a Trade as a publick Merchant, in which caſe ſhe can contract, without her Husband's conſent, in relation to any matter in her way of Trade.* Cowel's Inſtit. Book 1, Tit. 10.

II.

2. Diſtinctions by Birth, and of the Paternal Authority.

Birth puts Children under the Power of thoſe of whom they are born. And the natural effects of this Power are ſettled by Nature, and the divine Law, which marks out the Duties of Children to their Parents[b]. But there are ſome effects which the Civil Law gives to the Power of Parents over their lawful Children. And theſe effects make a particular character of the paternal Power[c], which conſtitutes the State of Sons that are ſubject to the Father's Authority; the diſtinction of which ſhall be explained in the ſecond Section.

[b] Honour thy father, and thy mother. *Exod.* xx. 12. Remember that thou waſt begot of them. *Ecclus.* vii. 28. Will do ſervice to his parents, as to his maſters. *Ecclus.* iii. 7.

[c] In poteſtate noſtra ſunt liberi noſtri, quos ex juſtis nuptiis procreavimus. *Inſt. de patr. poteſt. l.* 3. *ff. de his q. ſ. v. al. j. ſ.* Jus autem poteſtatis quod in liberos habemus, proprium eſt civium Romanorum. Nulli enim alii ſunt homines, qui talem in liberos habeant poteſtatem, qualem nos habemus. §. 2. *inſt. de patr. poteſt.*

III.

3. Lawful Iſſue, and Baſtards.

Children lawfully begotten are thoſe who are born of a Marriage lawfully contracted[d]. And Baſtards are ſuch as are born out of lawful Wedlock[e].

[d] Filium eum definimus, qui ex viro & uxore ejus naſcitur. *l.* 6. *ff. de his qui ſui vel al. jur. ſunt.*

[e] Vulgo concepti dicuntur, qui patrem demonſtrare non poſſunt. Vel qui poſſunt quidem, ſed eum habent, quem habere non licet, qui & ſpurii appellantur, παρὰ τὴν σποράν. *l.* 23. *ff. de ſtat. hom.* A baſtard ſhall not enter into the congregation of the Lord, even to the tenth generation, *Deut.* xxiii. 2.

Marriage being the only lawful way appointed for the propagation of Mankind, it is but juſt to diſtinguiſh the condition of Baſtards from that of Children lawfully begotten. And it is becauſe of this diſtinction, that the Laws declare Baſtards incapable of ſucceeding to Perſons who die Inteſtate; and as they cannot inherit to any perſon, they being reckoned to be of no Family, ſo no body ſucceeds to them, but their own lawful Iſſue; as ſhall be explained in its proper place. See the Ordinance of *Charles* VI. of 1386.

IV.

4. Still-born Children.

Children that are born dead are conſidered as if they had never been born, or conceived[f].

[f] Qui mortui naſcuntur, neque nati, neque procreati videntur; quia nunquam liberi appellari potuerunt. *l.* 129. *ff. de verb. ſign.* Uxoris abortu teſtamentum mariti non ſolvi; poſtumo verò præterito, quamvis natus illico deceſſerit, non reſtitui ruptum, juris evidentiſſimi eſt. *l.* 2. *Cod. de poſt. hered. inſt.*

Still-born Children are ſo much conſidered to be in the ſame condition as if they had never been conceived, that the Inheritances which fell to them while they were alive in their Mother's Womb, go to the perſons to whom they would have belonged, if theſe Children had never been conceived. And they do not tranſmit ſuch Inheritances to their Heirs, becauſe the Right which they had to them was only an Expectation, which implied a condition, that they ſhould come alive into the world, to be capable of them. See hereafter, Art. 6.

V.

5. Abortive Children.

Abortive Children are ſuch as by an untimely Birth are born either dead, or incapable of living[g].

[g] *The State of abortive Children may be conſidered under two views. One is to know if, when they are lawfully begotten, and born alive, they are capable of inheriting, and tranſmitting an Inheritance to their Heirs, which ſhall be explained in its place. The other is to know how long a Woman muſt be pregnant, before the Child comes to that maturity as that it may be able to live; and this ſerves to determine, whether Children who live, altho' born before the ordinary time, reckoning from the day of the Marriage, ought to be reputed lawfully begotten, or not. We reckon thoſe to be lawfully begotten, who live, altho' they be born in the beginning of the ſeventh month after the Marriage.* De eo qui centeſimo octogeſimo ſecundo die natus eſt, Hippocrates ſcripſit, & divus Pius Pontificibus reſcripſit, juſto tempore videri natum. *l.* 3. §. *ult. ff. de ſuis & legit. hered.* Septimo menſe naſci perfectum partum jam receptum eſt, propter auctoritatem doctiſſimi viri Hippocratis. Et ideo credendum eſt, eum, qui ex juſtis nuptiis ſeptimo menſe natus eſt, juſtum filium eſſe. *l.* 12. *ff. de ſtat. hom.*

VI.

6. Children unborn.

Children who are ſtill in their Mother's Womb, have not their State determined; neither ought it to be, but by the Birth. And till they are born they cannot be reckoned in the number of Children; not even for the benefit of their Fathers, in order to procure to them the Rights and Advantages which accrue to Parents by the number of their Children[h]. But the hopes that they will be born alive, makes them to be conſidered, in whatever concerns themſelves, as if they were already born. Thus, the Inheritances which fell to them before their Birth, and which belong to them, are kept for them; and Curators are aſſigned to them, to take care of theſe Inheritances for their behoof[i]. Thus, the Mother who procures her own Abortion, is puniſhed as a Murderer[l].

[h] Partus antequam edatur, mulieris portio eſt, vel viſcerum. *l.* 1. §. 1. *ff de inſpect. vent.* Partus nondum editus, homo non rectè fuiſſe dicitur. *l.* 9.

in f. ff. ad leg. falc. Spes animantis. *l. 2. ff. de mort. infer.*

Qui in utero eſt, perinde ac ſi in rebus humanis eſſet, cuſtoditur, quoties de commodis ipſius partus quæritur. Quamquam alii, antequam naſcatur, nequaquam proſit. *l. 7. ff. de ſtat. hom.* Qui in ventre eſt, etſi in multis partibus legum comparatur jam natis, tamen neque in præſenti quæſtione (excuſationis à tutela) neque in reliquis civilibus muneribus prodeſt patri. Et hoc dictum eſt in Conſtitutione divi Severi. *l. 2. §. 6. ff. de excuſ. v. l. 26. ff. de ſtat. hom.*

[l] Sicuti liberorum eorum qui jam in rebus humanis ſunt, curam prætor habuit, ita etiam eos qui nondum nati ſunt, propter ſpem naſcendi non neglexit. Nam & hac parte edicti eos tuitus eſt, dum ventrem mittit in poſſeſſionem. *l. 1. ff. de vent. in poſſ. mit.* bonorum ventris nomine curatorem dari oportet. *l. 8. ff. de curat. fur. & al. l. 20. ff. de tut. & cur. dat. ab his q.*

[l] Cicero in oratione pro Cluentio Avito, ſcripſit, Mileſiam quamdam mulierem cùm eſſet in Aſia, quòd ab heredibus ſecundis accepta pecunia partum ſibi medicamentis ipſa abegiſſet, rei capitalis eſſe damnatam. *l. 39. ff. de pœn.*

What is ſaid in this Article, in relation to Succeſſions, is to be underſtood under condition that the Children come to be born alive. See the 4th Article of this Section. So that this State renders their capacity, or incapacity of Inheriting, uncertain, till they are born.

VII.

7. Poſthumous Children. Poſthumous Children are thoſe that are born after the death of their Father; and who by this Birth are diſtinguiſhed from thoſe who are born during the Father's life-time; in that poſthumous Children are never under the Power of their Father, and are not of the number of Sons ſubject to the Father's Authority: of whom mention will be made in the 5th Article of the 2d Section[m].

[m] Poſtumos dicimus eos duntaxat, qui poſt mortem parentis naſcuntur. *l. 3. §. 1. ff. de inj. rupt.*

VIII.

8. Children born after their Mother's Death. Children that are born after the death of their Mothers, and who are taken out of the Mother's Womb after ſhe is dead, are of the ſame condition with other Children[n].

[n] Natum accipe, & ſi exſecto ventre editus ſit. Nam & hic rumpit teſtamentum. *l. 12. ff. de lib. & poſt. l. 6. ff. de inoff. teſt.*

IX.

9. Hermaphrodites. Hermaphrodites are thoſe who have the marks of both Sexes; and they are reputed to be of that Sex in which Nature moſt prevails in them[o].

[o] Quæritur hermaphroditum cui comparamus? & magis puto, ejus ſexus æſtimandum, qui in eo prævalet. *l. 10. ff. de ſtat. hom.* hermaphroditus an ad teſtamentum adhiberi poſſit, qualitas ſexus incaleſcentis oſtendet. *l. 15. §. 1. ff. de teſtib. v. l. 6. in f. ff. de lib. & poſt,*

X.

10. Eunuchs. Eunuchs are thoſe whom a defect of conformation of their Members, whether it proceed from their Birth, or any other cauſe, renders incapable of begetting Children[p].

[p] Generare non poſſunt ſpadones. *§. 9. inſt. de adopt.* Spadonum generalis appellatio eſt. Quo nomine, tam hi qui natura ſpadones ſunt, item thlibiæ, thlaſiæ, ſed & ſi quod aliud genus ſpadonum eſt, continentur. *l. 128. ff. de verb. ſign.* Non intrabit Eunuchus, attritis, vel amputatis teſticulis, & abſciſſo veretro in Eccleſiam Domini. He that is wounded in the ſtones, or hath his privy member cut off, ſhall not enter into the congregation of the Lord, *Deut.* xxiii. 1. *It appears by theſe Texts, who are thoſe that are to be reckoned in the number of Eunuchs, and why it is that they are incapable of Marriage.*

XI.

11. Madmen. Madmen are thoſe who are deprived of the uſe of Reaſon, after they have attained the age in which they ought to have it; Whether it be that this defect is natural to them from their Birth, or has happened by ſome accident. And ſeeing this condition renders them incapable of all manner of Engagements, and of the Management of their Eſtate, they are put under the tuition of a Guardian[q].

[q] Furioſi nulla voluntas eſt. *l. 40. ff. de reg. jur.* Furioſus nullum negotium contrahere poteſt. *l. 5. eod.* Furioſi in curatione ſunt. *§. 3. inſt. de curat. l. 2. & l. 7. ff. de curat. fur. See the 1st Article of the 1st Section of Guardians, and the 13th Article of this Section.*

XII.

12. Perſons that are deaf and dumb, and others labouring under the like Infirmities. Perſons that are both deaf and dumb, or thoſe who by other infirmities are rendered incapable of managing their affairs, are in ſuch a condition that Guardians are appointed to them, as well as to Madmen, to take care of their Affairs, and of their Perſons, as occaſion requires[r].

[r] Et ſurdis & mutis, & qui perpetuo morbo laborant, quia rebus ſuis ſupereſſe non poſſunt, curatores dandi ſunt. *§. 4. inſt. de curat. l. 2. ff. de curat. fur. l. 19. in f. l. 20. l. 21. ff. de reb. auct. jud. poſſ.*

XIII.

13. How Madneſs, or Imbecillity, does not change the ſtate of Perſons. Thoſe who labour under Madneſs, or under any of the other Infirmities above-mentioned, do not loſe the State which their other qualities give them. And they retain their dignities, their privileges, the capacity of inheriting, their Right to their Eſtates, and likewiſe ſuch effects of the Paternal Power as are conſiſtent with that condition[f].

[f] Qui furere cœpit & ſtatum, & dignitatem in qua fuit, & magiſtratum, & poteſtatem videtur retinere: ſicut rei ſuæ dominium retinet. *l.* 20. *ff. de ſtat. hom.* Patre furioſo, liberi nihilominus in patris ſui poteſtate ſunt. *l.* 8. *ff. de his qui ſui vel al. j. ſ.*

XIV.

14. Monſters. Monſters, who have not Humane Shape, are not reputed in the number of Perſons, and are not reckoned as Children to their Parents[t]. But ſuch as have what is eſſential to Humane Shape, and have only ſome exceſs, or ſome defect, in the conformation of their members, are ranked with the other Children[u].

[t] Non ſunt liberi, qui contra formam humani generis, converſo more, procreantur. Veluti ſi mulier monſtroſum aliquid, aut prodigioſum enixa ſit. *l.* 14. *ff. de ſtat. hom.*

[u] Partus autem qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus, & ideo inter liberos connumeratur. *d. l.* 14.

XV.

15. A caſe in which Monſters are reckoned among the other Children. Altho' Monſters who have not Humane Shape, are not placed in the number of Perſons, and are not conſidered as Children, yet they are reckoned as ſuch, when it is for the behoof of the Parents, and are allowed to fill up the number of Children, to intitle their Parents to any Privilege or Exemption, which belongs to Fathers or Mothers having a certain number of Children[x].

[x] Quæret aliquis: ſi portentoſum, vel monſtroſum, vel debile mulier ediderit: vel qualem viſu, vel vagitu novum, non humanæ figuræ, ſed alterius magis animalis, quàm hominis partum: an quia enixa eſt, prodeſſe ei debeat? & magis eſt, ut hæc quoque parentibus proſint. Nec enim eſt quod eis imputetur, quæ qualiter potuerunt, ſtatutis obtemperaverunt. Neque id quod fataliter acceſſit, matri damnum injungere debet. *l.* 135. *ff. de verb. ſignif. We may add as another reaſon of this Rule, that theſe Monſters are more chargeable to the Parents than their other Children.*

XVI.

16. Diſtinction made by Age. Age diſtinguiſhes among perſons, thoſe who have not Reaſon or Experience enough to govern themſelves, from thoſe to whom Age has given ſuch a maturity of Reaſon, as to enable them to be maſters of their own conduct[y]. But becauſe Nature does not mark in every one the time of this maturity, the Civil Law has regulated the times in which perſons are judged capable both of Marriage, and other Engagements. And we ſhall ſee in the following Section, the diſtinctions which the Law has made of Minors and of Majors; of thoſe who have attained to the years of Maturity, and thoſe who have not[z].

[y] Hoc edictum (de minoribus) prætor, naturalem æquitatem ſecutus, propoſuit. Quo tutelam minorum ſuſcepit. Nam cum inter omnes conſtet, fragile eſſe, & infirmum hujuſmodi ætatum conſilium, & multis captionibus ſuppoſitum, multorum inſidiis expoſitum: auxilium eis prætor, hoc edicto, pollicitus eſt. Et adverſus captiones opitulationem. *l.* 1. *ff. de min.*

[z] *See the 8th and 9th Articles of the 2d Section.*

SECT. II.

Of the State of Perſons by the Civil Law.

Diſtinction of Perſons by the Civil Law. THE diſtinctions which the Civil Law makes of the State of Perſons, are thoſe that are eſtabliſhed by Arbitrary Laws; whether it be that theſe diſtinctions have no foundation in Nature, as that of Freemen and Slaves; or that ſome Natural Qualities have given riſe to the ſaid diſtinctions, ſuch as Majority and Minority of Age.

The principal diſtinctions of Perſons in the Roman Law. The *Roman* Law conſidered chiefly three things in every perſon; that is, Liberty, Country, and Family; and under theſe three views it made three diſtinctions of Perſons. The firſt, of Freemen and Slaves; the ſecond, of Citizens of *Rome*, and Strangers, or of ſuch as had loſt the right of Citizen, by a Civil Death; and the third, of Fathers of a Family, and of Sons ſubject to the Father's Authority[a]. Theſe two laſt diſtinctions are in uſe with us, altho' the Rules we obſerve in them are different from thoſe of the *Roman* Law. And as to the ſtate of Slavery, altho' there are no Slaves in *France*, yet it is neceſſary to know the nature of that State. For this reaſon, we ſhall ſet down under this Title theſe three diſtinctions, together with the others which we have in common with the *Roman* Law.

Some diſtinctions in uſe with us. We have in *France* a diſtinction of Perſons which is not in the *Roman* Law, or which is very different from any thing that is to be found there. And ſince for this reaſon it is not to be ſet down in the Articles of this Section, and yet it being conſidered as belonging to the State of Perſons, this diſtinction ſhall be explained here in a few words. It is that which Nobility makes between Gentlemen, and thoſe who are not, whom the *French* call *Roturiers*.

The Nobility.

Nobility gives to thoſe who are of that Order divers Privileges and Exemptions, and a capacity of holding certain Offices and Benefices appropriated to Gentlemen, and of which thoſe who are not of Noble Extraction are incapable. Nobility makes likewiſe in ſome Cuſtoms a difference as to Succeſſions. This Nobility is acquired either by Birth, which ennobles all the Children of thoſe who are Noble; or by certain Offices, which ennoble the Deſcendants of thoſe who have enjoy'd them [a]. Or laſtly, by Letters of Nobility, which are obtained from the King, as a Recompence for ſome ſignal Services.

Burgeſſes.

We diſtinguiſh in *France* between the Inhabitants of Towns, who have certain Rights, Exemptions, and Privileges annexed to the Right of Burgeſhip of thoſe Towns, with a capacity of bearing Offices in it; and the People who live in the Country, and in little Villages, who have not the ſame Privileges, nor the ſame Rights.

Vaſſal, Subjection to the Court of a Lord of a Manor, or perpetual Leſſee.

To theſe diſtinctions we muſt add thoſe, which are made by ſome Cuſtoms, of Perſons of a ſervile condition, which diſtinguiſhes them from thoſe who are of a free condition, in that they are bound by the ſaid Cuſtoms to ſome perſonal Servitudes which relate to Marriages, Teſtaments, and Succeſſions. But theſe Servitudes being differently regulated by the ſaid Cuſtoms, and being unknown in the other Provinces, it is not neceſſary to ſay any more of them here, and it is enough that we have made this bare Remark. To which we muſt add, that this diſtinction of theſe perſons of ſervile condition, is not founded on any perſonal Qualities, but barely upon the Domicil of the ſaid Perſons, and the Quality of their Eſtates, which are ſubject to theſe ſervile conditions. In the ſame manner as the qualities of Vaſſal, Subjection to the Courts of a Lord of a Manor, a perpetual Leſſee, who is ſtiled in the *Roman* Law *Emphyteuta*, are not, properly ſpeaking, Perſonal Qualities, but conſequences either of one's Domicil, or of the nature of the Lands which they poſſeſs.

Diſtinction of Perſons in Britain. *Nobility.*

Commoners.

It may not be improper to add one word here touching the diſtinction of Perſons in *Great Britain*. The Nobility, ſtrictly taken, is what makes up the Peerage of *Great Britain*, and conſiſts of Lords Spiritual and Temporal, who have a Seat and Vote in Parliament, and are divided into Five Ranks, or Degrees, *viz.* Duke, Marquis, Earl, Viſcount and Baron. All who are not Peers of the Kingdom, come under the general name of Commoners, who may be diſtinguiſhed into two claſſes. The firſt takes in all the Gentry, of what denomination ſoever they be; whether Baronets, Knights, Eſquires, or Gentlemen. Baronets and Knights are made by Creation. The Honour of Baronet is Hereditary, and deſcends to the Male Iſſue. That of a Knight-Batchelor is only Perſonal, and dies with the Perſon on whom the ſaid Honour is conferred. The Titles of Eſquire and Gentleman are acquired either by Birth, by Profeſſion, or by certain Offices, which ennoble thoſe who have ſerved in them, and their Deſcendants. Under the other claſs may be comprehended the Yeomanry, or Freeholders, who have Lands and Tenements of their own, to the value of at leaſt Forty Shillings a Year, all Citizens, Tradeſmen, and Day-Labourers.

Perſons of a ſervile condition.

To theſe diſtinctions we muſt add another, which is mentioned in our Books of the Common Law, and that is of perſons of a ſervile condition, who are called *Villains*, from the *Latin* word *Villa*, a Country Farm, where they were appointed to do ſervice. Of theſe Bondmen, or Villains, there were two ſorts in *England*, one termed a *Villain in groſs*, who was immediately bound to the perſon of his Lord and his Heirs. The other was a *Villain* belonging to a Manor, who in the *Roman* Law is called *glebæ adſcriptitius*, being bound to his Lord as a member belonging and annexed to a Manor, whereof the Lord was owner. There are not, properly ſpeaking, any Villains now in *England*, and therefore it is not neceſſary to ſay any more concerning the ſtate of Villainage, it being enough barely to have mention'd it.

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I.

1. *Slaves.* A Slave is one who is in the power of a Maſter, and who belongs to him in ſuch a manner, that the Maſter may ſell him, diſpoſe of his Perſon, his Induſtry, and his Labour; and who can do nothing, have nothing, nor acquire any thing, but what muſt belong to his Maſter[a].

[a] Servitus eſt conſtitutio juris gentium, qua quis dominio alieno, contra naturam ſubjicitur. *l.* 4. §. 1. *ff. de ſtat. hom.* §. 2. *inſt de jur. perſ.* Vobis acquiritur quod ſervi veſtri ex traditione nanciſcuntur. Sive quid ſtipulentur, ſive ex donatione, vel ex legato, vel ex qualibet alia cauſa acquirant. §. 3. *inſt. per quas perſ. cuique acq. l.* 1. §. 1. *ff. de his qui ſui vel al. jur. ſ.*

II.

2. *Free-men.* Free-men are all thoſe who are not Slaves, and who have preſerved their natural Liberty; which conſiſts in a right to do whatever one pleaſes, except in ſo far as we are reſtrained by Law, or hindered by ſome outward Violence[b].

[b] Libertas eſt naturalis facultas ejus quod cuique facere libet, niſi ſi quid vi, aut jure prohibetur. *l.* 4. *ff. de ſtat. hom.* §. 1. *inſt. de jur. perſ.*

III.

3. *Cauſes of Slavery.* Men become Slaves by Captivity in time of War, among Nations where it is the cuſtom that the Conqueror, by ſaving the life of the perſon conquered, becomes his Maſter, and makes him his Slave. And it is a conſequence of the Slavery of Women, that their Children are Slaves by their Birth[c].

[c] Jure gentium ſervi noſtri ſunt qui ab hoſtibus capiuntur, aut qui ex ancillis noſtris naſcuntur. *l.* 5. §. 1. *ff. de ſtat. hom.* §. 4. *inſt. de jur. perſ.*

If one who was paſt twenty years of age ſuffered himſelf to be ſold, that he might have the price of his Liberty, he became a Slave by the Roman *Law, altho' that Law did not allow him at that age to have the power of ſelling his Eſtate.* Jure Civili ſi quis ſe major viginti annis, ad pretium participandum, venire paſſus eſt (ſervus ſit.) *l.* 5. §. 1. *ff. de ſtat. hom.*

IV.

4. *Manumiſed perſons.* Manumiſed perſons are thoſe who having been Slaves, are made free[d].

[d] Libertini ſunt, qui ex juſta ſervitute manumiſſi ſunt. *l.* 6. *ff. de ſtat. hom. inſt. de libert.*

V.

5. *Who are Fathers of a Family, and who Sons of a Family.* The Sons and Daughters of a Family are perſons who are ſubject to the Father's Authority; and the Fathers, or Mothers of a Family, whom we call likewiſe Heads of a Family, are the perſons who are not ſubject to the Father's Authority[e]; whether they have Children of their own, or not, and whether they have been freed from the Father's Authority by Emancipation[f], or by the Natural[g], or Civil Death of the Father[h]. And however young theſe perſons may happen to be, yet they are conſidered as Heads of a Family; ſo that the ſeveral Children of one Father are ſo many Heads of a Family after the Father's Death[i].

[e] Patres familiarum ſunt, qui ſunt ſuæ poteſtatis, ſive puberes, ſive impuberes. Simili modo matres familiarum, filii familiarum, & filiæ, quæ ſunt in aliena poteſtate. *l.* 4. *ff. de his qui ſui vel al. jur. ſ.*

[f] Emancipatione deſinunt liberi in poteſtate parentum eſſe. §. 6. *inſt. quib. mod. jus patr. pot. ſolv.*

[g] Qui in poteſtate parentis ſunt, mortuo eo ſui juris fiunt. *inſt. eod.*

[h] Cùm autem is qui ob aliquod maleficium in inſulam deportatur, civitatem amittit, ſequitur ut qui eo modo ex numero Civium Romanorum tollitur, perinde quaſi eo mortuo, deſinant liberi in poteſtate ejus eſſe. §. 1. *eod.* Pœnæ ſervus effectus, filios in poteſtate habere deſinit. §. 3. *eod. Concerning the Civil Death, ſee Art.* 12. *below.*

[i] Denique & pupillum patrem familias appellamus. Et cùm pater familias moritur, quotquot capita ei ſubjecta fuerint, ſingulas familias incipiunt habere. Singuli enim patrum familiarum nomen ſubeunt, idemque eveniet & in eo qui emancipatus eſt. Nam & hic ſui juris effectus propriam familiam habet. *l.* 195. §. 2. *ff. de verb. ſignif.*

The Paternal Power is the foundation of ſeveral Incapacities in Sons; but which are different in the Roman *Law, and in our Cuſtoms. Thus in the* Roman *Law, Sons who lived in ſubjection to the Father's Authority, were firſt of all incapable of acquiring any thing. But all that they did acquire by any way whatſoever, belonged to their Fathers, excepting the* Peculium, *if the Father thought fit to let them have it. And afterwards they had the power of acquiring, and the Fathers had the Uſufruct of all that their Sons acquired. And then ſome Exceptions were made, and the Fathers had not any longer the Uſufruct of certain Goods. But it is not neceſſary to explain here all theſe changes, nor the different kinds of Uſufruct which Fathers have of the Goods of their Children in the Provinces of this Kingdom, whether it be under the name of Uſufruct, or under the name of Wardſhip.*

Thus likewiſe in the Roman *Law, Sons who were ſtill under the Father's Juriſdiction, could not oblige themſelves by borrowing Money.* Toto Tit. ad Senatuſc. Maced. *Thus in* France, *Sons ſubject to the Paternal Authority cannot marry, without the conſent of their Fathers and Mothers, unleſs they are upwards of thirty years of age, and Daughters after they are paſt twenty-five years, according to the Ordinances of* 1556 *of* Blois, *and of* 1539.

Thus, in France *Marriage emancipates Children from the Paternal Juriſdiction. Whereas under the* Roman *Law, the Son and Daughter that were married, remained* *ed nevertheleſs under the Power of the Father, unleſs he emancipated them when he married them.* l. 5. Cod. de cond. inſert. tam in leg. quam in fidei com. l. 7. Cod. de nupt. l. 1. Cod. de bon. quæ lib.

VI.

6. Emancipation does not alter the Natural Right of the Paternal Power. Emancipation, and the other ways which ſet the Son or Daughter free from under the Father's Authority, regard only the effects which the Civil Laws give to the Paternal Power, but change nothing in thoſe that are of Natural Right[l].

[l] Eas obligationes quæ naturalem præſtationem habere intelliguntur, palam eſt capitis diminutione non perire: quia civilis ratio naturalia jura corrumpere non poteſt. *l. 8. ff. de cap. minut.*

VII.

7. Who are thoſe that are ſaid to be Maſters of their own Rights. According to theſe two diſtinctions, of Free-men and Slaves, of Fathers and Sons, there is no perſon who is not either under the Power of another, or in his own; that is to ſay, Maſter of his own Rights[m]. And this does no ways hinder the Son that is emancipated from being ſubject to the Authority which the Law of Nature gives his Father over him; nor a Minor, who happens to be Father of a Family, from being under the Conduct and Authority of a Tutor, or Guardian.

[m] Quædam perſonæ ſui juris ſunt, quædam alieno juri ſubjectæ. Rurſus earum quæ alieno juri ſubjectæ ſunt, aliæ in poteſtate parentum, aliæ in poteſtate dominorum. *inſt. de his qui ſui vel al. j. ſ. l. 1. ff. eod. l. 3. ff. de ſtat. hom.*

VIII.

8. Who are of ripe Age, and who of unripe Age. Males who have not attained the Age of fourteen years compleat, and Females who are under twelve, are ſaid to be of an unripe Age, and are called in the *Roman* Law *Impuberes*. And Sons who have attained the Age of fourteen years compleat, and Daughters the Age of twelve, are reckoned to be of ripe Age, and are diſtinguiſhed in the *Roman* Law by the name of *Adulti*[n].

[n] Noſtrâ ſanctâ conſtitutione promulgatâ, pubertatem in maſculis poſt decimum quartum annum completum illico initium accipere diſpoſuimus: antiquitatis normam in fœminis bene poſitam, in ſuo ordine relinquentes, ut poſt duodecim annos completos viri potentes eſſe credantur. *inſt. quib. mod. tut. fin. l. ult. Cod. quand. tut. vel cur. eſſe deſ.*

It is the Pubertas, *or Ripeneſs of Age, that removes the Incapacity for Marriage, which proceeded from want of years. But the* Romans *diſtinguiſhed between this Puberty, that is ſufficient to make the Marriage lawful, and full Puberty; which renders it more decent. This full Puberty in Males is eighteen years compleat, and in Females fourteen.* Non tantùm cùm quis adoptat, ſed & cùm adrogat, major eſſe debet eo quem ſibi per adrogationem vel per adoptionem filium facit; & utique plenæ pubertatis, id eſt, decem & octo annis eum præcedere debet. *l. 40. §. 1. de adopt. §. 4. inſt. eod. As to the other effects of full Puberty, vid. l. 14. §. 1. ff. de alim. leg. l. 57. ff. de re jud. l. 1. §. 3. ff. de poſtul.*

IX.

9. Majors and Minors. Minors are thoſe of both Sexes who have not as yet five and twenty years compleat; and they are under Tutelage till that Age. When they have compleated the laſt moment of the five and twentieth year, they are then ſaid to be of full Age, or Majors[o].

[o] Maſculi quidem puberes, & fœminæ viri potentes uſque ad viceſimum quintum annum completum curatores accipiunt. Quia licet puberes ſint, adhuc tamen ejus ætatis ſunt, ut ſua negotia tueri non poſſint. *inſt. de curat.* à momento in momentum tempus ſpectetur. *l. 3. §. 3. ff. de min.*

We have thought fit to make uſe here of the word Tutelage for Adults, altho' by the Roman *Law they were out of Tutelage, and had Curators aſſigned them, as ſhall be explained under the Title of* Tutors. *But according to our uſage in* France, *Tutelage does not expire till the five and twentieth year, except in ſome Cuſtoms which fix a ſhorter period of time for Minority.*

[*By the* Roman *Law, and likewiſe in* France *and other Countries, Minority both in Men and Women laſts till they are paſt five and twenty years. But in* Britain, *perſons of both Sexes are reckoned by the Law to be of full Age, when they have accompliſhed one and twenty years.* Coke 1 Inſt. Book 1. Chap. 4. §. 104. *Mackenzie*'s Inſtitutes of the Law of *Scotland*, Book 1. Tit. 7.]

X.

10. Prodigals. We ought to place in the rank of Minors, thoſe Perſons who are forbid the Management of their own Affairs, as being Prodigals, altho' they be of full Age; becauſe their bad conduct renders them incapable of managing their own Eſtate, and of entring into any Engagements, which is the conſequence of the former. And therefore the care of all their concerns is committed to a Guardian[p].

[p] Prodigi licet majores viginti quinque annis ſint, tamen in curatione ſunt. §. 3. *inſt. de curat.* Prodigo interdicitur bonorum ſuorum adminiſtratio. *l. 1. ff. de curat. fur.* ejus cui bonis interdictum ſit, nulla voluntas eſt. *l. 40. ff. de reg. jur.*

[*The* Roman *Lawgivers thought it for the intereſt of the Publick to take care, that particular perſons ſhould not fooliſhly and riotouſly ſquander away their Eſtates; and therefore when any perſon grew prodigal to that exceſs, that it was neceſſary to tie up his hands, the Magiſtrate interdicted him the Adminiſtration of his Eſtate, and committed the care of it to a Curator, till the Owner ſhould give greater proofs of his prudence and diſcretion. But the Laws of* England *take no ſuch care of Prodigals, and for want of this due care, many antient Families run to ruine and decay, thro' the extravagance and folly of the preſent poſſeſſors.*]

XI.

11. *Natural-born Subjects, and Strangers.* We call Natural-born Subjects thoſe that are born within the King's Dominions, and we reckon theſe to be Strangers who are Subjects of another Prince, or another State. And Strangers of this kind, who have not been Naturalized by Letters Patents of the Prince, are under the Incapacities which are regulated by the Ordinances, and by our Cuſtoms[q].

[q] In orbe Romano qui ſunt, ex conſtitutione Imperatoris Antonini, cives Romani effecti ſunt. *l.* 17. *ff. de ſtat. hom. nov.* 78. *c.* 5. Peregrini capere non poſſunt (hæreditatem.) *l.* 1. *C. de hær. inſt. l.* 6. §. 2. *ff. eod.* Nec teſtari. *l. in verbo* cives Romani. *ff. ad leg. falc. v. auth. omnes peregrini. C. comm. de ſucceſſ.*

In France, *Strangers who are call'd Aliens,* alibi nati, *are incapable of Succeſſions, and of making a Teſtament. They are not capable of enjoying Offices or Benefices; and they are under the other Incapacities regulated by the Ordinances, and by our Uſage.* See the Ordinance of 1386. that of 1431, and that of *Blois,* Art. 4. *We muſt except from theſe Incapacities ſome Strangers to whom our Kings have granted the Rights and Privileges of Natives, and Natural-born* French.

[*In* Great Britain, *Aliens, that is, Perſons born out of the Ligeance of our Sovereign Lord the King, are capable of ſucceeding to Perſonal Eſtates, and of making Teſtaments, but they are incapable of purchaſing or inheriting Lands, and are under other Incapacities, regulated by our Statutes and Cuſtoms. This Incapacity of Aliens may be taken off either by Denization by the King's Letters Patents, or by Naturalization by Act of Parliament: Between which two ways the* Engliſh *Law makes this difference, That when one is Denizated by Letters Patents, if he had Iſſue in* England *before his Denization, that Iſſue is not inheritable to his Father; whereas if the Father be Naturalized by Act of Parliament, ſuch Iſſue does inherit. So if an Iſſue of an* Engliſhman *be born beyond Sea, if the Iſſue be Naturalized by Act of Parliament, he ſhall inherit his Father's Lands; but if he be made Denizen by Letters Patents, he ſhall not. The* Engliſh *Law diſtinguiſheth alſo between an Alien that is a Subject to a Prince or State that is at Enmity with our King, and one that is Subject to a Prince or State that is at Amity with us. An Alien Enemy cannot maintain either Real or Perſonal Action, until both Nations be in Peace; But an Alien that is in Peace and Amity with us, may maintain Perſonal Actions; for an Alien Friend may trade and traffick, buy and ſell, and therefore of neceſſity muſt be of ability to have Perſonal Actions, but he cannot maintain either Real or Mixt Actions.* Coke 1. Inſt. §. 198]

XII.

12. *Civil Death.* Civil Death is the State of thoſe perſons who are condemned to Death, or to other Puniſhments which are attended with the Confiſcation of Goods. And therefore this State is compared to natural Death, becauſe it cuts off from the Civil Life thoſe perſons who fall under it, and renders them as it were Slaves to the Puniſhment which is inflicted on them[r].

[r] Qui ultimo ſupplicio damnantur, ſtatim & civitatem & libertatem perdunt. Itaque præoccupat hic caſus mortem. *l.* 29. *ff. de pœn.* Servi pœnæ. §. 3. *inſt. quib. mod. jus patr. pot. ſolv.* Is qui ob aliquod maleficium, in Inſulam deportatur, civitatem amittit. §. 1. *inſt. quib. mod. jus patr. pot. ſolv.* ex numero civium Romanorum tollitur. *d.* §. Servi pœnæ efficiuntur, qui in metallum damnantur, & qui beſtiis ſubjiciuntur. §. 3. *eod.* Sunt quidam ſervi pœnæ, ut ſunt in metallum dati, & in opus metalli, & ſi quid eis teſtamento datum fuerit, pro non ſcripto eſt: quaſi, non Cæſaris ſervo datum, ſed pœnæ. *l.* 17. *ff. de pœn. l.* 1. *C. de hæred. inſt.*

XIII.

Profeſſed Monks, or Nuns, are under another kind of Civil Death, which is voluntary; into which State they enter by their Vows, which render them incapable of Marriage, or of having any Property in Temporal Goods, or entring into any Engagements which are conſequences of the ſame[ſ]. 13. *Profeſſed Monks and Nuns.*

[ſ] Ingreſſi monaſteria, ipſo ingreſſu, ſe ſuaque dedicant Deo. Nec ergo de his teſtantur, utpote nec domini rerum. *Auth. ingreſſi, ex nov.* 5. *cap.* 5. *C. de Sacroſ. Eccleſ. Nov.* 76.

In France, *the Eſtates of Perſons who are Profeſſed Religious, do not go to the Monaſtry, but to their Heirs, or thoſe to whom they are pleaſed to give them. And they cannot diſpoſe of them for the uſe of the Monaſtry.*

[*By the Law of* England, *when a Man entreth into Religion, and is profeſſed, he is dead in the Law, and his Son, or next Heir, ſhall inherit him, as if he were really and truly dead. And when he entreth into Religion, he may make his Teſtament, and therein name his Executors, who may have an Action of debt due to him before his entry into Religion, or any other Action that Executors may have, as if he were dead indeed. And if he make no Executors when he entreth into Religion, then the Ordinary may commit the Adminiſtration of his Goods to others, as if he were really dead. Littleton,* Book 2. Chap. 11. of *Villenage,* §. 200. *My Lord* Coke, *in his Commentary upon this Section, takes a difference between Profeſſion in a Foreign Country, and Profeſſion in ſome Houſe of Religion within the Realm; and ſays, that Profeſſion in a Foreign Country doth not bring the party profeſſed under thoſe diſabilities that a Profeſſion within the Realm doth; becauſe a Profeſſion within the Realm may be tried by the Ordinary; whereas a Foreign Profeſſion wanteth Trial, and therefore the Common Law taketh no knowledge of it. I confeſs, I do not ſo readily enter into the reaſon of this diſtinction, ſeeing that it is not the proof, or method of Trial, that worketh the Diſability in the perſon that enters into Religion; but it is the Vow that he takes at the time of his Profeſſion, by which he ſolemnly devotes himſelf, and all that he hath, to the Service of God, and renounces the World, and all that is in it. And whether this ſolemn Vow or Renunciation be made in* England, *or in any other Country, it muſt produce the ſame effect as to the Diſability of the Perſon that makes it. As to the proof of this Profeſſion, it muſt be made in ſuch manner as the circumſtances of it will admit.*]

XIV.

Clergymen are thoſe who are ſet apart for the Miniſtry of God's Worſhip; ſuch as Biſhops, Prieſts, Deacons, Subdeacons, and thoſe who are called to other Orders. And this State, which diſtinguiſhes them from Laymen, renders them incapable of Marriage, in ſuch as are in Holy Orders, and worketh alſo 14. *Clergymen.*

other Incapacities in the matters of Commerce prohibited to the Clergy, and entitles them to the Privileges and Exemptions which have been granted to them by the Canons of the Church, by the Ordinances, and by the Cuſtom of the Kingdom.

XV.

15. *Communities.* Communities Eccleſiaſtical and Secular, are Aſſemblies of many perſons united into one Body, that is formed with the Prince's Conſent, without which theſe kinds of Aſſemblies would be unlawful[u]. And theſe Bodies, and Corporations, ſuch as Chapters of Churches, Univerſities, Monſtaries, Town Corporations, Companies of Trade, and others, are eſtabliſhed for the forming of Societies that may be uſeful either to Church[x], or State[y]; and they are accounted as Perſons[z], having their own proper Goods, their Rights, and their Privileges. And among other differences which diſtinguiſh them from particular Perſons, theſe Societies are under ſome Incapacities, which are acceſſory, and natural to this State: As particularly that of being incapable of alienating their Stock without juſt Cauſe[a].

TITLE III.

Of Things.

In what manner the Laws conſider Things. THE Civil Laws extend the diſtinctions which they make of Things to every thing that God hath created for the uſe of Man. And as it is for our uſe that he hath made the whole World, and that he deſtinates for the ſupplying of our wants, every thing that is here on the Earth below, or in the Heavens above[a]; it is this deſtination of all things to our different wants, which is the foundation of the different manners in which the Laws conſider and diſtinguiſh the different kinds of Things, in order to regulate the ſeveral uſes and commerce which Men make of them.

The foundations of the diſtinctions of Things. The divine Providence which forms an univerſal Society of Mankind, and which divides it into Kingdoms, Towns, and other Places, and ſettles in every one the Families, and the particular Perſons who compoſe them; does likewiſe diſtinguiſh, and diſpoſe in ſuch a manner all the things that are for the uſe of Man, that many things are common to all Mankind; others common to one Kingdom; ſome to a Town, or ſome other Place; and other things enter into the Poſſeſſion, and Commerce of particular perſons.

It is theſe diſtinctions of Things, and the other different ways in which they

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[t] Presbyteros, Diaconos, Subdiaconos, atque Exorciſtas, & Lectores, Oſtiarios, & Acolytos etiam perſonalium munerum expertes eſſe præcipimus. *l.* 6. *C. de Epiſc. & Cler.* Ordinance of St. *Lewis*, 1228. Ordinance of *Blois*, Art. 59. *v. l.* 1. *& ſeq. & l.* 2. *d. Tit. C. de Epiſt. & Cler.*

[u] Mandatis principalibus, præcipitur præſidibus provinciarum, ne patiantur eſſe collegia. *l.* 1. *& l.* 2. *ff. de coll. & corp. l.* 3. §. 1. *eod. l.* 1. *ff. quod cujuſque univ. l.* 2. *ff. de extr. crim.*

[x] Religionis cauſa coire non prohibentur. Dum tamen per hoc non fiat contra ſenatuſconſultum, quo illicita collegia arceantur. *l.* 1. §. 1. *ff. de coll. & corp. tot. tit. C. de Epiſc. & Cler.*

[y] Item Collegia Romæ certa ſunt, quorum corpus ſenatuſconſultis, atque conſtitutionibus principalibus confirmatum eſt, velut piſtorum, & quorumdam aliorum, & naviculariorum, qui & in provinciis ſunt. *l.* 1. *ff. quod cujuſque univ. As to Town Corporations,* v. l. 3. ff. quod cujuſque univ. tit. ff. ad Munic.

[z] Perſonæ vice fungitur municipium, & decuria. *l.* 22. *ff. de fidejuſſ.*

[a] *Eccleſiaſtical and Lay Communities being eſtabliſhed for a publick Good, and with an intent that they ſhould laſt always; they are forbid to alienate their Goods, without juſt cauſe.* l. 14. C. de Sacr. Eccl. *And it is becauſe of this perpetuity, and of theſe prohibitions to alienate, that Lands which come into the poſſeſſion of Communities, are ſaid to be in* Mortmain, *that is,* in a dead Hand; *becauſe what they once acquire, remaining always in their poſſeſſion, the King, and Lords of Mannors, loſe their Services, and the profits due to them upon the change of their Vaſſals, and upon Alienation of the Lands. It is for this reaſon that they are not permitted to acquire Immoveables, without paying to the King a conſideration for a Licence of* Mortmain, *and ſome acknowledgment to the Lord of the Mannor, for the loſs of the perquiſites that would accrue by the future changes of Maſters.* See the Ordinances of *Philip* III. 1275. Charles VI. 1372. and others.

It was in conſideration of this loſs which the King, and Lords of Mannors ſuſtained, when Lands were alienated to religious or other Corporations, that this Alienation of Lands in Mortmain *was prohibited in* England *by the* Statute 7 E. 1. *commonly called,* The Statute of Mortmain, *and by* 18 E. 3. chap. 3. and 15 R. 2. chap. 5. *But theſe Statutes were in ſome manner abridged by* 39 Eliz. chap. 5. *by which the Gift of Lands,* &c. *to Hoſpitals is permitted, without obtaining Licenſes in* Mortmain. *And by the Statute made* 14 Car. 2. cap. 9. *the Preſident and Governors for the Poor within the Cities of* London *and* Weſtminſter, *may without Licenſe in* Mortmain, *purchaſe Lands,* &c. *not exceeding the yearly value of three Thouſand Pounds.*

[a] And leſt thou lift up thine eyes unto Heaven, and when thou ſeeſt the Sun, and the Moon, and the Stars, even all the Hoſt of Heaven, ſhouldeſt be driven to worſhip them, and ſerve them, which the Lord thy God hath divided unto all Nations under the whole Heaven, *Deut.* iv. 19. And ordained Man through thy Wiſdom, that he ſhould have Dominion over the Creatures which thou haſt made, *Wiſdom of* Solomon, *ch.* ix. 2.

have relation to the Uſe, and Commerce of Men, that ſhall be the ſubject matter of this Title. And becauſe there are ſome diſtinctions of Things, which are altogether natural, and others which have been eſtabliſhed by Laws, we ſhall explain in the firſt Section of this Title, the diſtinctions made by Nature, and in the ſecond thoſe that are made by the Laws of Men.

SECT. I.

Diſtinctions of Things by Nature.

The CONTENTS.

1. *Things common to all.*
2. *Things publick.*
3. *Things belonging to Towns, or other Places.*
4. *Diſtinction of Immoveables, and Moveables.*
5. *Immoveables.*
6. *Trees and Buildings.*
7. *The hanging Fruits are a part of the Ground.*
8. *Acceſſories to Buildings.*
9. *Moveables.*
10. *Moveables, living and dead.*
11. *Animals, wild and tame.*
12. *Moveable Things, that are conſumed by uſe.*

I.

1. *Things common to all.* THE Heaven, the Stars, the Light, the Air, and the Sea, are all of them things belonging ſo much in common to the whole Society of Mankind, that no one perſon can make himſelf Maſter of them, nor deprive others of the uſe of them. And likewiſe the Nature and Situation of all theſe things is intirely proportion'd to this common Uſe for all Men[a].

II.

2. *Things publick.* Rivers, the Banks of Rivers, Highways, are Things Publick, the uſe of which is common to all particular Perſons, according to the reſpective Laws of Countries. And theſe kinds of things do not appertain to any particular Perſon, nor do they enter into Commerce[b]. But it is the Sovereign that regulates the uſe of them.

III.

3. *Things belonging to Towns, or other Places.* We reckon among the number of Publick Things, and of ſuch as are out of Commerce, thoſe which belong in common to the Inhabitants of a Town, or other Place; and to which particular Perſons can have no Right of Property, ſuch as the Walls, the Ditches of a Town, Town-Houſes, and publick Market-Places[c].

IV.

4. *Diſtinction of Im-* The Earth being given to Men for their Habitation, and for the production

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[a] Which the Lord thy God hath divided unto all Nations under the whole Heaven, *Deut.* iv. 19. Naturali jure communia ſunt omnium hæc, aër, aqua profluens, & mare, & per hoc littora maris. §. 1. *Inſt. de rer. div. l.* 2. §. 1. *eod.*

It is to be remarked on this Article, and the two following, that our Laws differ from the Roman *Law, in regulating the uſe of the Seas, except in ſo far as concerns that Natural Uſe of them in the communication which all Nations have with one another, by a free Navigation over all the Seas. Thus, whereas the* Roman *Law allowed every body indifferently to fiſh, both in the Sea, and in the Rivers.* §. 2. Inſt. de rer. div. *in the ſame manner as it allowed Hunting.* §. 12. eod. *our Laws prohibit them. And our Ordinances have made ſeveral regulations concerning them; the Origine of which is owing, among other cauſes, to the neceſſity of preventing the inconveniencies of allowing a liberty of Hunting, and Fiſhing, to all ſorts of perſons. And we muſt obſerve in general, touching the uſe of the Seas, Sea-Ports, Rivers, Highways, the Walls, and Ditches of Towns, and of other things of the like nature, that ſeveral Regulations have been made in them by our Ordinances. Such as thoſe that concern the Admiralty, Rivers, Foreſts, Hunting, Fiſhing, and others of the like nature, which do not belong to the Matters that come within the compaſs of this Deſign.*

[b] Flumina autem omnia & portus publica ſunt. §. 2. *inſt. de rer. div.* Riparum quoque uſus publicus eſt. §. 4. *eod.* litorum quoque uſus publicus eſt. §. 5. *eod.* Publicas vias dicimus quas Græci βασιλικὰς *i. e.* regias, noſtri prætorias, alii conſulares vias appellant. *l.* 2. §. 22. *ff. ne quid in loc. publ. vel itin. f.* Viam publicam populus non utendo amittere non poteſt. *l.* 2. *ff. de via publ.* See the remark on the preceding Article.

[c] Univerſitatis ſunt, non ſingulorum, quæ in civitatibus ſunt theatra, ſtadia, & ſi qua alia ſunt communia civitatum. §. 6. *inſt. de rer. div. l.* 1. *ff. eod.* Sanctæ quoque res, veluti muri, & portæ civitatis, quodammodo divini juris ſunt. Et ideo nullius in bonis ſunt. Ideò autem muros ſanctos dicimus, quia pœna capitis conſtituta eſt, in eos, qui aliquid in muros deliquerint. Ideò & legum eas partes, quibus pœnas conſtituimus adversùs eos qui contra leges fecerint, ſanctiones vocamus. §. 10. *inſt. eod. v. l.* 8. *& d. l.* 8. §. 1 *ff. de div. rer. l.* 9. §. 3. *eod. l. ult. eod.* See the remark on the firſt Article.

In the Roman *Law they called the Walls, and the Gates of Towns, things holy; which is not to be underſtood in the ſenſe which this word is commonly taken in, but in the ſenſe explained in the Text cited on this Article.*

The diſtinction of the things mentioned in this Article, belongs more properly to the Order of Laws, than of Nature. However, ſeeing it hath its foundation in Nature, and that it has relation to the preceding Article, we have put it down here.

moveables, and Moveables. of all things neceſſary for ſupplying all their wants; we diſtinguiſh in it the portions of the Surface of the Earth which every one occupies, from the things that may be ſeparated from it, for our uſe. And it is this that makes the diſtinction of what we call Immoveables, and Moveables, or Goods moveable[d].

[d] Labeo ſcribit, Edictum Ædilium Curulium, de venditionibus rerum, eſſe tam earum *quæ ſoli ſunt*, quàm earum *quæ mobiles. l. 1. ff. de æd. ed. l. 8. §. 4. C. de bon. quæ lib. l. 30. C. de jur. dot. l. 93. ff. de verb. ſign.*

V.

5. Immoveables. Immoveables are all the parts of the Surface of the Earth, in what manner ſoever they are diſtinguiſhed; whether into Places for Buildings, or into Woods, Meadows, Arable Land, Vineyards, Orchards, or otherwiſe, and to whomſoever they belong[e].

[e] Quæ ſoli. *l. 1. ff. de æd. ed.* quæ terra continentur. *l. 17. §. 8. ff. de act. empt. & vend.*

VI.

6. Trees and Buildings. We comprehend likewiſe under the name of Immoveables, every thing that is adherent to the Surface of the Earth, either by Nature, as Trees; or by the hand of Man, as Houſes, and other Buildings; altho' theſe kinds of things may be ſeparated from the Earth, and become moveable[f].

[f] *See the two following Articles.*

VII.

7. The hanging Fruits are a part of the Ground. The Fruits hanging by the root, that is, ſuch as are not as yet gathered, nor fallen, but which ſtick to the Tree, are part of the Ground[g].

[g] Fructus pendentes pars fundi videntur. *l. 44. ff. de rei vend.*

VIII.

8. Acceſſories to Buildings. Whatever ſticks to Houſes, and other Buildings, ſuch as any thing that is faſtned with Iron, Lead, Plaiſter, or any other manner of way, to the intent that it may always continue ſo, is reputed to be Immoveable[h].

[h] Fundi nihil eſt, niſi quod terra ſe tenet. *l. 17. ff. de act. empt. & vend.* Quæ tabulæ pictæ protectorio includuntur, itemque cruſtæ marmoreæ, ædium ſunt. *d. l. §. 3.* Item conſtat, ſigilla, columnas quoque, & perſonas ex quorum roſtris aqua ſalire ſolet, villæ eſſe. *d. l. §. 9.* Labeo generaliter ſcribit, ea quæ perpetui uſus causâ in ædificiis ſunt, ædificii eſſe. *d. l. §. 7.*

IX.

Moveables are all thoſe things that are disjoined from the Earth, and the Waters; whether it be that they have been ſeparated from it, as Trees that are fallen, or cut down, Fruits that are gathered, Stones taken out of a Quarry; or that they are by Nature diſtinct and ſeparate from the Earth, and Water, as living Creatures[i]. *9. Moveables.*

[i] Quæ ſoli, quæ *mobiles. l. 1. ff. de ædil. ed.* See the 4th Article of this Section.

X.

Moveable Things are of two ſorts. There are ſome which live, and move themſelves, as Animals; and the things that are inanimate, are called dead Moveables[l]. *10. Moveables, living and dead.*

[l] *Mobiles*, aut *ſe moventes. l. 1. ff. de æd. ed. l. 30. C. de jur. dot. l. 93. ff. de verb. ſignif.*

XI.

Animals are of two ſorts. One is of thoſe that are tame, and ſerve for the ordinary uſe of Men, and are in their power; ſuch as Horſes, Oxen, Sheep, and others. The other ſort is of thoſe Animals that live in their natural liberty, out of the power of Man; ſuch as the wild Beaſts, Fowls, and Fiſhes. And the Animals of this ſecond ſort are applied to the uſe, and come into the power of Men, by Hunting, and Fiſhing, according as the uſe of theſe Sports is permitted by the Laws[m]. *11. Animals, wild and tame.*

[m] Feræ beſtiæ, & volucres, & piſces, & omnia animalia quæ mari, cœlo, & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. de rer. diviſ.*

We muſt underſtand this according to the Ordinances which relate to Hunting and Fiſhing.

XII.

In moveable Things we diſtinguiſh thoſe that may be uſed, and yet kept entire; ſuch as a Horſe, a Sute of Hangings, Tables, Beds, and other things of this kind; from ſuch as we cannot uſe without conſuming them, ſuch as Fruits, Corn, Wine, Oil, and the like[n]. *12. Moveable things that are conſumed by uſe.*

[n] Quæ uſu tolluntur, vel minuuntur. *l. 1. ff. de uſufr. ear. rer. quæ uſ. conſ. v. min.*

SECT.

SECT. II.

Diſtinctions of Things by the Civil Laws.

Difference between the diſtinctions of the foregoing Section, and theſe in this. ALtho' the diſtinctions of Things which have been explained in the foregoing Section, have been made by the Civil Laws, yet it was proper to ſeparate them from the diſtinctions that are treated of in this Section. For thoſe in the preceding Section are formed by Nature, and the Laws have only taken notice of them, or added ſomething to them: As, for Example, what has been explained in the third and eighth Articles. But theſe treated of in this Section, owe their chief Eſtabliſhment to the Laws.

The CONTENTS.

1. *Diſtinction of Things that enter into Commerce, and thoſe that do not.*
2. *Things conſecrated, and ſet apart for Divine Worſhip.*
3. *Things Corporeal, and Incorporeal.*
4. *Allodial Lands, and Lands burden'd with Quit-Rents, or other Duties.*
5. *Mines.*
6. *Coin.*
7. *Treaſure.*
8. *Another diſtinction of ſeveral ſorts of Goods.*
9. *Purchaſe.*
10. *Inheritance.*
11. *Paternal Eſtate.*
12. *Maternal Eſtate.*

I.

1. Diſtinction of Things that enter into Commerce, and thoſe that do not. THE Laws reduce all Things to two Kinds. One is of thoſe that do not enter into Commerce, and which cannot belong to any one in particular; ſuch as thoſe that have been explained in the three firſt Articles of the preceding Section. The other ſort is of ſuch as enter into Commerce, and of which one may become Maſter[a].

II.

2. Things conſecrated, and ſet apart for divine Worſhip. Religion, and the Civil Laws, which are conformable to it, diſtinguiſh the things which are deſtinated to divine Worſhip, from all others. And among thoſe which are made uſe of in this Worſhip, we diſtinguiſh between things that are Conſecrated, ſuch as Churches, the Communion Cups; and things that are Religious and Holy, ſuch as Church-yards, the Ornaments, Oblations, and other things dedicated to the Service of God. And all theſe kinds of things are out of Commerce, while they continue under this deſtination to the divine Service[b].

III.

3. Things Corporeal, and Incorporeal. The Civil Laws make another general diſtinction of Things, into thoſe that are Senſible and Corporeal, and thoſe which we call Incorporeal, in order to diſtinguiſh from every thing that is ſenſible, certain things which owe their Nature, and their Exiſtence, wholly to the Laws: Such as an Inheritance, an Obligation, a Mortgage, an Uſufruct, a Service; and, in general, every thing that conſiſts only in a certain Right[c].

IV.

4. Allodial Lands, and Lands burdened with Quit-Rents, or other Duties. Among the Immoveables that are in Commerce, and ſerve for the common uſe of Men, there are ſome which particular Perſons may poſſeſs fully in their own right, without any burthen. And there are other Immoveables which are burthened with certain Duties, and Services, that are inſeparable from them. Thus, we have in this Kingdom, Lands which are called *Allodial*, or Free Lands, which pay neither Quit-Rent, nor any other ſuch like Acknowledgment[d]. And there are other Lands, which having been given away originally with the charge of paying a Quit-Rent irredeemable[e], or upon other conditions, ſuch as thoſe of Fiefs, deſcend to all ſorts of

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[a] Modo videamus de rebus, quæ vel in noſtro patrimonio, vel extra patrimonium noſtrum habentur. *inſt. de rer. div. l.* 1. *ff. eod.*

[b] Summa rerum diviſio in duos articulos deducitur. Nam aliæ ſunt divini juris, aliæ humani. Divini juris ſunt, veluti res ſacræ & religioſæ. *l.* 1. *ff. de div. rer.* Sacræ res ſunt, quæ ritè, per pontifices Deo conſecratæ ſunt. Veluti ædes ſacræ, & donaria, quæ ritè ad miniſterium Dei dedicata ſunt. Quæ etiam per noſtras conſtitutiones alienari, & obligari prohibuimus: excepta cauſa redemptionis captivorum. §. 8. *inſt. de rer. div.* See the 6th Article of the 8th Section of the Contract of Sale, concerning the Sale of things conſecrated.

[c] Quædam præterea res corporales ſunt, quædam incorporales. Corporales, hæ ſunt quæ tangi poſſunt: veluti fundus, homo, veſtis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem ſunt, quæ tangi non poſſunt: qualia ſunt ea quæ in jure conſiſtunt: ſicut hæreditas, uſusfructus, uſus, & obligationes quoquo modo contractæ. *inſt. de reb. corp. & incorp.* Eodem numero ſunt jura prædiorum urbanorum, & ruſticorum, quæ etiam ſervitutes vocantur. §. *ult. eod l.* 1. §. 1. *ff. de diviſ. rer.*

Poſſeſſors, with the burdens annexed to them.

[d] Solum immune. *l. ult.* §. 7. *ff. de cenſib.*

[e] De tributis, ſtipendiis, cenſibus, & prædiis juris Italici. *V. tit.* 19. *Ulp. de dom. & acq. rer.* §. 40. *inſt. de rer. div. l.* 13. *ff. de impenſis in res dot. l.* 27. §. 1. *ff. de verb. ſignif. l.* 1. *C. de uſuc. transform. Toto tit. ff. de cenſib. Toto tit. C. ſi propt. publ. penſ.*

The Origine of theſe burdens upon Eſtates in the Roman *Law, was a conſequence of the Conqueſts of Provinces made by the* Romans, *of which they diſtributed the Lands to ſuch perſons as they thought would remain faithful to the* Roman *Empire; but upon condition that the Poſſeſſors ſhould pay a certain Tribute, to which the Lands of* Italy *were not ſubject, nor thoſe likewiſe of ſome other Provinces, which were diſtinguiſhed by Exemptions from ſuch Tribute.* d. Tit. de cenſib.

There are ſome Provinces in France, *in which all the Lands are reputed Allodial, free from all burden of Quit-Rent, or other, unleſs they are ſubjected to it by ſome Title; and others where they have no ſuch thing as Allodial Lands.*

We muſt not reckon in the number of Eſtates clogged with Burthens, thoſe which are liable to pay Tithes to the Church. For this is a Burthen of another nature, and from which the Poſſeſſors of Allodial Lands are not exempt.

[*The* Engliſh *have a full dominion and power of things Corporeal and Moveable; but not of Immoveable, if we except the ſupreme Power and Right of the Crown. For the Subject hath not an abſolute Freehold in their Lands and Tenements, but a Fee only. And that* Fee *doth not comprize ſo abſolute a Power, appears, not only by thoſe Authors who write of Fees, but even by* Littleton *himſelf, when he ſays, that ſuch a one was ſeized of ſuch an Eſtate in his Demeſne as of Fee. By which words he affirms the higheſt and fulleſt Title to be expreſs'd. And theſe words, (as of Fee) do abate ſomewhat of an abſolute Power, and argue a Tenure from a Superior. Cowel's* Inſtit. of the Laws of *England,* Book 2. Tit. 2.]

V.

5. Mines. We may reckon among Lands which particular perſons cannot poſſeſs fully in their own right, thoſe in which there are Mines of Gold, Silver, and other Metals, or Matters in which the Prince has a right[f].

[f] Cuncti qui privatorum loca, ſaxorum venam laborioſis effoſſionibus perſequentur, decimas fiſco, decimas etiam domino repræſentent. Cætero modo propriis ſuis deſideriis vindicando. *l.* 3. *C. de metallar. & metal.* See the Ordinance of *Charles* IX. of 1563, and others concerning Mines.

VI.

6. Coin. We may place among Things diſtinguiſhed by the Laws, the publick Coin, which is a piece of Gold, Silver, or other Metal; the form, weight, and value of which is regulated by the Prince, in order to make it the Price of all Things that are in Commerce[g].

[g] Electa materia eſt, cujus publica, ac perpetua æſtimatio, difficultatibus permutationum, æqualitate quantitatis ſubveniret. Eaque materia, forma publica percuſſa. *l.* 1. *ff. de contr. empt.*

VII.

7. Treaſure. The Laws diſtinguiſh likewiſe that which we call a Treaſure; which is, according to the definition given of it in the Laws, an ancient Depoſitum of Money, or other precious Things, that have been depoſited time out of mind, in ſome hidden place, where it is diſcovered by ſome chance, and whereof the true Owner cannot be known[h].

[h] Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat. *l.* 31. §. 1. *ff. de acq. rer. dom.*

It is not the buſineſs of this place to explain, to whom it is that the Treaſure ought to belong. v. l. un. C. de Theſaur.

VIII.

8. Another diſtinction of ſeveral ſorts of Goods. Beſides the diſtinctions of Things which have been ſpoken of in the preceding Articles, the Laws conſider under other Views, and by other general diſtinctions, the Goods or Eſtates which particular perſons are poſſeſs'd of. Thus, they diſtinguiſh in the Eſtates of particular perſons, between thoſe which are of their own Purchaſe, and thoſe that come to them by Deſcent or Inheritance; and in Eſtates of Inheritance, they make a diſtinction between the Paternal, and Maternal Eſtates[i].

[i] *See the following Articles, and the remark on the laſt.*

IX.

9. Purchaſe. We call that Eſtate, which one has acquired by his own Labour and Induſtry, an Eſtate of Purchaſe[l].

[l] Quæ ex liberalitate fortunæ, vel laboribus ſuis ad eum perveniant. *l.* 6. *C. de bon. quæ lib. l.* 8. *ff. pro ſocio.*

X.

10. Inheritance. An Eſtate of Inheritance is that which deſcends to us from the perſons to whom we have a right to ſucceed as Heirs[m].

[m] Debitum naturale. *l. un. C. de impon. lucr. deſcr.* Quaſi debitum nobis hæreditas (à parente) obvenit. *l.* 10. *ff. pro ſocio. v. l.* 3. *C. de bon. quæ lib.*

XI.

11. *Paternal Eſtate.* The Paternal Eſtate is that which deſcends to us from our Father, or other Aſcendants, or collateral Relations of the Father's ſide[n].

XII.

12. *Maternal Eſtate.* The Maternal Eſtate is that which deſcends to us from our Mother, or other Aſcendants, or collateral Relations of the Mother's ſide[o].

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[n] Prædia à patre. *l.* 16. *C. de prob. l.* 10. *ff. pro ſoc.*

[o] Res quæ ex matris ſucceſſione ſive ex teſtamento, ſive ab inteſtato fuerint ad filios devolutæ. *l.* 1. *C. de bon. mat.* Quæ ad ipſum ex matre, vel ab ejus linea pervenerint. *l.* 3. *C. de bon. quæ lib.*

Although the texts which are quoted on theſe four laſt Articles, have relation to theſe ſeveral ſorts of Eſtates; yet this diſtinction hath not the ſame uſe in the Roman *Law, as it hath in our Cuſtoms; which make different Heirs, of Eſtates of Purchaſe, Eſtates of Inheritance, Paternal Eſtates, and Maternal Eſtates. This diſtinction hath likewiſe place in the matter concerning the Power of Redemption.*

THE

THE CIVIL LAW IN ITS NATURAL ORDER.

PART I.

Of ENGAGEMENTS.

BOOK I.

Of Voluntary and Mutual Engagements by Covenants.

The nature of Covenants. COVENANTS are Engagements made by the mutual conſent of two or more perſons, who make a Law among themſelves to perform what they promiſe to one another.

The uſe of Covenants. The Uſe of Covenants is a natural conſequence of the Order of Civil Society, and of the Ties which God forms among Men. For as he has made the reciprocal uſe of their Induſtry and Labour, and the different Commerce of Things neceſſary for ſupplying all their wants; it is chiefly by the intervention of Covenants that they agree about them. Thus, for the uſe of Induſtry and Labour, Men enter into Partnerſhip, hire themſelves, and act differently the one for the other. Thus, for the uſe of Things, when they have occaſion to purchaſe them; or a mind to part with them, they traffick in them by Sales, and by Exchanges; and when they only want them for a certain time, they either hire, or borrow them; and according to their other different wants, they apply to them the different ſorts of Covenants.

Divers kinds of Covenants. It appears from this general Idea of Covenants, that the word *Covenant* comprehends not only all Contracts and Treaties of what kind ſoever, ſuch as Sale, Exchange, Partnerſhip, Hiring and letting to Hire, a *Depoſitum*, and all other Contracts; but likewiſe all particular Pacts that may be added to any Contract, ſuch as Conditions, Charges, Reſerves, Clauſes of Nullity, and all others. This word *Covenant* comprehends likewiſe the acts by which we make void, or change by a new conſent, the Contracts, Treaties, and Pacts by which we were already bound.

The order of this Book of Covenants. It is of all theſe kinds of Covenants that we deſign to treat in this Book. And becauſe there are many Rules which agree to all the kinds of Covenants, ſuch as thoſe which concern their Nature in general, the ways by which they are form'd, the Interpretation of ſuch as are obſcure, or ambiguous, and ſome others; theſe kinds of common Rules ſhall be the ſubject matter of the firſt Title, which ſhall be of Covenants in general. We ſhall afterwards explain the detail of the particular Rules belonging to each kind of Covenant, every one under its proper Title. And in the laſt place we ſhall ſubjoin a Title concerning the Vices of Covenants, which is a matter eſſentially neceſſary to theſe contained in this Book.

TITLE I.

Of COVENANTS *in General.*

SECTION I.

Of the Nature of Covenants, and the ways by which they are form'd.

The CONTENTS.

1. *The Meaning of the word* Covenant.
2. *Definition of a Covenant.*
3. *The Subject matter of Covenants.*
4. *Four ſorts of Covenants, by four combinations of the uſe of Perſons and Things.*
5. *No Covenant obligatory without a cauſe.*
6. *Donations have their cauſe.*
7. *Some Covenants have a proper Name, and others not; but they all oblige to what was agreed upon.*
8. *Conſent makes the Covenant.*
9. *Covenants which oblige by the intervention of a Thing.*
10. *Covenants either written, or unwritten.*
11. *Written Covenants made either before a Notary Publick, or ſigned only by the Parties.*
12. *Proofs of unwritten Covenants.*
13. *Covenants made before a Notary, carry their proof along with them.*
14. *Verification of a Sign Manual that is conteſted.*
15. *What perfects Covenants made before a Notary.*

I.

THIS word *Covenant* is a general Name, which comprehends all manner of Contracts, Treaties, and Pacts of what kind ſoever[a]. *1. The Meaning of the word* Covenant.

[a] Conventionis verbum generale eſt, ad omnia pertinens, de quibus negotii contrahendi, tranſigendique cauſa, conſentiunt, qui inter ſe agunt. *l.* 1. §. 3. *ff. de pact.*

II.

A Covenant is the conſent of two, or more perſons[b], to enter into ſome Engagement among themſelves[c], or to diſſolve a former Engagement, or to make ſome change in it[d]. *2. Definition of a Covenant.*

[b] Eſt pactio duorum, pluriumve in idem placitum conſenſus. *l.* 1. §. 2. *ff. de pact.*

[c] Negotii contrahendi, tranſigendique cauſa. *d. l.* §. 3. ut alium nobis obſtringat. *l.* 3. *ff. de obl. & act.*

[d] Nudi conſenſus obligatio, contrario conſenſu diſſolvitur. *l.* 35. *ff. de reg. jur.* Obligationes quæ conſenſu contrahuntur, contraria voluntate diſſolvuntur. §. *ult. inſt. quib. mod. toll. obl.*

III.

The ſubject matter of Covenants is the infinite diverſity of the voluntary ways, by which Men regulate among themſelves the communication, and commerce of their Induſtry and Labour, and of all things, according to their wants[e]. *3. The Subject matter of Covenants.*

[e] Conventionis verbum generale eſt, ad omnia pertinens. *l.* 1. §. 3. *ff. de pact.*
Non ſolùm res in ſtipulatum deduci poſſunt, ſed etiam facta. §. *ult. inſt. de verb. obl.*

IV.

The Commerce and Communications for the uſe of Perſons and Things, are of four ſorts, which make four kinds of Covenants. For thoſe who treat together, either give to one another reciprocally one thing for another[f], as in a Sale, and in an Exchange; or they do one thing for another[g], as if they undertake the Management of one another's Concerns: Or otherwiſe one of the parties does ſomething, and the *4. Four ſorts of Covenants, by four combinations of the uſe of Perſons and Things.*

other gives ſomething[h], as when a Labourer gives his Labour for a certain Hire: Or laſtly, one of them either does, or gives ſomething, the other neither doing, nor giving any thing; as when a perſon undertakes without any gratuity to manage the Affairs of another[i]; or that one gives another ſomething out of mere Liberality[l].

[f] Aut do tibi, ut des. *l. 5. ff. de præſcrip. verb.*

[g] Aut facio, ut facias. *d. l.*

[h] Aut facio, ut des. *d. l.* aut do, ut facias. *d. l.* Stipulationum quædam in dando, quædam in faciendo conſiſtunt. *l. 2. ff. de verb. obl. l. 3. ff. de obl. & act.*

[i] Mandatum, niſi gratuitum, nullum eſt. *l. 1. §. 4. ff. mand.*

[l] Propter nullam aliam cauſam facit: quam ut liberalitatem, & munificentiam exerceat. Hæc propriè donatio appellatur. *l. 1. ff. de don.* Donatio eſt contractus. *l. 7. C. de his quæ vi metuſve cauſa geſta ſunt.*

In this Article we have made only one Combination of the caſe where one does a Thing, and the other gives ſomething; whereas the Roman *Law diſtinguiſhes it into two; one, where one of the parties does ſomething, and the other gives; and the other, where one of the parties gives, and the other does ſomething for it. But in effect, it is only one bare character of a Covenant, and one ſimple combination of giving on one ſide, and doing on the other, whoſoever of the two parties it is that begins on his ſide to do, or to give. And the diſtinction of this caſe that was made in the* Roman *Law, being founded upon a reaſon which is not in uſe with us, it is not neceſſary to explain it here.*

V.

5. No Covenant obligatory without a cauſe.

In the three firſt ſorts of Covenants, the tranſaction between the parties is not gratuitous, the Engagement of one of the parties being the foundation of the Engagement of the other. And even in the Covenants where only one of the parties ſeems to be obliged, as in the Loan of Money, the Obligation of the Borrower is always preceded by the Lender's delivering what he gives in credit, before any Covenant is formed. Thus, the Obligation which is contracted in theſe kinds of Covenants, which are for the benefit only of one of the parties covenanting, hath always its cauſe from ſomething that is either done, or to be done by the other party[m]; And the Obligation would be null, if it were really without any cauſe[n].

[m] Do ut, facio ut. *d. l. 5. ff. de præſcr. verb.* Ultrò citróque obligatio. *l. 19. ff. de verb. ſign.*

Aſſentimur alienam fidem ſecuti, mox recepturi quid ex hoc contractu. *l. 1. ff. de reb. cred.*

[n] Cùm nulla ſubeſt cauſa propter conventionem, hîc conſtat non poſſe conſtitui obligationem. *l. 7. §. 4. ff. de pact.*

Eſt & hæc ſpecies conditionis, ſi quis ſine cauſa promiſerit. *l. 1. ff. de cond. ſine cauſa.* Qui autem promiſit ſine cauſa, condicere quantitatem non poteſt, quam non dedit, ſed ipſam obligationem. *d. l.*

VI.

6. Donations have their cauſe.

In Donations, and in the other Contracts where one party alone does, or gives ſomething, and where the other neither does, nor gives any thing, it is the Acceptance that forms the Covenant[o]. And the Engagement of the Donor, hath for its foundation ſome juſt and reaſonable Motive; ſuch as ſome good office done by the Donee, or ſome other merit in him[p], or even the bare pleaſure of doing good to others[q]. And this Motive ſtands in place of a cauſe, on the part of the perſon who receives the benefit, and gives nothing[r].

[o] Si ei vivus libertus *donavit*, ille *accepit. l. 8. §. 3. ff. de bon. lib.* Si neſcit rem quæ apud ſe eſt, ſibi eſſe donatam, vel miſſam ſibi non acceperit, donatæ rei dominus non fit. *l. 10. ff. de don.* Non poteſt liberalitas nolenti acquiri. *l. 19. §. 2. eod.*

[p] Non ſine cauſa, obveniunt (donationes) ſed ob meritum aliquod accedunt. *l. 9. ff. pro ſoc.* Erga benè merentes. *l. 5. ff. de donat.*

[q] Ut liberalitatem, & munificentiam exerceat. *l. 1. ff. de don.*

[r] Cauſa donandi. *l. 3. eod.*

VII.

7. Some Covenants have a proper Name, and others not; but they all oblige to what is agreed on.

Of theſe different kinds of Covenants, ſome are of ſo frequent uſe, and ſo well known every where, that they have a proper Name; ſuch as a Sale, a Loan, Hiring, and letting to Hire, a *Depoſitum*, Partnerſhip, and others[s]. There are likewiſe ſome Covenants which have no proper Name; as if one perſon gives to another a thing to ſell at a certain price, on condition that he ſhall keep to himſelf whatever he gets over and above the price that is fixt[t]. But all Covenants, whether they have a peculiar Name or not, have always their effect, and oblige the parties to what is agreed on[u].

[s] Conventionum pleræque in aliud nomen tranſeunt, velut in emptionem, in locationem, in pignus. *l. 1. §. ult. ff. de pact.*

[t] Natura enim rerum conditum eſt, ut plura ſint negotia, quàm vocabula. *l. 4. ff. de pr. verb.* Si tibi rem vendendam, certo pretio dediſſem, ut quò pluris vendidiſſes, tibi haberes. *l. 13. ff. de pr. verb. V. d. l. §. 1.*

[u] Quid tam congruum fidei humanæ, quàm ea, quæ inter eos placuerunt, ſervare. *l. 1. ff. de pact.*

It is not neceſſary to explain here the difference that was made in the Roman *Law, between the Contracts which had a Name, and thoſe which had none. Theſe Subtilities, which are not in uſe with us, would perplex the Reader to no purpoſe.*

VIII.

8. Conſent makes the Covenants.

Covenants are perfected by the mutual conſent of the parties, which they give to one another reciprocally[x]. Thus, a Sale is perfected by the bare conſent of the parties, altho' the Merchandize be not delivered, nor the Price paid[y].

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[x] Sufficit eos qui negotia gerunt, conſentire. *l.* 2. §. 1. *ff. de obl. & act.* 48. *eod.* Etiam nudus conſenſus ſufficit obligationi. *l.* 52. §. 9. *eod.*

[y] Emptio & venditio contrahitur, ſimul atque de pretio convenerit, quamvis nondum pretium numeratum ſit. *Inſt. de empt. & vend.* Quid enim tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.* *As to the accompliſhment of Covenants*, See the next Article, and the ſecond Article of the firſt Section, and tenth Article of the ſecond Section of the Contract of Sale.

IX.

9. *Covenants which oblige by the intervention of a Thing.* In the Covenants which oblige the party to make reſtitution of what he has received, whether it be of the ſame Individual thing, as in the caſe of a Loan of a thing to be reſtored in ſpecie, or a *Depoſitum*; or whether Reſtitution is to be made, not of the ſame Individual Thing, but of ſomething of the ſame kind, as in the Loan of Money or Proviſions; the Obligation is not contracted, but when the conſent of the parties is accompanied with the deliverance of the thing. And 'tis for this reaſon that it is ſaid, that theſe kinds of Obligations are contracted by the intervention of the Thing[z], altho' the conſent of the parties be alſo neceſſary[a].

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[z] Re contrahitur obligatio, veluti mutui donatione: *inſt. quib. mod. re contr. obl.* Item is cui res aliqua utenda datur, id eſt, commodatur, re obligatur. §. 2. *eod.* Prætereà & is apud quem res aliqua deponitur, re obligatur. §. 3. *eod.* *l.* 1. §. 2, 3, 4, 5. *ff. de obl. & act.* Mutuum damus recepturi non eandem ſpeciem quam dedimus (alioquin commodatum erit, aut depoſitum) ſed idem genus. *l.* 2. *ff. de reb. cr.*

[a] Ex contractu obligationes, non tantùm re conſiſtunt, ſed etiam verbis & conſenſu, *l.* 4. *ff. de obl. & act.* Eleganter dicit Pedius, nullum eſſe contractum, nullam obligationem, quæ non habeat in ſe conventionem: ſive re, ſive verbis fiat. *l.* 1. §. 3. *ff. de pact.*

X.

10. *Covenants either written or unwritten.* The conſent which makes the Covenant, is either in Writing, or without it[b]. The unwritten Covenant is made either by the interpoſition of words, or by ſome other way, which ſignifies or preſuppoſes the conſent. Thus he who receives a *Depoſitum*, altho' he do not ſpeak, obliges himſelf to the Engagements of Depoſitaries[c].

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[b] Sive ſcriptis, ſive ſine ſcriptis. *inſt. de empt. & vend.* Neque ſcriptura opus eſt. §. 1. *inſt. de obl. ex conſ.* *l.* 2. §. 1. *ff. de obl. & act.* *l.* 17. *C. de pact.*

[c] Tacitè conſenſu convenire. *l.* 2. *ff. de pact.* Sed & nutu ſolo pleraque conſiſtunt. *l.* 52. §. 10. *ff. de obl. & act.* Pactum quod bona fide interpoſitum docebitur, etſi ſcriptura non exiſtente, tamen ſi aliis probationibus rei geſtæ veritas comprobari poteſt. Præſes Provinciæ ſecundùm jus cuſtodiri efficiet. *l.* 17. *C. de pact.*

XI.

11 *Written Covenants made either before a Notary Publick, or ſigned only by the Parties.* Written Covenants are made either in the preſence of a Publick Notary[d], or only ſigned and ſealed by the parties themſelves; whether it be that the whole Deed is written by the parties who covenant, or that they barely put their names to it[e].

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[d] Per tabellionem. *l.* 16. *C. de fide inſtr. inſt. de empt. & vend.*

[e] Vel manu propriâ contrahentium, vel ab alio quidem ſcripta, à contrahentibus autem ſubſcripta. *inſt. de empt. & vend. d. l.* 16. *C. de fide inſtr.*

XII.

12. *Proofs of unwritten Covenants.* If the truth of an unwritten Covenant is called in queſtion, it may be proved either by Witneſſes, or by the other ways which are preſcrib'd in the Rules concerning Proofs[f].

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[f] Inſtrumentis etiam non intervenientibus, ſemel diviſio rectè facta, non habetur irrita. *l.* 9. *l.* 10. *& ſeq. C. de fide inſtr.*

By the Roman *Law, all unwritten Covenants were good. But the Ordinance of* Moulins, *Art.* 54. *and that of* 1667, *Tit.* 20. *Art.* 2. *have forbid the receiving proofs of unwritten Covenants, exceeding the value of one hundred Livres.*

[*So likewiſe in* England, *it is enacted by Statute* 29 Car. II. cap. 3. §. 17. *That no Contract for the Sale of any Goods, Wares, and Merchandizes, for the price of ten Pounds Sterling, or upwards, ſhall be allowed to be good, except the Buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the Bargain, or in part of payment, or that ſome Note, or Memorandum in writing, of the ſaid Bargain be made and ſign'd by the parties to be charged by ſuch a Contract, or their Agents thereunto lawfully authorized.*]

XIII.

13. *Covenants made before a Notary, carry their proof along with them.* Covenants made before a Notary Publick, carry along with them the proof of their truth, by the Signature of the publick Officer[g].

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[g] *V. l.* 16. *C. de fide inſtr. Inſtit. de empt. & vend.* *Contracts made before Notaries, have ſummary Executions.* Ordinance of 1539, Art. 65 and 66.

XIV.

14. *Verification of a ſign manual that is conteſted.* If the Signature of a Covenant that is ſigned only by parties is conteſted, it muſt be proved[h].

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[h] *V. l.* 17. *Cod. ſi cert. petat.* Ordinance 1539. Art. 92.

XV. Cove-

XV.

15. What perfects Covenants made before a Notary. Covenants which are made in the preſence of a Publick Notary, are not perfected till all is writ, and till thoſe perſons who ought to ſign it, have ſet their hands to it, and the Notary his[i].

[i] (Contractus quos) in inſtrumento recipi convenit, non aliter vires habere ſancimus, niſi inſtrumenta in mundum recepta, ſubſcriptionibuſque partium confirmata, & ſi per tabellionem conſcribantur, etiam ab ipſo completa, & poſtremò à partibus abſoluta ſint. *l.* 17. *C. de fid. inſtr. inſt. de empt. & vend.*

For the Forms of Contracts, ſee the Ordinances of 1539. Art. 67. Orleans, Art. 84. Blois 165. &c.

XVI.

16. Covenants between abſent perſons. Covenants may be made not only between perſons who are preſent, but likewiſe between thoſe that are abſent[l], by Proxy[m], or other Mediator[n], or even by Letter[o].

[l] Inter abſentes talia negotia contrahuntur. *l.* 2. §. 2. *ff. de obl. & act. l.* 2. *ff. de pact.*

[m] Trebatius putat ſicuti pactum procuratoris mihi nocet, ita & prodeſſe. *l.* 10. *in fine. ff. de pact.*

[n] Vel per nuntium. *d. l.* 2. §. 2. *de obl. & act.* §. 1. *inſt. de obl. ex conſ. l.* 2. *ff. de pact.*

[o] Vel per epiſtolam. *dd. ll.*

SECT. II.

Of the Principles which ariſe from the Nature of Covenants. And of the Rules for interpreting them.

The CONTENTS.

1. *Who may enter into Covenants, and of what ſort they muſt be.*
2. *Covenants ought to be made wittingly and willingly.*
3. *No perſons can covenant for others, nor to their prejudice.*
4. 1st Exception. *Proxies may covenant for their Conſtituents.*
5. 2d Exception. *Of thoſe who have a right to treat for others.*
6. *Of him who treats for another, undertaking for his conſent.*
7. *Covenants are in place of Laws.*

Rules for the Interpretation of Covenants.

8. 1st Rule. *Obſcurities and doubts are to be interpreted by the common intention of the contractors.*
9. 2d Rule. *Interpretation made by Uſage, or other ways.*
10. 3d Rule. *To judge of the ſenſe of every clauſe by the tenour of the whole Deed.*
11. 4th Rule. *The Intention to be preferred to the Expreſſion.*
12. 5th Rule. *Of Clauſes that have a double meaning.*
13. 6th Rule. *Interpretation in favour of him who is obliged.*
14. 7th Rule. *Interpretation againſt him who ought to have explained his meaning.*
15. 8th Rule. *The alternative Obligation is in the choice of him who is obliged.*
16. 9th Rule. *Obligations of things whoſe goodneſs and value may reach to more or leſs.*
17. 10th Rule. *How the Price of Things is regulated.*
18. 11th Rule. *Of the Time and Place of the Eſtimation.*
19. 12th Rule. *Expreſſions which have no ſenſe.*
20. 13th Rule. *Faults in the Writing.*
21. 14th Rule. *Covenants are limited to the matters of which they treat.*
22. 15th Rule. *Interpretation of Judicial Covenants.*

I.

1. Who may enter into Covenants, and of what ſort they muſt be. SEEING Covenants ought to be proportion'd to the wants to which they have relation, they are therefore Arbitrary, and ſuch as the parties pleaſe to make them; And all perſons may enter into all manner of Covenants[a], provided only that the perſon be not incapable of contracting[b], and that the Covenant have nothing in it contrary to Law and Good Manners[c].

[a] Quid tam congruum fidei humanæ, quàm ea; quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.*

[b] *Thus, ſome perſons are incapable of all manner of Covenants.* Furioſus nullum negotium gerere poteſt, quia non intelligit, quod agit. §. 8. *inſt. de inut. ſtip. l.* 1. §. 12. *ff. de obl. & act. Others cannot covenant to their prejudice, ſuch as perſons under Age.* Contra Juris Civilis regulas pacta conventa rata non habentur; veluti ſi pupillus ſine tutoris autoritate pactus ſit, ne à debitore ſuo peteret. *l.* 28. *ff. de pact.*

[c] Pacta quæ contra leges, conſtitutioneſque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris eſt. *l.* 6. *C. de pact. l.* 7. §. 7. *ff. de pact. l.* 27. §. 4. *eod.* §. 23. *inſt. de inut. ſtip. Ait Prætor:* Pacta conventa, quæ neque dolo malo, neque adverſus leges, plebiſcita, ſenatuſconſulta, Edicta Principum, neque quo fraus cui eorum fiat, facta erunt, ſervabo. *l.* 7. §. 7. *ff. de pact.* See the fourth Section of the Vices of Covenants.

II.

2. Covenants ought to be made Covenants being voluntary Engagements which are formed by the conſent *wittingly and willingly.* of the parties concerned, they ought to be made with knowledge, and with freedom; and if they want either the one or the other of theſe characters, as if they are made thro' miſtake[d], or by compulſion, they are null, according to the Rules which ſhall be explained in the fifth Section.

[d] In omnibus negotiis contrahendis, ſive bona fide ſint, ſive non ſint, ſi error aliquis intervenit, ut aliud ſentiat puta qui emit, aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti ſit. *l. 57. ff. de obl. & act.* non videntur qui errant, conſentire. *l. 116. §. 2. ff. de reg. jur. v. l. 9. ff. de contr. empt.*

[e] Nihil conſenſui tam contrarium eſt, qui & bonæ fidei judicia ſuſtinet, quàm vis atque metus. *d. l. 116. de reg. jur. v. tit.* quod metus cauſa. *See the Title of the Vices of Covenants.*

III.

3. No perſons can covenant for others, nor to their prejudice. Covenants being formed by the conſent of parties, no man can covenant for another, unleſs he has power from him ſo to do. And much leſs can any perſons do prejudice, by their Covenants, to others[f].

[f] Alteri ſtipulari nemo poteſt. *l. 38. §. 17. ff. de verb. obl.* §. 18. *inſt. de inut. ſtip. l. 9. §. 4. ff. de reb. cred.* nec paciſcendo, nec legem dicendo, nec ſtipulando, quiſquam alteri cavere poteſt. *l. 73. §. ult. ff. de reg. jur.* Certiſſimum eſt ex alterius contractu, neminem obligari. *l. 3. C. ne ux. pr. mar.*

Non debet alii nocere, quod inter alios actum eſt. *l. 10. ff. de jurej.* Non debet alteri per alterum iniqua conditio inferri. *l. 74. ff. de reg. jur.* Ante omnia enim animadvertendum eſt, ne conventio in alia re facta, aut cum alia perſona, in alia re, aliave perſona noceat. *l. 27. §. 4. ff. de pact.* See the two next Articles.

IV.

1st Except. *4. Proxies may covenant for their Conſtituents.* Proxies may covenant for thoſe perſons from whom they have power ſo to do[g]; and they may engage them ſo far as the power reaches which they have received from them[h].

[g] Sicuti pactum procuratoris mihi nocet, ita & prodeſt, *l. 10. in fine ff. de pact.*

[h] Diligenter fines mandati cuſtodiendi ſunt; nam qui exceſſit, aliud quid facere videtur. *l. 5. ff. mand.* Interdum melior, deterior verò numquam (cauſam mandantis fieri poteſt.) *l. 3. eod.* See the ſecond and third Articles of the third Section of Proxies.

V.

2d Except. *5. Of thoſe who have a right to treat for others.* Tutors and Curators, Governors and Heads of Corporations, and Maſters of Companies, Factors and Agents that are employed in any particular Commerce, and all perſons who have others ſubject to their Power, or under their Conduct, or who repreſent others, may make Covenants in their Names, according to the extent of their Miniſtry or Power[i], as ſhall be explained in its proper place with reſpect to every one of theſe kinds of Perſons.

[i] Tutoris pactum pupillo prodeſt. *l. 15. ff. de pact.* Magiſtri ſocietatum pactum, & prodeſſe, & obeſſe conſtat. *l. 14. ff. de pact.* See the fifth and following Articles of the ſecond Section of Tutors; the fifth Article of the firſt Section, and the firſt and third Articles of the third Section of Syndicks, Directors, and other Adminiſtrators of Companies and Corporations; the ſixteenth and ſeventeenth Articles of the fourth Section of Partnerſhip; and the firſt and ſecond Articles of the third Section of Perſons who drive any publick Trade.

VI.

6. Of him who treats for another, undertaking for his conſent. If a third perſon treats for one that is abſent, without his order, but undertakes for his conſent; the abſent party does not enter into the Covenant, but when he ratifies it; and if he does not ratify it, the perſon who undertook for his conſent ſhall be bound, either to pay the Penalty to which he ſubmitted, or to make good the Damages which he ſhall have occaſioned, according to the Nature of the Covenant, the conſequences to which he ſhall have given occaſion, and the other circumſtances. But after that the abſent perſon has ratified what was done in his name, altho' it prove to his prejudice, he cannot afterwards complain of it[l].

[l] Pomponius ſcribit, ſi negotium à te quamvis male geſtum, probavero, negotiorum tamen geſtorum te mihi non teneri. *l. 9. ff. de neg. geſt.* Quod reprobare non poſſem ſemel probatum & quemadmodum quod utiliter geſtum eſt, neceſſe eſt apud judicem pro rato haberi, ita omne quod ab ipſo probatum eſt. *d. l.* Si quis alium daturum facturumve quid promiſerit, non obligabitur: veluti ſi ſpondeat Titium quinque aureos daturum. Quod ſi effecturum ſe ut Titius daret, ſpoponderit, obligatur. §. 3. *inſt. de imutil. ſtip.* Qui alium facturum promiſit, videtur in ea eſſe cauſa ut non teneatur, niſi pœnam ipſe promiſerit. §. 20. *eod.*

VII.

7. Covenants are in place of Laws. When the Covenants are finiſhed, whatever has been agreed upon ſtands in place of a Law to thoſe who made them[m]; and they cannot be revoked but by common conſent of the parties[n], or by the other ways which ſhall be explained in the ſixth Section.

[m] Hoc ſervabitur, quod initio convenit, legem enim contractus dedit. *l. 23. ff. de reg. jur.* Contractus legem ex conventione accipiunt. *l. 1. §. 6. ff. depoſiti.* Quid tam congruum fidei humanæ, quàm ea quæ inter eos placuerunt, ſervate. *l. 1. ff. de pact. l. 34. ff. de reg. jur.* See the twenty-ſecond Article of this Section.

[n] Contraria voluntate diſſolvuntur. §. *ult. inſt. quib. mod. toll. obl. l. 35. ff. de reg. jur.*

VIII.

Rules for the interpretation of Covenants.

1st Rule. 8. *Obscurities and doubts are to be interpreted by the common intention of the contracters.*

Seeing Covenants are to be formed by the mutual conſent of thoſe who treat together, every one of them ought to explain in the Covenant ſincerely and clearly what he promiſes, and what he pretends to[o]. And it is by their common intention, that we are to explain whatever may be obſcure or doubtful in the Covenant[p].

[o] In quorum fuit poteſtate legem apertiùs conſcribere. *l.* 39. *ff. de pact.* *l.* 21. *ff. de contr. empt.* Liberum fuit verba latè concipere. *l.* 99. *ff. de verb. obl.*

[p] Semper in ſtipulationibus, & in cæteris contractibus, id ſequimur quod actum eſt. *l.* 34. *ff. de reg. jur.* Quod factum eſt, cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l.* 168. §. 1. *eod.*

IX.

2d Rule. 9. *Interpretation made by Uſage, or other ways.*

If the common intention of the parties does not appear from the words of the Covenant, and if it can be interpreted by any Cuſtom or Uſage of the place where it was made, or of the perſons who made it, or by other ways, we muſt keep to that which ſhall appear to be the moſt probable, under all theſe views[q].

[q] Si non appareat, quid actum eſt, erit conſequens ut id ſequamur, quod in regione in qua actum eſt frequentatur. *l.* 34. *ff. de reg. jur.* In obſcuris inſpici ſolet quod veriſimilius eſt, aut quod plerumque fieri ſolet. *l.* 114. *eod.*

X.

3d Rule. 10. *To judge of the ſenſe of every Clauſe, by the tenour of the whole Deed.*

All the Clauſes of Covenants are interpreted one by another, in giving to each one the ſenſe which reſults from the tenour of the whole Deed; and even from what is ſet forth in the Preamble to it[r].

[r] *In the ſame manner as we interpret the ſeveral parts of a Law.* Incivile eſt niſi tota lege perſpecta, una aliqua particula ejus propoſita, judicare, vel reſpondere. *l.* 24. *ff. de legib.* Plerumque ea quæ præfationibus conveniſſe concipiuntur, etiam in ſtipulationibus repetita creduntur. *l.* 134. §. 1. *ff. de verb. oblig.*

XI.

4th Rule. 11. *The Intention to be preferred to the Expreſſion.*

If the words of a Covenant appear to be contrary to the intention of the Contracters, which is otherways evident; we muſt follow this intention, rather than the words[s].

[s] In conventionibus contrahentium voluntatem, potiùs quàm verba ſpectari placuit. *l.* 219. *ff. de verb. ſign.* V. exemplum in d. l. Potiùs id quod actum, quàm id quod dictum ſit, ſequendum eſt. *l.* 6. §. 1. *ff. de contr. empt.* Prior atque potentior eſt quàm vox, mens dicentis. *l.* 7. *in f. ff. de ſuppell. leg.*

XII.

5th Rule. 12. *Of Clauſes that have a double meaning.*

If the words of a Covenant have a double meaning, we muſt take that which is moſt conformable to the common intention of the Contracters; and which has the greateſt affinity to the ſubject matter of the Covenant[t].

[t] Quoties idem ſermo duas ſententias exprimit, ea potiſſimùm excipiatur, quæ rei gerendæ aptior eſt. *l.* 67. *ff. de reg. jur.* Quoties in ſtipulationibus ambigua oratio eſt, commodiſſimum eſt id accipi, quo res, qua de agitur, in tuto ſit. *l.* 80. *ff. de verb. obl.*

XIII.

6th Rule. 13. *Interpretation in favour of him who is obliged.*

The obſcurities and uncertainties of the obligatory Clauſes, are to be interpreted in favour of him that is obliged, and we muſt always reſtrain the Obligation to the ſenſe which diminiſhes it[u]. For he that obliges himſelf, is willing only to be engaged for as little as he can, and the other party ought to have taken care to have it clearly explained what he pretended to[x]. But if there are other Rules which demand that the interpretation be made againſt the perſon who is obliged, as in the caſe of the following Article, the Obligation is extended according to the circumſtances. And in general, when the Engagement is ſufficiently underſtood, it ought neither to be extended, nor reſtrained, to the prejudice of one party in favour of the other[y].

[u] Arrianus ait multum intereſſe, quæras utrum aliquis obligetur, an aliquis liberetur, ubi de obligando quæritur, propenſiores eſſe debere nos, ſi habeamus occaſionem, ad negandum. Ubi de liberando ex diverſo, ut facilior ſis ad liberationem. *l.* 47. *ff. de obl. & act.* In ſtipulationibus cùm quæritur quid actum ſit, verba contra ſtipulatorem interpretanda ſunt. *l.* 38. §. 18. *ff. de verb. oblig.*

[x] Ferè ſecundùm promiſſorem interpretamur, quia ſtipulatori liberum fuit verba latè concipere. *l.* 99. *ff. eod.* Si ita ſtipulatus fuero, decem aut quindecim dabis? Decem debentur. Item ſi ita poſt annum, aut biennium dabis? Poſt biennium debentur, quia in ſtipulationibus id ſervatur, ut quod minus eſſet, quodque longius, eſſe videretur, in obligationem deductum. *l.* 109. *ff. de verb. oblig.*

[y] Cùm quid mutuum dederimus, etſi non cavemus ut æquè bonum nobis redderetur, non licet debitori deteriorem rem quæ ex eodem genere ſit, reddere, veluti vinum novum pro vetere. Nam in contrahendo, quod agitur pro cauto habendum eſt, id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur qua datum ſit. *l.* 3. *ff. de reb. cred.*

XIV.

7th Rule. 14. *Interpretation againſt him who ought to have explained his meaning.*

If the obſcurity, ambiguity, or other defect of Expreſſion, be an effect of the knavery, or fault of him who ought to explain his intention, it is to be interpreted againſt him, becauſe he ought to have explained diſtinctly what his meaning was. Thus, when a Seller makes uſe of an equivocal expreſſion concerning the qualities of the thing which he ſells, his words are explained againſt him[a].

[a] Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit nocere, in quorum fuit poteſtate, legem apertiùs conſcribere. *l. 39. ff. de pact.* Obſcuritatem pacti nocere potiùs debere venditori, qui id dixerit, quàm emptori: quia potuit re integra apertiùs dicere. *l. 21. ff. de contr. empt.* Cùm in lege venditionis ita ſit ſcriptum, flumina, ſtillicidia, uti nunc ſunt, ut ita ſint: nec additur, quæ flumina, vel ſtillicidia; primùm ſpectari oportet, quid acti ſit; ſi non id appareat, tunc id accipitur, quod venditori nocet, ambigua enim oratio eſt. *l. 33. ff. de contr. empt. l. 172. ff. de reg. jur. V. l. 69. §. 5. ff. de evict.* Servitutes, ſi quæ debentur, debebuntur. Etenim juris auctores reſponderunt: ſi certus venditor quibuſdam perſonis, certas ſervitutes debere, non admonuiſſet emptorem, ex empto eum teneri debere. *l. 39. ff. de act. empt. & vend.* See the tenth Article of the third Section of Hiring and letting to Hire; and the fourteenth Article of the eleventh Section of the Contract of Sale.

XV.

8th Rule. 15. *The alternative Obligation is in the choice of him who is obliged.*

If one is obliged indeterminately to one, or other of two things, he is at liberty to give that which he pleaſes, if the Covenant contains nothing to the contrary[a].

[a] Cùm illa, aut illa res promittitur, rei electio eſt utram præſtet. *l. 10. in fine. ff. de jur. dot.* Si ita res diſtrahatur, illa aut illa res: utram eliget venditor, hæc erit empta. *l. 25. ff. de contr. empt. v. l. 21. in fine. ff. de act. empt.*

XVI.

9th Rule. 16. *Obligations of things whoſe goodneſs and value may reach to more or leſs.*

In the Covenants, where one is obliged for things, whoſe value may reach to more or leſs, according to the difference of their qualities, ſuch as Proviſions[b], ſome kinds of Works[c], or other things, the Obligation is not extended to that which is beſt, and of the greateſt price, but is moderated to that which is called good and merchantable[d]. And the Debtor, for example, who owes Wheat, diſcharges himſelf of his Obligation, if he gives Wheat that is good and vendible; becauſe it is preſumed that the Contracters did not think of any other but that which is of common uſe. But if the Covenant regulates that which is due, or if the intention of the Contracters appears by the circumſtances, we muſt hold to that[e].

[b] Ergo ſi quis fundum, ſine propria appellatione, vel hominem generaliter, ſine proprio nomine, aut vinum, frumentumve, ſine qualitate, dari ſibi ſtipulatur, incertum deducit in obligationem. *l. 75. §. 1. ff. de verb. obl.* Uſque adeo ut ſi quis ita ſtipulatus ſit, tritici Africi boni modios centum, vini Campani boni amphoras centum; incertum videatur ſtipulari, quia bono melius inveniri poteſt. Quo fit ut boni appellatio non ſit certæ rei ſignificativa: cùm id quod bono melius ſit, ipſum quoque bonum ſit. *d. l. §. 2.* fidejuſſorem ſi ſine adjectione bonitatis tritici, pro altero triticum ſpopondit, quodlibet triticum dando reum liberare poſſe exiſtimo. *l. 52. ff. mand. This we are to underſtand ſo as that it be good and merchantable.*

[c] Operarum ſtipulatio, ſimilis eſt his ſtipulationibus in quibus genera comprehenduntur. *l. 54. §. 1. ff. de verb. oblig.*

[d] Si quis artificem promiſerit, vel dixerit, non utique perfectum eum præſtare debet, ſed ad aliquem modum peritum: ut neque conſummatæ ſcientiæ accipias, neque rurſum indoctum in artificium. Sufficiet igitur talem eſſe, quales vulgò artifices dicuntur. *l. 19. §. 4. ff. de æd. ed.* Hæc omnia ex bono & æquo modicè deſiderentur. *l. 18. eod.* Qui ſimpliciter cocum eſſe dixerit, ſatisfacere videtur, etiamſi mediocrem cocum præſtet. *d. l. 18. §. 1. l. 16. §. 1. ff. de op. lib.*

[e] At cùm optimum quiſque ſtipulatur, id ſtipulari intelligitur, cujus bonitas principalem gradum bonitatis habet. *d. l. 75. §. 2. ff. de verb. obl. V. l. 52. ff. mand.*

XVII.

10th Rule. 17. *How the Price of things is regulated.*

If in a Covenant the Parties omit to regulate the Price of a thing[f], it is to be eſtimated neither at the higheſt nor loweſt Price, but at the common rate[g], without any regard to the particular circumſtances of the affection which either the one or other of the Contracters might have had for the thing that is to be eſtimated, or of their want of it[h]. But we ought only to conſider what it is worth in reality[i]; what it would be worth in its common uſe to any perſon whatſoever; and what it might be reaſonably ſold for[l].

[f] Juſto pretio tunc æſtimandum. *l. 16. §. ult. ff. de pign.*

[g] Ex præſenti æſtimatione (juſta pretia) conſtitui. *l. 3. §. 5. ff. de jur. fiſc.* ſecundùm rei veritatem æſtimanda erunt. Hoc eſt ſecundùm præſens pretium. *l. 62. §. 1. ff. ad leg. falc.* Rei verum pretium. *l. 50. ff. de furt.*

[h] Pretia rerum non ex affectu, nec utilitate ſingulorum, ſed communiter funguntur. *l. 63. ff. ad leg. falc. l. 33. ff. ad leg. Aquil.*

[i] Secundum rei veritatem. *d. l. 62. §. 1. ad leg. falc.*

[l] Non affectiones æſtimandas eſſe puto, veluti ſi filium tuum naturalem quis occiderit, quem tu magno emptum velles: ſed quanti omnibus valeret. *d. l. 33. ff. ad leg. Aq.* Quanti emptorem poteſt invenire. *l. 52. §. 39. ff. de furt.*

XVIII.

11th Rule. 18. *Of the time and place of the Eſtimation.* The Eſtimation of things which have not been delivered at the time and place appointed, as of Wine, Corn, and other things of the like nature, is made according to the value they had at the time, and in the place where they ought to have been delivered[m].

[m] Si merx aliqua, quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die, quo dari debuit. *l.* 4. *ff. de cond. tritic. l.* 22. *ff. de reb. cred.* Idemque juris in loco eſſe: ut æſtimatio ſumatur, ejus loci quo dari debuit. *dd. ll.*

XIX.

12th Rule. 19. *Expreſſions which have no ſenſe.* The Expreſſions which can have no ſenſe any manner of way, are rejected, as if they had not been written[n].

[n] *The ſame as in Teſtaments.* Quæ in teſtamento ita ſunt ſcripta, ut intelligi non poſſint, perinde ſunt, ac ſi ſcripta non eſſent. *l.* 73. §. 3. *ff. de reg. jur.*

XX.

13th Rule. 20. *Faults in the writing.* The faults in the writing, which may be repaired by the Senſe clearly underſtood, do not hinder the effect which the Covenant ought to have[o].

[o] Si librarius in tranſcribendis ſtipulationis verbis erraſſet, nihil nocere. *l.* 92. *ff. de reg. jur.*

XXI.

14th Rule. 21. *Covenants are limited to the matters of which they treat.* All the Clauſes of Covenants have their ſenſe limited to the matter of which they treat; and ought not to be extended to things which were never thought of[p]. Thus, a general Acquittance which has relation to a ſtated Account of Charge and Diſcharge, does not annul Obligations which are not accounted for[q]. Thus, a tranſaction is limited to the differences concerning which the parties treated; and does not extend to others which were not under treaty. For we ought not to preſume either that a perſon engages himſelf, or diſcharges another of his Engagement, unleſs his will is clearly explained, and rightly underſtood[r].

[p] Ante omnia enim animadvertendum eſt, ne conventio in alia re facta, aut cum alia perſona, in alia re, aliave perſona noceat. *l.* 27. §. 4. *ff. de pact.* Iniquum eſt perimi pacto id de quo cogitatum non docetur. *l.* 9. *in fine ff. de tranſ.*

[q] Si tantùm ratio accepti atque expenſi eſſet computata, cæteras obligationes manere in ſua cauſa. *l.* 47. *in f. ff. de pact.*

[r] Tranſactio quæcumque fit, de his tantùm de quibus inter convenientes placuit, interpoſita creditur. *l.* 9. §. 1. *ff. de tranſ.* Cùm Aquiliana ſtipulatio interponitur, quæ ex conſenſu redditur, lites de quibus non eſt cogitatum, in ſuo ſtatu retinentur. Liberalitatem enim captioſam, interpretatio prudentium fregit. *l.* 5. *ff. de tranſ. l.* 3. *C. eod.* de quo cogitatum non docetur. *d. l.* 9. *in f. de tranſ.*

XXII.

15th Rule. 22. *Interpretation of Judicial Covenants.* If it happens that a Covenant is made only in obedience to an Order of Court; as if a Judge orders a Plaintiff to make ſome abatement in order to receive what he demands, or that ſecurity be given for certain things; in theſe and the like caſes, if the Act or Deed which contains the Engagement that is enjoined by a Sentence, or Decree, happens to have any ambiguity or obſcurity in it, it ought to be interpreted by the intention of the Sentence, or Decree, in execution of which it is made[ſ].

[ſ] In Prætoriis ſtipulationibus ſi ambiguus ſermo acciderit, Prætoris erit interpretatio, ejus enim mens æſtimanda eſt. *l.* 9. *ff. de ſtip. præt.* In conventionalibus ſtipulationibus contractui formam contrahentes dant. Enim verò prætoriæ ſtipulationes legem accipiunt de mente Prætoris qui eas propoſuit. *l.* 52. *ff. de verb. obl.*

SECT. III.

Of Engagements which follow naturally from Covenants, altho' they be not particularly mentioned therein.

The CONTENTS.

1. *Three ſorts of Engagements in Covenants.*
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4. *Penalties of the non-performance of Covenants.*
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6. *The place of Payment, or other performance of Covenants.*
7. *The Delay laſts till the laſt moment of the Term is expired.*
8. *Of the care which one ought to have of that which belongs to another, when the charge of it is committed to him by ſome Covenant.*
9. *No body is accountable for accidents.*
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11. *The Eſtimation referred to ſome perſon.*
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13. *Honeſty required as to third perſons.*
14. *In what ſenſe we ought to underſtand that it is lawful for one party to cheat the other.*

15. *Delays are arbitrary for the performance of Covenants, according to the condition of things.*

I.

1. Three ſorts of Engagements in Covenants. Covenants oblige not only to what is expreſs'd in them, but likewiſe to every thing which the nature of the Covenant demands; and to all the conſequences which Equity, Law, and Cuſtom give to the Obligation which the parties have contracted[a]. So that we may diſtinguiſh three ſorts of Engagements in Covenants. Thoſe which are expreſsly mentioned; Thoſe which are natural conſequences of the Covenants; And thoſe which are regulated by ſome Law, or ſome Cuſtom. Thus, it is by natural Equity, that a Partner is obliged to take care of the common Affair, which is in his hands; That he who borrows a thing to uſe it, ought to preſerve it carefully; That the Seller ought to warrant that which he has ſold; altho' the Covenants make no expreſs mention of theſe things[b]. Thus, it is in virtue of a Law, that whoever purchaſes an Eſtate for leſs than half the juſt value, is obliged either to reſtore it, or to make up the Price. Thus, in the Leaſe of a Houſe, ſome Cuſtoms continue the Leaſe beyond the term for a certain time, unleſs the Contracters have derogated from it. And all theſe conſequences of Covenants, are as it were tacit Pacts, which are underſtood, and which make a part of the Covenant. For the Contracters conſent to every thing that is eſſential to their Engagements[c].

II.

2. Reciprocal performance of Covenants. In all Covenants, the Engagement of one of the parties being the foundation of the Engagement of the other, the firſt effect of the Covenant is, that every one of the Contracters may oblige the other to execute his Engagement, by performing what he is bound to do on his own part, according as one or other of the parties is obliged by the Covenant. Whether it be that the Articles of the Covenant are to be performed on both ſides at one and the ſame time; as if it is agreed on in a Sale, that the Price ſhall be paid at the time of the delivery of the Goods; or whether it be that performance is to be made firſt by one of the parties, as if the Seller is obliged to deliver the Goods, and has given ſome reſpite of time for payment of the Price, or by the other, as if the Buyer be to pay the Money down, before the Goods are delivered[d].

III.

3. Exception to the foregoing Rule. If when a Covenant is not at all executed, or when it is done only by one of the parties, there happens a change, which ought to ſuſpend its Execution, or the performance of what remains to be executed, it is underſtood by the tacit will of the Contracters, that the execution ought to be ſuſpended until the obſtacle is removed. Thus the Buyer, who, after the Sale, diſcovers that there is danger of an Eviction, before he has paid the Price, will not be bound to pay the Price, till he is ſufficiently ſecured againſt the Eviction[e].

IV.

4. Penalties of the non-performance of Covenants. In all Covenants, it is the ſecond effect of the Engagements, that he who fails in the performance of what he is bound to, or delays to do it, whether it be for want of ability, or want of will, ſhall be bound to make good the damages of the other party, according to the nature of the Covenant, the quality of the Non-performance, or Delay, and the circumſtances of the caſe[f]. And if there is ground to diſſolve the Covenant, it ſhall be diſſolved with a reſervation of the Penalties which ought to follow from it againſt him who ſhall have fail'd to perform his part of the Engagement[g].

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[a] Alter alteri obligatur, de eo quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.* Ea quæ ſunt moris, & conſuetudinis, in bonæ fidei judicis debent venire. *l.* 31. §. 20. *ff. de ad. ed. l.* 17. §. 1. *ff. de aqua & aq. pl.*

[b] Quod ſi nihil convenit, tunc ea præſtabuntur quæ naturaliter inſunt hujus judicii poteſtate, & imprimis ipſam rem præſtare venditorem oportet. *l.* 11. §. 1. *ff. de act. empt.*

[c] Quaſi id tacitè conveniret. *l.* 4. *ff. in quib. cauſ. pign. vel hyp. t. c.* ea quæ tacitè inſunt ſtipulationibus. *l.* 2. §. 3. *ff. de eo quod cert. loc.* Plerumque id accidit, ut extra id quod ageretur tacita obligatio naſcatur. *l.* 13. *in f. ff. commod.* in contrahendo, quod agitur, pro cauto habendum eſt. *l.* 3. *ff. de reb. cred.* quædam in ſermone tacitè excipiuntur. *l.* 9. *ff. de ſervit.*

[d] Contractum, ultrò citròque obligationem, quod Græci *συνάλλαγμα* vocant. *l.* 19. *ff. de verb. ſign.* Alter alteri obligatur, de eo quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. §. *ult. ff. de obl. & act.* Quod ab initio ſpontè ſcriptum, aut in pollicitationem deductum eſt, hoc ab invitis poſtea compleatur. *l. ult. C. ad vell.* Id quod convenit ſervabitur. *l.* 1. *C. qu. dec. non. eſt op.* Sicut ab initio libera poteſtas unicuique eſt habendi vel non habendi contractus, ita renunciare ſemel conſtitutæ obligationi, adverſario non conſentiente, nemo poteſt. *l.* 5. *C. de obl. & act.*

[e] Ante pretium ſolutum, dominii quæſtione motâ, pretium emptor ſolvere non cogetur, niſi fidejuſſores idonei, à venditore ejus evictionis, offerantur. *l.* 18. §. 1. *ff. de per. & com. r. v. V. l.* 17. §. 2. *ff. de doli mal. exc.* See the 11th Article of the 3d Section of the Contract of Sale.

[f] Ut damneris mihi quanti intereſt mea, illud de quo convenit accipere. *l.* 5. §. 1. *ff. de praſc. verb.* Quanti ea res erit. *l.* 29. §. 2. *ff. de ad. ed.* See concerning damages, the 17th and 18th Articles of the 2d Section of the Contract of Sale.

[g] Vel ſi meum recipere velim, repetatur quod datum eſt, quaſi ob rem datum, re non ſecuta. *l.* 5. §. 1. *ff. de praſc. verb.* Omnia in integrum reſtituuntur. *l.* 60. *ff. de ad. ed.* Non impleta promiſſi fide, dominii tui jus in ſuam cauſam reverti convenit. *l.* 6. *C. de pact. int. empt. & vend. comp.* Quoniam contractus fidem fregit, ex empto actione conventus, quanti tua intereſt præſtare cogetur. *l.* 6. *C. de har. vel act.* V. cauſa omnis reſtituenda. *l.* 31. *ff. de reb. cred.*

V.

5. *An Obligation without a term.*

If it has been omitted in a Covenant to expreſs the term of payment, or delivery of any other thing promis'd, it is a conſequence of the Covenant, that ſince the term is added only in favour of the perſon who is obliged; if no time is allowed him for performing what he ought to do, or to give, he is bound to do it, or to give it immediately, and without delay. Unleſs it happens that the performance of the Covenant implies the neceſſity of a delay, as if the performance is to be made in another place, than that where the parties entred into Covenant[h].

[h] In omnibus obligationibus in quibus dies non ponitur, præſenti die debetur. *l.* 14. *ff. de reg. jur.* Quoties in obligationibus dies non ponitur, præſenti die pecunia debetur: niſi ſi locus adjectus ſpatium temporis inducat, quo illò poſſit perveniri. *l.* 41. §. 1. *ff. de verb. obl.* §. 2. *inſt. eod.* Diei adjectionem pro reo eſſe, non pro ſtipulatore. *d. l.* 41. §. 1. *in f.*

VI.

6. *The place of payment, or other performance of Covenants.*

If in a Covenant which obliges one to deliver any Moveable Thing, it has been omitted to expreſs the place where the delivery ought to be made; the thing ſhall be delivered in the place where it ſhall happen to be at the time; unleſs it is that by the knavery of the perſon who ought to deliver it, it has been removed from the place where it ought to be; or that it appears to have been the intention of the Contracters, that the thing ſhould be delivered in another place[i].

[i] Depoſitum eo loco reſtitui debet, in quo ſine dolo malo ejus eſt, apud quem depoſitum eſt. *l.* 12. §. 1. *depoſ.* Eadem dicenda ſunt communiter & in omnibus bonæ fidei judiciis. *d.* §. Ibi dari debet ubi eſt, (quod legatur) *l.* 38. *ff. de jud. V. ll.* 10. 11. 12. *ff. de rei vind.* Is qui certo loco dare promittit, nullo alio loco, quàm in quo promiſit, ſolvere invito ſtipulatore poteſt. *l.* 9. *ff. de eo quod cert. loc.*

VII.

7. *The Delay laſts till the laſt moment of the term is expired.*

He who has a term for paying, delivering, or doing any thing, is not in delay, nor can he be ſued, till the laſt moment of the term is expired. For it cannot be ſaid, that he has not ſatisfied his Obligation, till the delay is fully expired. Thus, he who is bound to make payment within a Year, a Month, or a Day, has for his Delay all the moments of the Year, the Month, and the Day[l].

[l] Ne eo quidem ipſo die, in quem ſtipulatio facta eſt, quia totus is dies arbitrio ſolventis tribui debet. Neque enim certum eſt eo die in quem promiſſum eſt, datum non eſſe, priuſquàm is prætererit. §. 2. *inſt. de verb. obl.* Quod quis aliquo anno dare promittit, aut dare damnatur, ei poteſtas eſt quolibet ejus anni die dandi. *l.* 50. *ff. de obl. & act. l.* 42. *ff. de verb. obl.*

VIII.

8. *Of the care which one ought to take of that which belongs to another, when the charge of it is committed to him by ſome Covenant.*

It is a natural conſequence of many Covenants, that thoſe who have the charge either of a Thing, or of an Affair belonging to another perſon, or which belongs to them in common, are bound to take care of it; and they are anſwerable for their Knavery, their Faults, their Negligences, but in a different manner[m], according to the different cauſes for which the thing is committed to their charge, whether it be for their own intereſt alone, as he who borrows a thing of another to make uſe of it[n]; or for the bare intereſt of the Owner, as the Depoſitary[o]; or for their common Intereſt, as in the caſe of a Partner[p]. And they are obliged to more or leſs care and diligence, according to the Rules which ſhall be explained in each kind of Covenant. But if it be adjuſted in the Covenant, what care he ought to take who is entruſted with the Affair, or Thing, of another perſon, or which is in common to them both, it is neceſſary to keep to that[q].

[m] Contractus quidam, dolum malum dumtaxat recipiunt: quidam & dolum & culpam. *l.* 23. *ff. de reg. jur. l.* 5. §. 2. *ff. commod.*

[n] Commodatum plerumque ſolam utilitatem continet, ejus cui commodatur. *d. l.* 5. §. 2.

[o] Nulla utilitas ejus verſatur, apud quem deponitur. *d.* §. 2.

[p] Sed ubi utriuſque utilitas vertitur, ut in ——— ſocietate. *d.* §. 2.

[q] Sed hæc ita, niſi ſi quid nominatim convenit, vel plus, vel minus in ſingulis contractibus. Nam hoc ſervabitur quod initio convenit. *d. l.* 23. *ff. de reg. jur.*

IX.

9. No body is accountable for accidents.

No body is bound in any kind of Covenant, to anſwer for the loſſes and damages occaſioned by accident, ſuch as a Thunder-bolt, an Inundation, a Torrent, Force, and other events of the like nature: And the loſs of the thing which periſhes, or which is damaged by chance, falls upon him who is the Maſter of it, unleſs it has been otherwiſe agreed on[r], or that the loſs or damage may be imputed to ſome fault, for which one of the Contracters is accountable; as if a thing which ought to have been delivered, happens to periſh, while he who ought to deliver it, refuſes to do it[ſ].

[r] Rapinæ, tumultus, incendia, aquarum magnitudines, impetus prædonum, à nullo præſtantur. *l.* 23. *ff. de reg. jur. inf.* Ea quidem quæ vi majore auferuntur, detrimento eorum quibus res commodantur, imputari non ſolent Sed cùm is qui à te commodari ſibi bovem poſtulabat, hoſtilis incurſionis contemplatione, periculum amiſſionis, ac fortunam futuri damni in ſe ſuſcepiſſe proponatur: Præſes Provinciæ, ſi probaveris eum indemnitatem tibi promiſiſſe, placitum conventionis implere eum compellet. *l.* 1. *C. de commod. V. l.* 39. *ff. mand.* See the ſixth Article of the ſecond Section of the Loan of things to be reſtored in ſpecie.

[ſ] Quod te mihi dare oporteat, ſi id poſtea perit, quàm per te factum erit, quo minus id mihi dares; tuum fore id detrimentum conſtat. *l.* 5. *ff. de reb. cred. v. l.* 11. §. 1. *ff. locat. cond. l.* 11. *ff. de neg. geſt. l.* 1. §. 4. *ff. de obl. & act.*

X.

10. He who reaps the profit, ought to bear the loſs.

As it often happens after Covenants are agreed on, that the ſame thing, or the ſame affair, is an occaſion of Gain, or Loſs, according to the variety of accidents; it is always underſtood, that he who reaps the profit, ought to bear the loſs[t]: unleſs it be that the loſs ought to be imputed to the fault of the other party. Thus, as the Buyer, after the Sale, has the advantage of the changes which make the thing better; he ſuffers likewiſe the loſs of thoſe that make it worſe[u]. Unleſs the loſs may be imputed to the Buyer; as if the thing periſhes, or is diminiſhed, whilſt he is in delay to deliver it[x].

[t] Secundum naturam eſt, commoda cujuſque rei eum ſequi, quem ſequentur incommoda. *l.* 10. *ff. de reg. jur.* commodum ejus eſſe debet, cujus periculum eſt. §. 3. *inſt. de empt. & vend.* Si quem quæſtum fecit is qui experiendum quid accepit: veluti ſi jumenta fuerint, eaque locata ſint, id ipſum præſtabit ei qui experiendum dedit. Neque enim ante eam rem quæſtui cuique eſſe oportet, priuſquam periculo ejus ſit. *l.* 13. §. 1. *ff. commod.*

[u] Poſt perfectam venditionem omne commodum & incommodum, quod rei venditæ contingit, ad emptorem pertinet. *l.* 1. *C. de per. & com. r. v.*

[x] Quod ſi neque traditi eſſent, neque emptor in mora fuiſſet, quominus traderentur, venditoris periculum erit. *l.* 14. *ff. de per. & com.*

XI.

11. The Eſtimation referred to ſome perſon.

In the Covenants in which an Eſtimation is to be made, as of the Price in a Sale, of the value of a Rent, of the quality of a Work, of the ſhares of Gain and Loſs which Partners ought to have, and others of the like nature; if the Contracters refer the matter to the Arbitration of a third perſon, whether they name him, or not; or even to the Arbitration of one of the parties; it is the ſame thing, as if they had referred it to the Arbitration of perſons of probity, and ſkill in the matter. And whatever ſhall be awarded contrary to this Rule, will not be of any force; becauſe the intention of thoſe who make ſuch References to other perſons, implies the condition, that what ſhall be regulated in the matter ſhall be reaſonable; and their deſign is not to oblige themſelves to what may be arbitrated beyond the bounds of Reaſon and Equity[y]: but if the perſon named either could not, or would not make the Eſtimation, or died before he could make it; the Covenant in that caſe would be null. For it contained the condition, that the Eſtimation ſhould be made by that perſon[z].

[y] Ad boni viri arbitrium redigi debet: etſi nominatim perſona ſit comprehenſa, cujus arbitratu fiat. *l.* 76. *& ſeq. ff. pro ſocio.*

Si in lege locationis comprehenſum ſit, ut arbitratu domini, opus approbetur: perinde habetur, ac ſi viri boni arbitrium comprehenſum fuiſſet. Idemque ſervatur, ſi alterius cujuſlibet arbitrium comprehenſum ſit. Nam fides bona exigit, ut arbitrium tale præſtetur, quale viro bono convenit. *l.* 24. *ff. loc.*

Ea mens eſt perſonam arbitrio ſubſtituentium, ut quia ſperent eum recte arbitraturum id faciant, non quia vel immodicè obligari velint. *l.* 30. *ff. de opt. lib.*

It is neceſſary here to obſerve the difference between this ſort of Arbitrators, and Arbitrators named in a Compromiſe, and what ſhall be ſaid of them in the Title of Compromiſes. See l. 76. ff. pro ſocio.

[z] Si coita ſit ſocietas ex his partibus, quas Titius arbitratus fuerit: ſi Titius antequam arbitraretur deceſſerit, nihil agitur. Nam id ipſum actum eſt, ne aliter ſocietas ſit, quàm ut Titius arbitratus ſit. *l.* 75. *ff. pro ſocio.* Sin autem vel ipſe Titius noluerit, vel non potuerit pretium venditionis definire, tunc pro nihilo eſſe venditionem. *l. ult. C. de contr. empt.*

XII. There

XII.

12. *A perfect integrity is required in all kinds of Covenants.* There is no ſort of Covenant, in which it is not underſtood, that the one party is bound to deal honeſtly and fairly by the other, and to do whatever Equity may demand[a]; as well in the manner of expreſſing himſelf in the Covenant, as in the performance of what is covenanted, and of all the conſequences of it[b]. And altho' in ſome Covenants this honeſt and fair dealing has a larger, and in ſome a leſſer extent, yet it ought to be ſincere in all Covenants; and each party is obliged to every thing that the ſame may require, according to the nature of the Covenant, and the conſequences that it may have[c]. Thus, in a Sale, this Integrity forms a greater number of Engagements, than in the Loan of Money. For the Seller is obliged to deliver the thing ſold[d]; To keep it till the time of delivery[e]; To warrant it[f]; To take it back again, if it has ſuch faults as that the Sale ought to be made void[g]. And the Buyer has likewiſe his Engagements; which ſhall be explained in their place. But in the Loan of Money, the Borrower is bound only to reſtore the ſame Sum[h], with the Intereſt, if he does not pay it at the term after demand[i].

[a] Bonam fidem in contractibus conſiderari æquum eſt. *l. 4. C. de obl. & act.*

Bona fides quæ in contractibus exigitur, æquitatem ſummam deſiderat. *l. 31. ff. depos.*

[b] Alter alteri obligatur, de eo quod alterum alteri ex bono & æquo præſtare oportet. *l. 2. §. ult. ff. de obl. & act.*

[c] Ea præſtabuntur quæ naturaliter inſunt. *l. 11. §. 1. ff. de act. empt. & vend.*

[d] Imprimis ipſam rem præſtare venditorem oportet. *d. l. 11. §. 1.*

[e] Cuſtodiam & diligentiam præſtare debet. *l. 36. ff. de act. empt. & vend.*

[f] Evictionem præſtabimus. *l. 39. §. 2. ff. de evict.*

[g] Redhibitionem quoque contineri empti judicio. *l. 11. §. 3. ff. de act. empt. & vend.*

[h] Mutuum damus, recepturi idem genus. *l. 2. ff. de reb. cred. l. 1. §. 2. ff. de obl. & act.*

[i] In his judiciis, quæ non ſunt arbitraria, nec bonæ fidei, poſt litem conteſtatam actori cauſa præſtanda eſt. *l. 3. §. 1. ff. de uſur.*

This difference between a greater and leſſer extent of Integrity, according to the differences of Covenants, is the foundation of the diſtinction that is made in the Roman *Law, between Contracts which are there called Contracts* bonæ fidei, *and thoſe which are ſaid to be* ſtricti juris; *the meaning of which is, that ſome Contracts are ſo to be interpreted by the Rules of Honeſty and Conſcience, that they are ſuppoſed to include many things, altho' they be not expreſly mentioned in the Contract; and that in other Contracts they ſtick cloſe to the very Letter of the Contract. But by the Law of Nature, and by our Cuſtoms, every Contract is* bonæ fidei; *becauſe Honeſty and Integrity hath and ought to have in all Contracts the full extent that Equity can demand.* Ne propter nimiam ſubtilitatem verborum, latitudo voluntatis contrahentium impediatur. *l. un. C. ut act. & ab hær. & contr. hær. v. l. 111. ff. de verb. obl.*

XIII.

13. *Honeſty required, as to third perſons.* The Honeſty which is neceſſary in Covenants, is not confined to what concerns the Contracters themſelves; but they are bound likewiſe to deal honeſtly with reſpect to all thoſe, who may have intereſt in what is tranſacted between them. Thus, for Example, if a Depoſitary diſcovers that the perſon who made the Depoſite has ſtole the thing depoſited, Honeſty obliges him to refuſe to give it back to the Thief who intruſted it with him, and to reſtore it to the perſon who appears to be the true Owner[l].

[l] Incurrit hîc & alia inſpectio, bonam fidem inter eos tantùm quos contractum eſt, nullo extrinſecus aſſumpto, æſtimare debemus: an reſpectu etiam aliarum perſonarum, ad quas, id quod geritur, pertinet? exempli loco, latro ſpolia quæ mihi abſtulit, poſuit apud Sejum inſcium de malitia deponentis. Utrum latroni, an mihi reſtituere Sejus debeat? Si per ſe dantem, accipientemque intuemur: hæc eſt bona fides, ut commiſſam rem recipiat is qui dedit. Si totius rei æquitatem, quæ ex omnibus perſonis quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quæ facto ſceleſtiſſimo adempta ſunt. Et probo hanc eſſe juſtitiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione. *l. 31. §. 1. ff. depos. See the end of the third Section of a Depoſitum.*

XIV.

14. *In what ſenſe we ought to underſtand, that it is lawful for one party to cheat the other.* The ways by which every one manages his own intereſt, at the time he contracts with another, and the reſiſtance of one party to the pretenſions of the other, within the bounds of that which is uncertain and arbitrary, and which muſt be regulated, have nothing in them contrary to Honeſty. And whereas it is ſaid, that it is lawful, for Example, in Sales, for one to over-reach the other, this ought to be underſtood of the advantage which the one party takes of the other, in that extent which is uncertain and arbitrary; ſuch as in the greatneſs or lowneſs of the Price[m]; but this liberty ought not to be extended to any fraud.

[m] In pretio emptionis & venditionis naturaliter licet contrahentibus ſe circumvenire. *l. 16. §. 4. ff. de min.*

Dolus qualitate facti, non quantitate pretii æſtimatur. *l. 10. C. de reſc. vend.* Quemadmodum in emendo & vendendo naturaliter conceſſum eſt quod pluris ſit, minoris emere: quod minoris ſit pluris vendere, & ita invicem ſe circumſcribere; ita in locationibus quoque & conductionibus juris eſt. *l. 22. §. ult. ff. locat. v. l. 8. C. de reſc. vend.*

XV.

15. Delays are arbitrary for the performance of Covenants, according to the condition of Things. In all Covenants in which one of the Contracters is obliged to do or give a thing, or to accompliſh in any other manner that which is agreed on; and eſpecially in thoſe, in which the Non-performance is to be attended with a diſſolution of the Contract, or with ſome other Penalty, it is equitable, and for the Publick Intereſt, that the Covenants be not immediately diſſolved, nor the Penalties incurred for every ſort of Non-performance indifferently. Thus, for Example, if the Buyer does not pay the Price at the time appointed, the Sale ſhall not be inſtantly annulled, even altho' it had been ſo agreed on; but a certain time is allowed to the Buyer to pay the Price before the Sale be made void. And in the other caſes of backwardneſs, whether of payment, or delivery of any thing, the Judge ought in prudence to grant ſuch delays as may be reaſonable, according to the circumſtances[n].

[n] Modicum ſpatium datum videri. Hoc idem dicendum, & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l.* 23. *in f. ff. de obl. & act.*

Dilationem negari non placuit. Cujus rei æſtimatio arbitrio judicantis conceditur. *l.* 45. §. 10. *ff. de jur. fiſc.* quod omne ad judicis cognitionem remittendum eſt. *l.* 135. §. 2. *ff. de verb. obl.* Nihil ex obligatione, paucorum dierum mora minuet (ſi omnia in integro ſunt.) *l* 24. §. 4. *ff. locat.* See the fifteenth, ſixteenth, and eighteenth Articles of the following Section; and the tenth Article of the ſecond Section of Partnerſhip.

SECT. IV.

Of the ſeveral ſorts of Pacts which may be added to Covenants; and particularly of Conditions.

AMong the ſeveral ſorts of Pacts that may be added to all manner of Covenants, ſome are of common uſe to all the kinds of Covenants, ſuch as Conditions, Clauſes of Nullity, and others; And there are ſome which are peculiar to ſome kinds of Covenants, ſuch as the Power of Redemption to the Contract of Sale. We ſhall only ſet down here ſuch as are common to all ſorts of Covenants; and what is peculiar to ſome Covenants, ſhall be inſerted in their proper places.

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19. *The effect of Clauſes of Nullity, and Penal Clauſes.*
20. *It does not depend on him who fails in performing what he promiſed, to annul the Covenant by his Non-performance.*
21. *Covenants concerning an uncertain event.*

I.

1. An indefinite liberty for all ſorts of Pacts. SEcing Covenants are arbitrary, and vary according to the wants of Mankind; we may to all ſorts of Covenants, Contracts, and Treaties, add all manner of Pacts, Conditions, Reſtrictions, Reſervations, general Acquittances, and others, provided that they have nothing in them contrary to Law, and good Manners[a].

[a] V. *ſup. Sect.* 2. *art.* 2. Quid tam congruum fidei humanæ, quàm ea, quæ inter eos placuerunt, ſervare. *l.* 1. *ff. de pact.* hoc ſervabitur, quod initio convenit: legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depoſ.* pacta quæ turpem cauſam continent, non ſunt obſervanda. *l.* 27. §. 4. *ff. de pact.*

II.

2. We may add to ordinary Engagements, We may likewiſe change the natural and ordinary engagements of Covenants, and either augment, or diminiſh them, *Or take from them.* or even derogate from them. Thus, in the Contracts of Sale, *Depoſitum*, Partnerſhip, and others, the Laws have regulated in what manner the one party is anſwerable to the other for his fault, or his negligence; but one may charge himſelf with more or leſs care and diligence, according as it is agreed on[b]. Thus the Seller, altho' naturally bound to warrant what he has ſold, may free himſelf from all other Warranty beſides that of his own fact and deed[c]. And the Equity of theſe Arguments is grounded on the particular Motives which the Contracters have to enter into them. That Seller, for inſtance, is diſcharged from Warranty, becauſe he ſells the thing at a lower Price.

[b] Contractus quidam, dolum malum dumtaxat recipiunt: quidam & dolum, & culpam. *l.* 23. *ff. de reg. jur.* Sed hæc ita, niſi ſi quid nominatim convenit, vel plus vel minus, in ſingulis contractibus. Nam hoc ſervabitur, quod initio convenit. *d. l.*

[c] Qui habere licere vendidit, videamus, quid debeat præſtare. Et multum intereſſe arbitror, utrum hoc polliceatur; per ſe, venienteſque à ſe perſonas non fieri, quo minus habere liceat: an verò per omnes. Nam ſi per ſe, non videtur id præſtare, ne alius evincat. *l.* 11. §. 18. *ff. de act. empt. & vend.* See the fifth, ſixth, and ſeventh Articles of the tenth Section of the Contract of Sale.

III.

3. Exception of that which would be againſt Honeſty. The liberty of augmenting, or diminiſhing Engagements, is always reſtrained to what may be done honeſtly, and without fraud or deceit. And deceit is always excluded from all manner of Covenants[d].

[d] Id nulla pactione effici poteſt, ne dolus præſtetur. *l.* 27. §. 3. *ff. de pact. l.* 1. §. 7. *ff. dep. l.* 23. *ff. de reg. jur. l.* 69. *ff. de verb. ſign.* Pacta conventa, quæ *neque dolo malo*, neque adversùs leges— facta erunt, ſervabo. *l.* 7. §. 7. *ff. de pact.*

IV.

4. Every one may renounce his own right. In all Covenants, every one may renounce his own right, and that which is for his advantage[e]; provided that what he does be not contrary to Equity, Law, and Good Manners, nor to the intereſt of a third perſon[f].

[e] Licet ſui juris perſecutionem, aut ſpem futuræ perceptionis, deteriorem conſtituere. *l.* 46. *ff. de pact.* Omnes licentiam habent, his quæ pro ſe introducta ſunt, renunciare. *l.* 29. *C. eod. l* 41. *ff. de min.*

[f] Non debet alteri per alterum iniqua conditio inferri. *l.* 74. *ff. de reg. jur.* Ante omnia animadvertendum eſt, ne conventio facta cum alia perſona, in alia perſona noceat. *l.* 27. §. 4. *ff. de pact.* See the third Article of the ſecond Section. *v. l.* 4. §. 4. *ff. ſi quis caut. v. l.* 8. *ff. de tranſ.*

V.

The particular Pactions which are added in Contracts, are limited to the matter which occaſions them; and are not to be extended to that which the Contracters had not in view[g]. *5. Pactions are limited to their ſubject matter.*

[g] *See the twenty firſt Article of the ſecond Section of this Title.* Ante omnia animadvertendum eſt, ne conventio in alia re facta, in alia re noceat. *l.* 27. §. 4. *ff. de pact.*

VI.

Of Conditions.

IT being uſual in Covenants, for the parties to foreſee accidents that may produce ſome change which they are willing to guard againſt; they therefore regulate what ſhall be done if thoſe caſes do happen. And this is what is done by the uſe of Conditions. *6. Definition of Conditions, their uſe, and different effects.*

Conditions therefore are Pactions which regulate that which the Contracters have a mind ſhould be done, if a caſe which they foreſee ſhould come to paſs. Thus, if it is ſaid, that in caſe a Houſe that is ſold be found to be ſubject to ſuch a Service, the Sale ſhall be void, or the Price lowered; this is a Condition: For the parties foreſee a caſe, and they guard againſt it. Thus, if a Houſe is ſold on condition that the Purchaſer ſhall not raiſe it higher, the Seller foreſees that the Buyer may make this change, and he provides againſt it, that he may preſerve the Lights of another Houſe different from that which he ſells.

We have added this ſecond Example, to ſhew that the burthens which Contracters impoſe upon one another in Covenants, are of the ſame nature with Conditions. For it is, properly ſpeaking, a burthen impoſed upon the Purchaſer, not to have power to build his Houſe higher; but this burthen implies a Condition, as if it had been ſaid, that in caſe the Purchaſer ſhould offer to raiſe his Houſe, the Seller might hinder him. And it is for this reaſon, that we often make uſe of the word *Condition*, and of the word *Burthen* indifferently; and we ſay, on ſuch a Condition, or with ſuch a Burthen. And we likewiſe uſe the word *Conditions* in the plural number, to denote the different agreements in a Treaty, becauſe they oblige all of them in ſuch a manner, that if it happens that the parties fail in performing them, or that they act contrary to them, they are liable to the penalties of Nonperformance.

The events foreſeen by Conditions, are of three ſorts. Some of them depend on the deed of the perſons who treat together, as if it is ſaid, in caſe that a Partner engages himſelf in another Partnerſhip. Others are independent of the will of the Contracters, ſuch as caſual events, as if it is ſaid, in caſe there happens a froſt, hail, or barrenneſs. And there are ſome which depend partly on the deed of the Contracters, and partly on chance, as if it is ſaid, in caſe that ſuch a Merchandize arrives ſuch a day.

Conditions are of three ſorts, according to the different effects which they may have. One is of thoſe which accompliſh the Covenants that are made to depend on them; as if it is ſaid, that a Sale ſhall take place in caſe the Goods be delivered on ſuch a day. The ſecond is of ſuch as diſſolve the Covenants; as if it is ſaid, that if ſuch a perſon arrive within ſuch a time, the Leaſe of a Houſe ſhall be void. And the third ſort is of thoſe which neither accompliſh, nor diſſolve the Covenants; but which only make ſome other changes in them; As if it is ſaid, that if a Houſe which is let, be given without the Moveables that were promiſed, the Rent ſhall be leſſened ſo much.

There are ſome Conditions expreſt, and there are others tacit, which are underſtood without being expreſt. The expreſs Conditions are all thoſe which are expreſly mentioned; as when it is ſaid, if ſuch a thing be done, or not; if ſuch a thing happen, or not. The tacit Conditions are thoſe which are implied in a Covenant, without being expreſt; As if it is ſaid in the Sale of an Eſtate, that the Seller reſerves to himſelf the Fruits of that year; this reſervation implies the condition, that there ſhall grow Fruits, in the ſame manner as if it had been ſaid, that he reſerved the Fruits in caſe there ſhould be any.*

* Interdum pura ſtipulatio ex re ipſa dilationem capit. Veluti ſi id quod in utero ſit, aut fructus futuros, aut domum ædificari ſtipulatus ſit. Tunc enim incipit actio, cùm ea per rerum naturam præſtari poteſt. *l.* 73. *ff. de verb. obl.* ineſt conditio. *l.* 1. §. 3. *ff. de cond. & dem.*

VII.

7. Of the Condition on which depends the accompliſhment of a Covenant. In the Covenants whoſe accompliſhment depends on the event of a Condition, all things remain in ſuſpence, and in the ſame condition as if there never had been any Covenant, until the condition happens. Thus, in a Sale which is to be perfected by the event of a Condition, the Buyer has in the mean while only an Expectation, without any right either to enjoy the thing, or to acquire it by Preſcription[h]. But the Seller continues to be Maſter of the thing ſold, and the fruits of it belong to him[i]. And if the Condition does not happen, the Contract is void[l].

[h] Ubi conditionalis venditio eſt, negat Pomponius (emptorem) uſucapere poſſe, nec fructus ad eum pertinere. *l.* 4. *ff. de in diem add.* ex conditionali ſtipulatione, tantùm ſpes eſt debitum iri. §. 4. *inſt. de verb. obl.* conditionales creditores dicuntur & hi, quibus nondum competit actio: eſt autem competitura. Vel qui ſpem habent ut competat. *l.* 54. *ff. de verb. ſign.*

[i] Fructus medii temporis, venditoris ſunt. *l.* 8. *ff. de per. & com. r. v.*

[l] Sub conditione facta venditio, nulla eſt ſi conditio defecerit. *l.* 37. *ff. de contr. empt.* *l.* 8. *ff. de per. & com. r. v.*

VIII.

8. Effect of the event of this Condition. The condition on which depends the accompliſhment of a Covenant, being come to paſs, it makes the Covenant effectual, and produces the changes which ought to follow from it. Thus, a Sale being perfected by the event of a condition, the Buyer becomes inſtantly Maſter of the thing; and this change has the other conſequences, which are the effects of the Covenant[m].

[m] Conditionales venditiones, tunc perficiuntur, cùm impleta fuerit conditio. *l.* 7. *ff. de contr. empt.*

Si (conditio) extiterit, Proculus & Octavenus emptoris eſſe periculum aiunt. *l.* 8. *ff. de per. & com. r. v.*

The event of the Condition hath ſometimes a retroactive effect. Thus, the Mortgage ſtipulated in a conditional Obligation, will have its effect from the date of the Obligation whenever the Condition ſhall come to paſs. See the ſeventeenth Article of the third Section of Mortgages.

IX.

9. Of the Condition on which depends the diſſolution of a Covenant. In Covenants which are already perfected, but which may be diſſolved by the event of a condition, all things remain in the mean while in the ſame condition they were in by the Covenant; and the effect of the condition is in ſuſpence, until it happens. Thus, if it is ſaid, that a Sale which is perfected, ſhall be void, in caſe that within a certain time a third perſon give a greater price for the thing ſold, the Buyer until then remains Maſter, he preſcribes, he enjoys the fruits; and if the thing periſhes, he bears the loſs of it[n].

[n] Si hoc actum eſt, ut meliore allata conditione diſcedatur, erit pura emptio, quæ ſub conditione reſolvitur. *l.* 2. *ff. de in diem add.* Ubi igitur ſecundùm quod diſtinximus, pura venditio eſt Julianus ſcribit, hunc, cui res in diem addicta eſt & uſuca-

pere poſſe: & fructus, & acceſſiones lucrari: & periculum ad eum pertinere, ſi res interierit. *d. l.* 2. §. 1.

X.

10. Effect of the event of this condition.

The caſe of the condition, which is to annul a Covenant, being come to paſs, the Covenant ſhall be void[o]. And this change ſhall have the effects which ought to follow from it, according to the Rules which ſhall be explained in the ſixth Section, and in the Rule that follows.

[o] Conditione reſolvitur. *l.* 2. *ff. de in diem add. l.* 3. *ff. de contr. empt.*

XI.

11. In what manner the conſequences of conditional Covenants are regulated.

Whatever happens either before or after the event of the condition, it is regulated according to the ſtate in which things are at the time. Thus, when a Sale is perfected, and is to be annulled in caſe a certain condition happens; the Buyer is in the mean while Maſter of the thing, he preſcribes, he enjoys the fruits of it; and if it happens to periſh, he bears the loſs. Becauſe the Sale ſubſiſts ſtill; and conſequently the thing belongs to him, until the Sale be annulled by the event of the condition[p]. And on the contrary, when the accompliſhment of a Sale depends on a condition; if before the event of that condition the thing periſhes, it is the Seller that bears the loſs, becauſe he continues to be Maſter of it, till the event of the condition accompliſhes the Sale[q]. And after that the condition is come to paſs, all the events of Gain, or of Loſs, belong to the perſon who at that time happens to be Maſter of the thing; whether the condition accompliſhes, or whether it diſſolves the Covenant. Thus, it is always the ſtate in which things happen to be at the time when the condition comes to paſs, and the effect which it ought to have, which regulate the conſequences of conditional Covenants[r].

[p] Ubi igitur, ſecundùm quod diſtinximus, pura venditio eſt, Julianus ſcribit hunc, cui res in diem addicta eſt, & uſucapere poſſe: & fructus, & acceſſiones lucrari: & periculum ad eum pertinere, ſi res interierit. *l.* 2. §. 1. *ff. de in diem add.*

[q] Nam, cùm ſit conditionalis venditio, pendente autem conditione, mors (mancipii) contingens extinguat venditionem: conſequens eſt dicere, mulieri periiſſe, quia nondum erat impleta venditio. *l.* 10. §. 5. *ff. de jur. dot.*

[r] Neceſſariò ſciendum eſt, quando perfecta ſit emptio. Tunc enim ſciemus, cujus periculum ſit. Nam perfecta emptione periculum ad emptorem reſpiciet. Et ſi id quod venierit appareat, quid, quale, quantum ſit, ſit & pretium, & purè venit, perfecta eſt emptio. Quod ſi ſub conditione res venierit, ſiquidem defecerit conditio; nulla eſt emptio. Sicuti nec ſtipulatio. Quod ſi extiterit, Proculus & Octavenus emptoris eſſe periculum, aiunt. Idem Pomponius libro nono probat: quod ſi pendente conditione, emptor, vel venditor deceſſerit, conſtat, ſi extiterit conditio, hæredes quoque obligatos eſſe, quaſi jam contracta emptione in præteritum. Quod ſi pendente conditione, res tradita ſit, emptor non poterit eam uſucapere pro emptore: & quod pretii ſolutum eſt, repetetur: at fructus medii temporis venditoris ſunt. Sicuti ſtipulationes, & legata conditionalia perimuntur, ſi pendente conditione res extincta fuerit. Sanè ſi extet res, licet deterior effecta, poteſt dici eſſe damnum emptoris. *l.* 8. *ff. de peri. & com. r. v.*

XII.

12. Of Conditions which relate to the preſent, or paſt time.

Conditions which have no relation to the time to come, but only to the preſent or paſt time, have immediately their effect. And the Covenant is at the ſame time either accompliſhed or annulled, according to the effect which it ought to have from the condition. Thus, for example, if a Merchandize is ſold, on condition that the Sale ſhall not take place, unleſs the Merchandize be actually arrived in ſuch a Port; the Sale is either inſtantly accompliſhed, if the Merchandize is arrived in Port; or inſtantly void, if it is not arrived. And the Covenant is not in ſuſpence, altho' the perſons who treat on ſuch conditions, are ignorant whether they are obliged or not. But it is only the performance which is ſuſpended, until they know whether the condition has happened, or not[ſ].

[ſ] Cùm ad preſens tempus conditio confertur; ſtipulatio non ſuſpenditur. Et ſi conditio vera ſit, ſtipulatio tenet: quamvis tenere contrahentes conditionem ignorent. Veluti, ſi Rex Parthorum vivit, centum millia dare ſpondes? Eadem ſunt, & cùm in præteritum: conditio confertur. *l.* 37. *ff. de reb. cred. v. l.* 38. *&* 39. *eod.* Conditio in præteritum: non tantùm præſens tempus relata, ſtatim, aut perimit obligationem: aut omnino non differt. *l.* 100. *ff. de verb. oblig.*

XIII.

13. Of impoſſible Conditions.

Conditions that are impoſſible annul the Covenants to which they are added[t].

[t] Non ſolùm ſtipulationes impoſſibili conditioni applicatæ nullius momenti ſunt, ſed etiam cæteri quoque contractus. *l.* 31. *ff. de obl. & act.*

XIV.

14. The Effect of Conditions paſſes to the Heirs.

If the conditions do not happen till after the deceaſe of the Contracters, they have their effect with reſpect to their Heirs and Executors[u].

[w] Cùm quis ſub aliqua conditione ſtipulatus fuerit, licet ante conditionem deceſſerit, poſtea exiſtente conditione, hæres ejus agere poteſt. §. 24. *inſt. de mut. ſtip.* Si pendente conditione, emptor, vel venditor deceſſerit, conſtat, ſi extiterit conditio, hæredes quoque obligatos eſſe. *l.* 8. *ff. de per. & com. r. v.*

XV.

15. The Conditions which do not depend on the deed of the Contracters, have their effect immediately.

If the condition on which depends the accompliſhment or diſſolution of a Contract, or the making any change in it be independent on the deed of the Contracters, it hath its effect immediately when it happens, or as ſoon as it is known. Thus, for example, if it is agreed, that a Sale of Forrage ſhall not take effect, unleſs a Regiment of Horſe arrives within ſuch a time; it ſhall have its effect ſo ſoon as the Regiment arrives, or it ſhall remain null, if the Regiment does not arrive. Thus, when an Eſtate is ſold on condition, that if it be found ſubject to a certain charge, the Sale ſhall be diſſolved; it will depend on the Buyer to break the Sale, if the Eſtate appears to be ſubject to that charge [x]; unleſs it be ſuch a one as is in the Seller's power to free the Eſtate of, and that the circumſtances make it reaſonable to allow him a time for doing it.

[x] Sub conditione ſtipulatio ſit cùm in aliquem caſum differtur obligatio: ut ſi aliquid factum fuerit vel non fuerit, committatur ſtipulatio: veluti, ſi Titius Conſul fuerit factus. §. 4. *inſt. de verb. obl.* See on this and the following Article, the ſixteenth Article of the fifth Section, and the fourteenth Article of the ſixth Section.

XVI.

16. The Conditions which depend on the deed of the Contracters, may ſuffer a delay.

If the condition depends either wholly, or in part, on the deed of one of the Contracters, and he has not ſatisfied it within the time, it is underſtood, that in the caſes where it would be equitable to grant a delay, it ought to be granted according to the circumſtances; as when the delay has occaſioned no damage, or if there is any, when it may be repaired. Thus, when an Eſtate is farm'd out, or a Houſe let, on condition that the Proprietor ſhall make ſome Repairs within a certain time, the Leaſe ſhall not be immediately void, altho' the Repairs be not finiſhed preciſely within the time. But Prudence will direct the Judge to grant a delay according to the circumſtances; either without damages, if the Tenant has ſuffered no prejudice by the delay, or with reparation of the damage which the delay may have occaſioned [y].

[y] Spatium datum videri. Hoc idem dicendum, & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l.* 23. *ff. de obl. & act.* Neque enim magnum damnum eſt in mora modici temporis. *l.* 21. *ff. de jud.* See the next Article, and the fifteenth Article of the third Section.

XVII.

17. An Exception.

If a delay for performing a condition could not be granted, without deſtroying the very eſſence of the Covenant, or without cauſing a conſiderable damage; the condition ſhall have its effect without delay, whether it depend on the deed of one of the Contracters, or be altogether independent of it. Thus, for example, if a Sale of Goods be made on condition that the Seller ſhall deliver them on a certain day, for an Imbarkation, or for a Fair; and that the Buyer ſhall pay the price of the Goods in ready Money; it will depend on the Buyer to annul the Sale, if the Seller does not deliver the Goods on the day appointed; and it will likewiſe depend on the Seller to break the Contract, if the Buyer does not pay in ready Money. Thus, in all the caſes, it is by the Circumſtances that we muſt judge whether there be room for granting a delay for performing a condition, or other engagement [z].

[z] See the fifteenth Article of the third Section.

XVIII.

18. Of the party who hinders the accompliſhment of the condition.

If the event, or fulfilling of a condition be hindered by the party whoſe intereſt it is that it do not happen, whether it depend on his deed, or not, the condition with reſpect to him ſhall be held as fulfilled. And he ſhall be obliged to what he was bound to do, to give, or ſuffer, in caſe the condition happened [a].

[a] Jure civili receptum eſt, quoties per eum, cujus intereſt conditionem non impleri, fiat, quominùs impleatur, perinde haberi, ac ſi impleta conditio fuiſſet. Quod ad libertatem, & legata, & ad hæredum inſtitutiones perducitur. Quibus exemplis ſtipulationes quoque committuntur, cùm per promiſſorem factum eſſet, quominùs ſtipulator conditioni pareret. *l.* 161. *ff. de reg. jur.*

Of Clauſes of Nullity, and Penal Clauſes.

CLAUSES of Nullity are thoſe by which it is agreed, that the Covenant ſhall be null in a certain caſe. As, if it is ſaid, that a Tranſaction ſhall be void, if ſuch a thing be not done, or given within ſuch a time.

Penal Clauſes are thoſe which add a Penalty for default of performance of that which is agreed on. As is in general the Penalty of Damages, and in particular the Penalty of a certain Sum.

XIX.

19. The effect of Clauſes of Nullity, and Penal Clauſes.

Clauſes of Nullity and Penal Clauſes are not always executed to the rigour; and Covenants are not diſſolved, nor Penalties incurred, in the very moment which the Contract bears; even altho' it ſhould be agreed on that the Contract ſhould be void, by the bare deed, and without any miniſterial act of Juſtice. But theſe ſorts of Clauſes have their effect regulated by the diſcretion of the Judge[a]; according to the Nature of the Covenants, and the circumſtances, purſuant to the foregoing Rules.

[a] Quod omne ad judicis cognitionem remittendum eſt. *l.* 135. §. 2. *ff. de verb. obl.* See the preceding Rules, and the tenth Article of the ſecond Section of Partnerſhip.

XX.

20. It does not depend on him who fails in performing what he promiſed, to annul the Covenant by his Non-performance.

If it is ſaid that a Contract ſhall be made void, in caſe one of the Contracters fail to perform on his part any one of the engagements he is bound to; the Clauſe of Nullity ſhall not have this effect, to make it depend on him to annul the Contract by not performing what he has promiſed. But it will depend on the other party, either to force him to make performance, or to have the Contract declared void, and ſuch damages allowed him as ſhall be due. Thus, when it is ſaid that a Sale, a Tranſaction, or other Contract ſhall be annulled upon failure of payment; it will not depend on him who is bound to pay, to annul the Covenant by not making payment[b].

[b] Cùm venditor fundi in lege caverit, ſi ad diem pecunia ſoluta non ſit, ut fundus inemptus ſit. Ita accipitur, inemptus eſſe fundus, ſi venditor, inemptum eum eſſe velit. Quia id venditoris cauſa caveretur. *l.* 2. *ff. de leg. commiſſ.*

XXI.

21. Covenants concerning an uncertain event.

In Covenants where perſons treat of a right, or other thing which depends on ſome certain event; and from which there may accrue either Profit or Loſs, according to the difference of events that may happen; it is free for the parties to treat in ſuch a manner, that the one, for example, renounce all Profit, and free himſelf from all Loſs; or, that he take a certain Sum, in lieu of all that he could expect of Profit; or that he charge himſelf with a certain Loſs for all the Loſſes which he had to fear. Thus, a Partner who is deſirous to withdraw from the Partnerſhip, may adjuſt with his Copartners what preſent and certain Profit he ſhall have, or what Loſs he ſhall bear whatever accident fall out. Thus, an Heir may treat with his Coheirs to give up all his right in the Inheritance, for a certain Sum, and oblige them to indemnify him from all charges. And theſe kinds of Covenants have their Juſtice founded upon this, that one Party prefers a certainty, whether of Profit or Loſs, to an uncertain expectation of events; and the other Party, on the contrary, finds it his advantage to hope for a better condition. Thus, there is made up between them a ſort of Equality in their Bargains, which renders their Agreement juſt[c].

[c] *V. l.* 1. *ff. de tranſ. in verbo,* de re dubia. *l.* 12. *C. eod. l.* 17. *C. de uſur. in verbo,* propter incertum. *V. l.* 11. *C. de tranſ.*

Sicuti lucrum omne ad emptorem hæreditatis reſpicit; ita damnum quoque debet ad eundem reſpicere. *l.* 2. §. 9. *ff. de hær. vel act. vend. l.* 1. *C. de evict.*

It is upon the Rule explained in this Article, that the validity of Tranſactions is founded, which are authorized notwithſtanding the damage that may happen to one of the parties; becauſe theſe damages are balanced by the advantage which the tranſactors find in ridding themſelves of a troubleſome Law-ſuit, and ſettling the quiet of their families.

We make uſe likewiſe of this Rule, among other conſiderations, to juſtify our practice in admitting the Renunciations of Daughters in Contracts of Marriage, contrary to the tenor of the Roman *Law.* V. l. 3. C. de collat.

We muſt take heed in the uſe of this Rule concerning Treaties about uncertain events, not to extend it to caſes where the conſequences would be repugnant to Law, or Good Manners. As, for inſtance, if two preſumptive Heirs ſhould treat together concerning the future Inheritance of the perſon to whom they are to ſucceed as Heirs. For this Agreement would be unlawful, unleſs it were made with the expreſs conſent and approbation of the perſon concerning whoſe Inheritance they treat, as ſhall be explained in its proper place. V. l. 30. C. de pact.

SECT. V.

Of Covenants which are null in their Origin.*

* See the Title of the Vices of Covenants.

The CONTENTS.

1. *Definition of Covenants that are null.*
2. *Covenants null, altho' the Nullity be not yet known.*
3. *Cauſes of the Nullities of Covenants.*
4. *Incapacity of Perſons.*

5. *Different Incapacities of perſons.*
6. *Two ſorts of Nullities, either by Nature, or by ſome Law.*
7. *Covenants which are null on one part, and not on the other.*
8. *Covenants that are null, which may be validated.*
9. *A Natural Obligation.*
10. *Error and Force annul Covenants.*
11. *Covenants about things which cannot be bought or ſold, are null.*
12. *A Covenant annulled by the change of the thing ſold.*
13. *Obligations without a Cauſe are null.*
14. *The effect of Covenants that are null thro' the fault of one of the Contracters.*
15. *The Conſequences of Covenants annulled.*
16. *The Miniſtry of Juſtice for annulling Covenants.*
17. *Covenants which are null, are uſeleſs to third perſons, as well as to the Contracters themſelves.*

I.

1. Definition of Covenants that are null.

COVENANTS that are null, are thoſe which, for want of ſome eſſential character, have not the nature of a Covenant. As if one of the Contracters was under any infirmity of Mind or Body, which rendred him incapable of knowing what engagement he made[a]. If one had ſold a thing belonging to the Publick, a thing ſet apart for a Sacred Uſe, or any other thing that could not be bought or ſold. Or if the thing ſold did already belong to the Buyer[b].

[a] Furioſus, nullum negotium gerere poteſt, quia non intelligit quod agit. §. 8. *inſt. de inut. ſtip.*

[b] Idem juris eſt (id eſt, inutilis erit ſtipulatio) ſi rem ſacram aut religioſam quam humani juris eſſe credebat, vel rem publicam quæ uſibus populi perpetuo expoſita ſit, ut forum, vel theatrum: vel liberum hominem, quem ſervum eſſe credebat, vel cujus commercium non habuerit, vel rem ſuam dari quis ſtipuletur. §. 2. *eod.* See the firſt Article of the ſixth Section.

II.

2. Covenants null, altho' the nullity be not yet known.

The Covenants which are null in their Origin, are in effect ſuch, whether the nullity can be immediately diſcovered, or whether the Covenant appears to ſubſiſt, and to have ſome effect. Thus, when a Madman ſells his Eſtate, the Sale is immediately null from the beginning, altho' the Purchaſer be in poſſeſſion of the Eſtate, and enjoy the fruits of it, and altho' at the time of the Sale this condition of the Seller was not known. And it is the ſame thing, if one of the Contracters has been compelled by force[c].

[c] Protinus inutilis. §. 2. *inſt. de inut. ſtip.* Nec ſtatim ab initio talis ſtipulatio valebit. *d.* §. 2.

Si pater tuus, per vim coactus, domum vendidit, ratum non habebitur, quod non bona fide geſtum eſt, malæ fidei enim emptio irrita eſt. *l.* 1. *C. de reſc. vend.*

III.

3. Cauſes of the Nullities of Covenants.

Covenants are null, either becauſe of the incapacity of the perſons, as in the example of the preceding Article; or becauſe of ſome Vice in the Covenant, as if it is contrary to good Manners[d]; or becauſe of ſome other defect, as if it is not to be accompliſhed but by the event of a condition which is not come to paſs[e]; or for other cauſes[f].

[d] Quod turpi ex cauſa promiſſum eſt, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat, non valet. §. 24. *inſt. de inut. ſtip.* See the third Article of the firſt Section.

[e] Similis erit ſub conditione factæ venditioni, *quæ nulla eſt, ſi conditio defecerit. l.* 37. *ff. de cont. empt. l.* 8. *ff. de peric. & comm. r. v.*

[f] See the firſt Article, and thoſe which follow.

IV.

4. Incapacity of Perſons.

Perſons may be incapable of contracting, either by Nature, or by ſome Law. Thus, by Nature Madmen[g], and ſuch perſons as, becauſe of ſome infirmity, are not able to expreſs themſelves[h], are naturally incapable of all ſorts of Covenants. Thus, by the prohibition of the Law, Prodigals who are interdicted, are incapable of making Covenants to their prejudice[i].

[g] §. 8. *inſt. de inut. ſtip.*

[h] *V.* §. 7. *eod.*

[i] Prodigo interdicitur bonorum ſuorum adminiſtratio. *l.* 1. *ff. de cur. fur.* Is cui bonis interdictum eſt, ſtipulando ſibi acquirit: tradere verò non poteſt, vel promittendo obligari. *l.* 6. *ff. de verb. obl.*

There are other cauſes of Incapacity; ſuch as Minority, Civil Death, and others. See the Title of Perſons.

V.

5. Different Incapacities of perſons.

The Incapacities of Perſons are different, and have different effects. Some perſons are incapable of all Contracts; ſuch as Madmen, and thoſe who cannot expreſs themſelves: Others are only incapable of ſuch Covenants as are to their prejudice, ſuch as Minors and Prodigals. And married Women cannot contract any Obligation whatſoever in ſome Provinces, unleſs they are authorized by their Huſbands[l].

[l] *This follows from the foregoing Articles. See as to what is ſaid here, concerning married Women, what has been*

been obſerved on the firſt Article of the firſt Section of Perſons. And in the Preamble to the fourth Section of the Title of Dowries.

VI.

6. Two ſorts of Nullities, either by Nature, or by ſome Law.

The Nullities of Covenants are either natural, or depending on the diſpoſition of ſome Law. Thus, the Covenants which are contrary to Good Manners, ſuch as a Treaty about the Inheritance of a perſon who is alive[m]; and thoſe which are impoſſible, are naturally vicious and null[n]. Thus, it is by a Law, that the Sale of an intailed Eſtate is unlawful and void[o].

[m] Ex eo inſtrumento, nullam vos habere actionem, in quo contra bonos mores de ſucceſſione futura, interpoſita fuit ſtipulatio, manifeſtum eſt. *l.* 4. *C. de mut. ſtip. V. l.* 30. *C. de pact.* and the Remark on the twentieth Article of the fourth Section.

[n] Impoſſibilium, nulla obligatio eſt. *l.* 185. *ff. de reg. jur. v. l.* 7. *C. de reb. al. n. al.*

VII.

7. Covenants which are null on one part, and not on the other.

There are Covenants which may be declared null on the part of one of the Contracters; and which ſubſiſt, and oblige irrevocably on the part of the other. Thus, the Contract between one that is of full Age, and one under Age, may be annulled with reſpect to him who is under Age, if it is not to his advantage; and it ſubſiſts with reſpect to him that is of Age, if the Minor does not demand to be relieved[p]. And this inequality of the condition of the Contracters, has nothing in it that is unjuſt. For he that was of Age knew, or ought to have known, the condition of him with whom he treated[q].

[o] Sancimus, ſive lex alienationem inhibuerit, ſive teſtator hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolùm dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam: ſed etiam uſusfructus dationem, vel hypothecam, vel pignoris nexum, prohiberi. *l,* 7. *C. de reb. al. non al.*

[p] Si quis à pupillo ſine tutoris autoritate emerit, ex uno latere conſtat contractus. Nam qui emit, obligatus eſt pupillo: pupillum ſibi non obligat. *l.* 13. §. 29. *ff. de act. empt. & vend.*

[q] Qui cum alio contrahit, vel eſt, vel debet eſſe non ignarus conditionis ejus. *l.* 19. *ff. de reg. jur.*

VIII.

8. Covenants that are null which may be validated,

Covenants which were liable to be annulled by reaſon of the incapacity of the perſons, become valid afterwards, if when the incapacity ceaſes, the perſons ratify, or approve the Covenant. Thus, when a Minor, being come to Age, ratifies, or executes the Contract which he had made in his Minority; this Contract becomes irrevocable, as if he had made it after he was of Age[r].

[r] Si ſuæ ætatis factus, comprobaverit emptionem, contractus valet. *l.* 5. §. 2. *ff. de auth. & conſ. tut. & cur.*

Qui poſt vigeſimum quintum annum ætatis, ea quæ in minori ætate geſta ſunt, rata habuerint, fruſtra reſciſionem eorum poſtulant. *l.* 2. *C. ſi maj. fact. rat. hab. l.* 3. §. 1. *ff. de min.*

IX.

9. A Natural Obligation.

Perſons who are not by Nature incapable of contracting, and who are only incapacitated by the prohibition of ſome Law, do nevertheleſs tie themſelves by their Covenant to a Natural Obligation, which according to the circumſtances may have this effect; that altho' they cannot be compelled by Law to make good what they have promiſed; yet if they do perform their engagement, they cannot afterwards be relieved[s]. Thus, for example, by the *Roman* Law a Son who is ſtill in the power of his Father, altho' of Age, cannot oblige himſelf by borrowing Money; but if he pays what he has borrowed, he cannot afterwards recover it[t]. Thus, in the Provinces where a married Woman cannot bind her ſelf, not even with the conſent of her Huſband, if after the Huſband's death ſhe pays what ſhe had promiſed, ſhe cannot plead the Nullity of her Engagement for recovering what ſhe has paid.

[s] Naturales obligationes, non eo ſolo æſtimantur, ſi actio aliqua earum nomine competit: verùm etiam eo, ſi ſoluta pecunia repeti non poſſit. *l.* 10. *ff. de obl. & act. l.* 16. §. 4. *ff. de fidejuſſ.*

Id quod natura hæreditati debetur, & peti quidem non poteſt ſolutum verò non repetitur. *l.* 1. §. 17. *ff. ad leg. falc.* cauſa quæ peti quidem non poterat, ex ſolutione autem petitionem non præſtat. *l.* 94. §. 3. *ff. de ſol. v. l.* 10. *ff. de verb. ſignif. & l.* 84. §. 1. *ff. de reg. jur.*

[t] Quamquam ſolvendo non repetant, quia naturalis obligatio manet. *l.* 9. *in f. & l.* 10. *ff. de Senat. Maced.*

X.

10. Error and Force annul Covenants.

The Covenants in which the perſons, even thoſe who are capable of contracting, did not know what was neceſſary to be known, in order to form their engagement, or had not the liberty of conſenting to it, are null. Thus, the Covenants in which the Contracters miſtake one another's meaning, the one meaning to treat of one thing, and the other of another, are null, thro' the want of knowledge, and of their conſent to one and the ſame thing[u]. Thus, Covenants in which the liberty of the

Contracters is reſtrained by ſome violence, are alſo null[x].

XI.

11. *Covenants about things which cannot be bought or ſold, are null.* Covenants in which people treat about things which cannot be bought or ſold, ſuch as Things ſet apart to a Holy Uſe, Things belonging to the Publick, are null[y].

XII.

11. *A Covenant annulled by the change of the thing ſold.* If in a Covenant the one party is bound to give a thing to the other, and before it be delivered the thing ceaſes to be a vendible Commodity, without the deed of the perſon who was bound to deliver it, the Covenant will be annulled. Thus, the Sale of an Eſtate will be without effect, and will become null, if the Eſtate is deſtinated for ſome publick Work, without the act of the Seller[z].

XIII.

13. *Obligations without a cauſe are null.* In Covenants wherein any one is obliged without a cauſe, the Obligation is null[a]. And it is the ſame thing, if the cauſe happens to ceaſe[b]. But it is by the circumſtances, that we muſt judge whether the Obligation hath its Cauſe, or not.

XIV.

14. *The effect of Covenants that are null thro' the fault of one of the Contracters.* The Covenants which happen to be null thro' ſome cauſe for which one of the Contracters ought to be reſponſible, as if he has alienated a thing ſet apart to a Holy Uſe, or which belongs to the Publick, altho' they are null, yet they have this effect, to oblige the party who is in fault, to make good the damages which he has occaſioned to the other[c].

XV.

15. *The conſequences of Covenants annulled.* If a Covenant, altho' null, has had ſome conſequence, or ſome effect, and is declared to be void; the Contracters are reſtored to the condition which they would have been in if there had been no Covenant at all, in ſo far as the circumſtances will allow, and with the reſtitutions that may be due from him who is liable to make them[d].

XVI.

16. *The Miniſtry of Juſtice for annulling Covenants.* Altho' a Covenant proves to be null, yet he who complains of it, cannot reſtore himſelf to his own right, unleſs the other party conſent to it. But he muſt have recourſe to the Authority of Juſtice, whether it be to get the nullity declared by a Sentence, and himſelf reinſtated in his Right; or to get the Sentence of the Court put in execution, in caſe it ſhould meet with oppoſition[e]. For when it is neceſſary to make uſe of Force, the Publick Juſtice of a Country ſuffers none but what ſhe her ſelf imploys.

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[w] Si de alia re ſtipulator ſenſerit, de alia promiſſor, nulla contrahitur obligatio. §. 22. *inſt de inut. ſtip.*

In omnibus negotiis contrahendis, ſive bona fide ſint, ſive non ſint: ſi error aliquis intervenit, ut aliud ſentiat puta qui emit, aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti ſit. *l.* 57. *ff. de obl. & act.* Non videntur, qui errant, conſentire. *l.* 116. §. 2. *ff. de reg. jur. v. l.* 137. §. 1. *ff. de verb. obl.* Si Stichum ſtipulatus, de alio ſentiam, tu de alio, nihil actum erit. *l.* 83. §. 1. *ff. de verb. obl.* Cùm in corpore diſſentiatur, apparet nullam eſſe emptionem. *l.* 9. *ff. de contr. empt.*

[x] Si pater tuus, per vim coactus, domum vendidit, ratum non habebitur quod non bona fide geſtum eſt: malæ fidei enim emptio irrita eſt. *l.* 1. *C, de reſc. vend.* Nihil conſenſui tam contrarium eſt, qui & bonæ fidei judicia ſuſtinet, quàm vis atque metus. *d. l.* 116. *ff. de jur. reg.* See the Title of the vices of Covenants.

[y] Sacram vel religioſam rem, vel uſibus publicis in perpetuum relictam, ut forum, aut Baſilicam, aut hominem liberum inutiliter ſtipulor: quamvis ſacra, profana fieri, & uſibus publicis relicta, in privatos uſus reverti, & ex libero ſervus fieri poteſt. *l.* 83. §. 5. *ff. de verb obl.* §. 2. *inſt. de inut. ſtip.*

[z] Item contrà, licet initio utiliter res in ſtipulatum deducta ſit: ſi tamen poſteà in aliquam eorum cauſam, de quibus ſuprà dictum eſt, ſine facto promiſſoris devenerit, extinguitur ſtipulatio. §. 2. *inſt. de inut. ſtip. l.* 83. §. 5. *de verb obl.*

[a] *See the fifth Article of the firſt Section.*

[b] Nihil refert, utrumne ab initio ſine cauſa quid datum ſit, an cauſa propter quam datum ſit, ſecuta non ſit. *l.* 4. *ff. de condit. ſine cauſ.*

[c] Loca ſacra, vel religioſa, item publica, velutì forum, Baſilicam, fruſtra quis ſciens emit. Quæ tamen ſi pro profanis, vel privatis deceptus à venditore quis emerit, habebit actionem ex empto, quod non habere ei liceat. Ut conſequatur quod ſua intereſt, eum deceptum non eſſe. §. *ult. inſt. De emptione & venditione. v. l.* 3. *C. de reb. alien. non alien.*

[d] Deceptis, ſine culpa ſua, maximè ſi fraus ab adverſario intervenerit, ſuccurri oportebit: cùm etiam de dolo malo actio competere ſoleat. Et boni prætoris eſt, potiùs reſtituere litem, ut & ratio, & æquitas poſtulabit. *l.* 7. §. 1. *ff. de in int. reſtit.*

[e] Extat enim decretum Divi Marci in hæc verba. Optimum eſt, ut ſi quas putas te habere petitiones, actionibus experiaris. Cùm Marcianus diceret, vim nullam feci. Cæſar dixit, tu vim putas eſſe ſolùm, ſi homines vulnerentur; vis eſt tunc, quoties quis id, quod deberi ſibi putat, non per judicem repoſcit. Quiſquis igitur probatus mihi fuerit, rem ullam debitoris, vel pecuniam debitam, non ab ipſo ſibi ſponte datam, ſine ullo judice temerè poſſidere,

ſidere, vel accepiſſe, iſque ſibi jus in eam rem dixiſſe, jus crediti non habebit. *l.* 13. *ff. quod met. cauſ.* Si pater tuus per vim coactus, domum vendidit, ratum non habebitur, quod non bona fide geſtum eſt: malæ fidei enim emptio irrita eſt. Aditus itaque nomine tuo, Præſes Provinciæ, autoritatem ſuam interponet. *l.* 1. *C. de reſc. vend. V. l.* 9. *C. ſol. mat. V. l.* 1. *ff. uti poſſid.* See the fourteenth Article of the following Section, and the ſecond Section of the Vices of Covenants.

XVII.

17. Covenants which are null, are uſeleſs to third perſons, as well as to the contracters themſelves.

If the Covenants by which any right accrues to third perſons, prove to be null, they have no more effect, with reſpect to thoſe perſons, than with reſpect to the Contracters. Thus, the Creditor has no Mortgage on the Eſtate which his Debtor had acquired by a Contract that was null[f].

[f] *This Rule is a conſequence, and a natural and neceſſary effect of the Nullity.*

SECT. VI.

Of the diſſolution of Covenants which were not null.

The CONTENTS.

1. *Difference between Covenants that are null, and thoſe that are diſſolved.*
2. *Divers caſes which diſſolve Covenants.*
3. *The latter Covenants derogate from the firſt.*
4. *New Covenants cannot prejudice the Rights which third perſons have acquired by former Covenants.*
5. *A Covenant diſſolved by the event of a Condition.*
6. *Effect of Clauſes of Nullity.*
7. *Covenants annulled by agreement.*
8. *Covenants repealed becauſe of fraud.*
9. *Damage without fraud, which is called* dolus re ipſâ.
10. *Events which diſſolve Covenants.*
11. *Covenants diſſolved for Non-performance.*
12. *The effects and Conſequences of the Diſſolution of Covenants.*
13. *The acceſſory Covenants are diſſolved with the principal.*
14. *The Authority of Juſtice in diſſolving Covenants, and executing what is decreed.*

I.

1. Difference between Covenants that are null, and thoſe that are diſſolved.

THere is this difference between the nullity and diſſolution of Covenants; that the nullity makes it never to have been a real Covenant; but only the appearance of one[a]; whereas the diſſolution annuls a Covenant which was in force[b].

[a] Protinus inutilis §. 2. *inſt. de inut. ſtip.* Nec ſtatim ab initio talis ſtipulatio valebit. *d.* §.

[b] Si placita obſervata non eſſent, donatio reſolvetur. *l.* 2. *C. de cond. ob cauſ. dat.*

II.

2. Divers caſes which diſſolve Covenants.

Covenants which were valid, may be diſſolved, either by conſent of the parties who change their minds[c]; or by the effect of ſome Paction, which has been added to the Covenant it ſelf, ſuch as a Power of Redemption[d], a Clauſe of Nullity[e]; or by the event of a Condition[f]; or by a Reſtitution[g]; or by a Reſciſſion of the Contract, on account of ſome Fraud, or other Damage, ſuch as the lowneſs of the Price in a Sale, or for other Cauſes, as will appear in the following Articles.

[c] Contrario conſenſu. *l.* 35. *ff. de reg. jur.* Contraria voluntate. §. *ult. inſt. quib. mod. toll. obl.*

[d] *V. l.* 2. *C. de pact. int. empt. & vend. c. l.* 7. *eod.*

[e] *See the fifteenth Article of the third Section; and the eighteenth Article of the fourth Section.*

[f] Sub conditione reſolvitur. *l.* 2. *ff. de in diem add.*

[g] *Tit. de in int. reſt.*

[h] *Tit. de dolo. l.* 2. *C. de reſc. vend.*

III.

3. The latter Covenants derogate from the firſt.

The latter Covenants which annul the former, or which change them, or derogate from them, have the effect which the Contracters intend they ſhould have; whether it be to annul, or to alter what they had agreed upon. And they put the Contracters in the condition in which they have a mind to put themſelves by theſe changes, in ſo far as the circumſtances will allow[i].

[i] Pacta noviſſima, ſervari oportere, tam juris, quàm ipſius rei æquitas poſtulat. *l.* 12. *C. de pact.*

IV.

4. New Covenants cannot prejudice the Rights which third perſons have acquired by former Covenants.

The changes which the Contracters make to their former Covenants by thoſe of a later date, are no ways prejudicial to the Rights which third perſons had acquired by the firſt Covenants. Thus, a Sale which was already perfected, and executed in all its parts, being diſſolved only by the bare will of the Seller and Buyer; the Buyer's creditor retains his Right of Mortgage on the Eſtate, which returns to the Seller, by the bare voluntary diſſolution of the Contract of Sale[l]. But if the Covenant was diſſolved by the effect of a Clauſe in the Contract,

tract, ſuch as the event of a Condition, or a Power of Redemption in a Sale; this Mortgage would vaniſh, and the Contracters would enter again to their Rights, even by the effect of their Covenant.

[l] Actio quæſita non intercidit. *l.* 63. *ff. de jur. dot.* Non debet alterius colluſione aut inertia alterius jus corrumpi. *l.* 9. *ff. de lib. cauſ.* Non debet alii nocere, quod inter alios actum eſt. *l.* 10. *ff. de jure jur.* See the fourteenth and fifteenth Articles of the twelfth Section of the Contract of Sale; and the remarks made thereon.

V.

5. A Covenant diſſolved by the event of a Condition. Covenants which are accompliſhed, but upon condition that if ſuch a caſe happens, they ſhall be void; continue in force till the condition happens, and then they are diſſolved, purſuant to the fourteenth and fifteenth Articles of the fourth Section [m].

[m] *See the fourteenth and fifteenth Articles of the fourth Section, and the fourteenth Article of this.*

VI.

6. Effect of Clauſes of Nullity. If it is ſaid in a Covenant, that it ſhall be void, in caſe one of the Contracters fails to perform ſome engagement; the non-performance does not diſſolve and annul the Covenant, but in conformity to the Rules explained in the eighteenth and nineteenth Articles of the fourth Section [n].

[n] *See the eighteenth and nineteenth Articles of the fourth Section, and the fourteenth Article of this.*

VII.

7. Covenants annulled by agreement. If a Covenant leaves a liberty to one of the Contracters to recede from his bargain within a certain time, or if there is a Power of Redemption, or other Clauſes which may annul the Covenant ſome other way; the putting theſe Clauſes in execution, diſſolves and annuls the Covenant, according to the agreement of the Contracters [o].

[o] Si quid ita venierit, ut niſi placuerit, intra præfinitum tempus, redhibeatur, ea conventio rata habetur. *l.* 31. §. 22. *ff. de æd. ed. l.* 3. *ff. de contr. empt. l.* 2. §. 5. *ff. pro empt.*

Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocumque, vel intra certa tempora obtuliſſent, reſtitueretur; teque parato ſatisfacere conditioni dictæ, hæres emptoris non paret, ut contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito tibi dabitur. *l.* 2. *&* 7. *C. de pact. int. empt. & vend. c.* See the ſixteenth Article of the fifth Section, and the laſt Article of this Section.

VIII.

8. Covenants repealed becauſe of fraud. Covenants in which one of the Contracters is over-reached, and cheated by the fraud of the other, or by any other unfair way, are diſſolved and annulled when the injured party complains of it, and proves the fact [p].

[p] *Toto Tit. de dolo.* See the tenth Article of the foregoing Section, and the third Section of the Vices of Covenants.

IX.

9. Damage without fraud, which is called dolus reipſâ. There are ſome Covenants in which the bare damage, altho' without Fraud, is ſufficient to annul the Covenant. Thus, for example, the Partition of an Inheritance among Coheirs is annulled by reaſon of too great an inequality [q]; and a Sale, on account of the lowneſs of the Price [r]; or defect of the thing ſold [ſ]. According to the Rules which ſhall be explained in their proper places.

[q] Majoribus etiam, per fraudem, vel dolum, vel perperam ſine judicio factis diviſionibus, ſolet ſubveniri. *l.* 3. *C. comm. utr. jud.* It is that which we call, *Dolus reipsâ.* Si nullus dolus interceſſit ſtipulantis, ſed *ipſa res* in ſe *dolum habet.* *l.* 36. *ff. de verb. obl.* See the fourth Article of the third Section of the Vices of Covenants.

[r] Rem majoris pretii, ſi tu, vel pater tuus, minoris diſtraxerit, humanum eſt, &c. *l.* 2. *C. de reſc. vend.*

[ſ] *Tot. tit. de ædil. ed.*

X.

10. Events which diſſolve Covenants. Covenants are ſometimes diſſolved by the bare effect of ſome event. Thus, for inſtance, in the Leaſe of a Houſe, if the Neighbour darkens the Lights of it; if the Landlord does not repair what is ruinous [t]; if the Houſe is to be pulled down for ſome publick Work [u]; the Tenant in all theſe caſes gets the Leaſe to be declared void. Thus a Sale is diſſolved by an Eviction [x]. And it is likewiſe ſo, with reſpect to the Purchaſer, by the Right of Redemption, which belongs to the next lineal Heir, who comes in place of the Purchaſer. And many other events annul differently Covenants, according to the Condition in which they put the things.

[t] Si vicino ædificante, obſcurentur lumina cœnaculi, teneri locatorem inquilino. Certè quin liceat colono, vel inquilino relinquere conductionem, nulla dubitatio eſt. *l.* 25. §. 2. *ff. loc.* Eadem intelligemus, ſi oſtia, feneſtraſve nimium corruptas, locator non reſtituat. *d.* §.

[u] *L.* 9. *l.* 14. *& aliis C. de op. publ.*

[x] *V. Toto tit. de evict.*

XI.

11. Covenants diſſolved for Non-performance.

The Non-performance of Covenants on the part of one of the Contracters, may give occaſion to their being annulled; whether it be thro' want of ability, or of will, in the party to perform his engagement; altho' there be in the Contract no Clauſe of Nullity. As if the Seller does not deliver the thing ſold. And in theſe caſes, the Covenant is diſſolved, either immediately, if there is ground for it; or after a reaſonable Delay, and with ſuch Damages as the Non-performance may have occaſioned[y].

[y] *This Rule is a conſequence of the preceding Rules.* Si res vendita non tradatur, in id quod intereſt, agitur. *l. 1. ff. de act. empt. & vend. l. 4. C. eod.* See the following Article, the 14th and 15th Articles of the 5th Section, and the 17th and 18th Articles of the 2d Section of the Contract of Sale.

XII.

12. The effects and conſequences of the Diſſolution of Covenants.

In all the Caſes where Covenants are diſſolved, if it is by the will of the Contracters, they are mutually reſtored to the condition in which they have a mind to be by common conſent. And if the Covenant is repealed in a judicial way, the Contracters are put into the condition which ought to follow upon the diſſolution of the Contract; and they are condemned to ſuch Reſtitutions, Damages, and other conſequences as the Covenant ought to have, according to the circumſtances, and with a due regard to the different cauſes of the diſſolution. Which depends on the Prudence of the Judge[z], according to the foregoing Rules, and the others which ſhall be explained under the Title of Reſciſſion of Contracts, and Reſtitution of things to their firſt Eſtate.

[z] Uti quæque res erit, animadvertam. *l. 1. §. 1. ff. de min.*

Quod omne, ad judicis cognitionem remittendum eſt. *l. 135. §. 2. ff. de verb. obl.*

Cauſa rei reſtituatur. *l. 20. ff. de rei vind.* Et fructuum dumtaxat omniſque cauſæ nomine, condemnatio fit. *l. 68. eod.*

XIII.

13. The acceſſory Covenants are diſſolved with the principal.

The principal Covenants being annulled, thoſe which are conſequences and acceſſories to them, are ſo likewiſe[a].

[a] Pecuniam quam te ob dotem accepiſſe pacto interpoſito [ut fieri, cum jure matrimonium contrahitur, aſſolet] proponis, impediente, quocumque modo juris authoritate matrimonium conſtare, nullam de dote actionem habes: & propterea pecuniam, quam eo nomine accepiſti, jure condictionis reſtituere debes. Et pactum quod ita interpoſitum eſt, perinde ac ſi interpoſitum non eſſet, haberi oportet. *l. 1. C. de cond. ob cauſ. dat.*

XIV.

14. The Authority of Juſtice in diſſolving Covenants, and executing what is decreed.

When a Covenant is not diſſolved by common conſent, the party who complains, cannot moleſt the other; but he ought to have recourſe to Juſtice, to get the Covenant declared void, and the Sentence of the Judge put in execution[b].

[b] Qui reſtituere juſſus judici non paret, contendens non reſtituere: ſi quidem habeat rem, manu militari officio judicis, ab eo poſſeſſio transfertur. *l. 68. ff. de rei vind.* Ingrediendi enim poſſeſſionem rerum dotalium, hæredibus mariti non conſentientibus, ſine autoritate competentis judicis, nullam habes facultatem. *l. 9. C. ſol. matr.* See the ſixteenth Article of the fifth Section.

TITLE II.

Of the CONTRACT OF SALE.

Of the Origine, and Uſe of the Contract of Sale.

THE Neceſſity of having the Property of the greateſt part of Things which we ſtand in need of, and eſpecially of thoſe which we cannot uſe without conſuming, or waſting them, and conſequently without being Maſters of them; hath been the Origin of the ways of acquiring Things, and of transferring the Property of them from one Perſon to another.

The firſt Commerce for this Uſe was that of giving one Thing for another. And this way of Traffick is called *Exchange*[a]; in which, to have a Thing which we ſtand in need of, we give another, which is uſeleſs, or leſs neceſſary to us. But becauſe Exchange, or Bartering of Commodities, ſeldom or never ſuits with the circumſtances of all Parties, either becauſe the Contracters have not on both ſides wherewithal to accommodate one another; or becauſe it is troubleſome to make the Eſtimations, and to adjuſt the Things in a due Equality, People have invented the uſe of publick Coin, which, having its value regulated and known, makes the Price of every Thing. And thus, inſtead of two Eſtimations, which it was ſo difficult to make equal, there is no occaſion now to eſtimate any more than one thing on one ſide; and on the other ſide, there is the juſt Price of the thing eſtimated, by the publick Coin. And it is this Commerce of all things for Money, which we call *Sale*; which is compoſed partly of the natural Uſe of giving one thing for another, and of the Invention of publick Coin, which makes the Value of all things that are capable of being eſtimated.

[a] Origo emendi vendendique, à permutationibus cœpit, olim enim non ita erat nummus. Neque aliud merx, aliud pretium vocabatur; ſed unuſquiſque ſecundum neceſſitatem temporum ac rerum, utilibus inutilia permutabat. Quando plerumque evenit, ut quod alteri ſupereſt, alteri deſit. Sed quia non ſemper, ne facilè concurrebat, ut cùm tu haberes, quod ego deſiderarem, invicem haberem quod tu accipere velles, electa materia eſt, cujus publica, ac perpetua æſtimatio, difficultatibus permutationum, æqualitate quantitatis, ſubveniret. *l.* 1. *ff. de contr. empt.*

SECTION I.

Of the Nature of the Contract of Sale, and in what manner it is perfected.

The CONTENTS.

1. *Definition of Sale.*
2. *The Sale is perfected by the bare conſent.*
3. *How the conſent is given.*
4. *Who may ſell and buy, and what things may be ſold.*
5. *Three ſorts of Engagements in the Contract of Sale.*
6. *The firſt ſort, is of the Engagements that are expreſſed.*
7. *The ſecond ſort, is of the Engagements which ariſe from the Nature of the Contract.*
8. *The third ſort, is of the Engagements regulated by the Laws, Cuſtom, and Uſage of the Country.*

I.

1. *Definition of Sale.* THE Contract of Sale, is a Covenant by which one gives a thing for a Price in current Money; and the other gives the Price to have the thing[a].

[a] Si pecuniam dem, ut rem accipiam, emptio & venditio eſt. *l.* 5. §. 1. *ff. de præſc. verb.* Sine pretio nulla venditio eſt. *l.* 2. §. 1. *ff. de contr. empt.* Pretium in numerata pecunia conſiſtere debet. §. 2. *inſt. de empt. & vend.* Nec merx utrumque ſed alterum pretium vocatur. *l.* 1. *ff. de contr. empt.*

II.

2. *The Sale is perfected by the bare conſent.* The Sale is perfected by the bare conſent of the parties, altho' the thing ſold be not as yet delivered, nor the Price paid[b].

[b] *See the eighth Article of the firſt Section of the Title of Covenants.* Conſenſu fiunt obligationes, in emptionibus, venditionibus. *inſt. de obl. ex. conſenſu.* (Emptio) conſenſu peragitur. *l.* 1. *in f. ff. de contr. empt.* Emptio & venditio contrahitur, ſimul atque de pretio convenerit, quamvis nondum pretium numeratum ſit. *inſt. de empt. & vend.*

See the tenth Article of the ſecond Section, concerning the manner in which it is neceſſary to underſtand that the bare conſent perfects the Contract of Sale.

III.

3. *How the conſent is given.* The conſent which makes the Sale, is given either in preſence of the Parties, or in their Abſence; or in Writing, or by Word of Mouth; or under the hand of the Parties, or before a Publick Notary: Purſuant to the Rules explained in the Title of Covenants[c]. And after the Sale is thus perfected, it is not any longer in the Power either of the Seller, or Buyer, to revoke his Conſent; altho' it were immediately after the Contract is ended; unleſs both Parties ſhould agree jointly to diſſolve it[d].

[c] *See Art.* 10, 11, 12, 13, 14, 15, *and* 16, *of the ſecond Section of Covenants.*

[d] Nec enim, licet in continenti facta, pœnitentiæ conteſtatio, conſenſu finita reſcindit. *l.* 13. *C. de contr. empt. See the fourteenth and fifteenth Articles of the twelfth Section.*

IV.

4. *Who may ſell and buy, and what things may be ſold.* All ſorts of perſons may buy and ſell, unleſs they are under ſome Incapacity, or that the thing ſold is not Vendible, or unleſs there be ſome other Vice in the Sale. According to the Rules which ſhall be explained in the eighth Section[e].

[e] *See the ſecond Article of the ſecond Section of Covenants.*

V.

5. *Three ſorts of Engagements in the Contract of Sale.* The Contract of Sale, as all other Contracts, forms three ſorts of Engagements. The firſt is of thoſe which are expreſſed in the Contract; the ſecond, of thoſe which are the natural conſequences of the Sale, altho' the Contract makes no mention of them; and the third is of ſuch Engagements as the Laws, Cuſtoms, and Uſage of the Country has eſtabliſhed[f].

[f] *See the firſt Article of the third Section of Covenants.*

Imprimis ſciendum eſt, in hoc judicio id demum deduci quod præſtari convenit. *l.* 11. §. 1. *ff. de act. empt. & empt.* Quòd ſi nihil convenit, tunc ea præſtabuntur, quæ naturaliter inſunt hujus judicii poteſtate. *d.* §. in his contractibus (emptionibus & venditionibus) alter alteri obligatur, de eo quod alterum alteri, ex æquo præſtare oportet. *l.* 2. *in f. ff. de oblig. & act.* §. *ult. inſt. de obl. ex conſ.* Ea enim quæ ſunt moris, & conſuetudinis, in bonæ fidei judiciis debent venire. *l.* 31. §. 20. *ff. de ad. ed. w. l.* 8. *& l.* 19. *C. de locato & cond.* See the firſt Article of the third Section of Covenants.

VI.

6. The firſt ſort, is of the Engagements that are expreſ-ſed.

The firſt of theſe three ſorts of Engagements, reaches to all the particular Covenants, and to all the different Pacts, which may be added to the Contract of Sale; ſuch as Conditions, Clauſes of Nullity in default of Payment, the Right of Redemption, and others of the like nature, which ſhall be explained in the ſixth Section; And theſe Covenants make a part of the Contract, and are in the place of Laws[g].

[g] *See the firſt Article of the fourth Section of Covenants, and the ſixth Section of this Title.*

Hoc ſervabitur quod initio convenit, legem enim contractus dedit. *l.* 23. *ff. de reg. jur.*

Contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. dep.*

VII.

7. The ſecond ſort is of the Engagements which ariſe from the nature of the Contract.

The ſecond ſort of Engagements, which are the natural conſequences of the Contract of Sale, comprehends thoſe under which the Seller may be to the Buyer, and the Buyer to the Seller, altho' the Contract make no mention of them. Theſe Engagements oblige the Parties in the ſame manner as the Contract itſelf, of which they are Conſequences[h]. And they ſhall be explained in the two Sections which follow.

[h] De eo quod alterum alteri, ex bono & æquo præſtare oportet. *l.* 2. *in f. ff. de oblig. & act.* See the two following Sections.

VIII.

8. The third ſort, is of the Engagements regulated by the Laws, Cuſtom, and Uſage of the Country.

The third ſort of Engagements conſiſts of thoſe which are eſtabliſhed by particular Laws, by the Practice and Cuſtom of the Country. Thus, Cuſtom has regulated in the Sale of Horſes, the Defects which are ſufficient to annul the Sale[i].

[i] Ut mos regionis poſtulabat. *l.* 8. *C. de locato l.* 19. *eod.*

SECT. II.

Of the Engagements which the Seller is under to the Buyer.

The CONTENTS.

1. *The firſt Engagement of the Seller, is to deliver the thing ſold.*
2. *The ſecond Engagement of the Seller, is to take care of the thing ſold till the time of delivery.*
3. *The third Engagement, is that of Warranty.*
4. *The fourth Engagement relates to the Faults of the thing ſold.*
5. *The definition of Delivery.*
6. *The Delivery of Moveables.*
7. *Delivery of Immoveables.*
8. *The Clauſe of precarious Poſſeſſion tacitly underſtood.*
9. *Delivery of Things Incorporeal.*
10. *The firſt effect of the Delivery, is the tranſlation of the full Property.*
11. *Another effect of the Delivery, with reſpect to him who has bought the thing honeſtly from one who was not the right Owner; and that is, the right of enjoying it.*
12. *Another effect of the Delivery, the right to preſcribe.*
13. *Another effect of the Delivery, between two Buyers of the ſame thing.*
14. *Of the Time of Delivery.*
15. *Of the Place of Delivery.*
16. *Damages for the delay of Delivery.*
17. *Wherein conſiſt the Damages.*
18. *Conſequences of Gain, or Loſs, which enter not into the Damages.*
19. *Damages are due, whether the Sale ſubſiſts, or not.*
20. *It does not depend on the Seller to annul the Sale by his failing to deliver the thing.*
21. *The Delivery hindered by an accident.*
22. *If the Seller is in hazard of loſing the Price, he is not obliged to deliver the Thing.*
23. *The Seller and Buyer both in delay.*
24. *What care the Seller ought to take of the thing ſold.*
25. *The care which the Seller is to take, may be regulated by agreement.*
26. *If it is the Buyer's fault that he does not receive the Goods, the Seller is diſcharged from his Obligation to take care of them.*
27. *The Engagement of the Seller not to ſell too dear.*

I.

1. The firſt Engagement of the Seller, is to deliver the thing ſold.

PEOPLE buy things for no other end but to have them in their own power, and to poſſeſs them. Thus, the firſt Engagement which the Seller is under, is to deliver the thing ſold, altho' the Contract make no mention of it[a]. And the Rules of this Engagement ſhall be explained in the fifth Article, and thoſe that follow.

[a] Imprimis ipſam rem præſtare venditorem oportet, id eſt, tradere. *l.* 11. §. 2. *ff. de act. empt. & vend.*

II.

2. The ſecond Engagement of the Seller, is to take care of the thing ſold till the time of delivery.

It is a conſequence of this firſt Engagement of the Delivery, and therefore is reckoned as a ſecond Engagement, that until the time of the Delivery the Seller is obliged to keep, and to take care of the thing ſold[b], purſuant to the Rules which ſhall be explained in the twenty-fourth Article, and thoſe that follow.

[b] Antequam (venditor) vacuam poſſeſſionem tradat, cuſtodiam & diligentiam præſtare debet. *l.* 36. *ff. de act. & vend.*

III.

3. The third Engagement is that of Warranty.

This is another conſequence of the Delivery, and makes a third Engagement, that the Seller ought to warrant, that is, ſecure the Buyer in the peaceable Poſſeſſion of the thing ſold. And this obliges the Seller to put a ſtop to the Pretenſions of every one that claims, either a Right of Property in the thing ſold, or any other Right which might diſturb the Buyer in the Poſſeſſion and Enjoyment of the thing he has bought. For it is the Right to poſſeſs, and to enjoy, that he has bought[c]. I ſhall explain the Rules of this Engagement in the tenth Section.

[c] Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l.* 1. *ff. de evict. v. l.* 60. & 70. *eod.* Habere licere. *l.* 11. §. *ult. ff. de act. empt. & vend.*

[*The Common Law of* England *does not bind a Man to warrant the thing he ſells, unleſs there be an expreſs Warranty, or a Warranty by Law.*]

IV.

4. The fourth Engagement relates to the Faults of the thing ſold.

Since people buy things only to imploy them to the uſes for which they are deſtined, this is a fourth Engagement which the Seller is under to the Buyer, to take back the thing ſold, if it has ſuch faults and defects as render it unfit for its uſe, or too troubleſome; or to diminiſh the Price of the thing, whether the defects were known to the Seller, or not[d]. And if he knows them, he is obliged to declare them[e]. The Rules of this Engagement ſhall be explained in the eleventh Section.

[d] Qui pecus morboſum, aut tignum vitioſum vendidit, ſi quidem ignorans fecit: id tantùm exempto actione præſtaturum, quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem. Si verò ſciens reticuit, &c. *l.* 13. *ff. de act. empt. & vend.*

[e] Certiores faciant emptores, quid morbi, vitiive cuique ſit. *l.* 1. §. 1. *ff. de æd. ed.* Eademque omnia, cum ea mancipia venibunt, palàm, rectè pronuntianto. *d.* §.

Of DELIVERY.

V.

5. The definition of Delivery.

Delivery is the transferring of the thing ſold into the power and poſſeſſion of the Buyer[f].

[f] Ratio (vel datio) poſſeſſionis, quæ à venditore fieri debeat. *l.* 3. *ff. de act. empt. & vend.* Tradendo transfert. *l.* 20. *ff. de acq. rer. dom. l.* 9. §. 3. *eod.*

VI.

6. The delivery of Moveables.

The Delivery of Moveables is made, either by tranſporting them into the power and poſſeſſion of the Buyer[g], or without this tranſportation, by the delivery of the Keys, if the things ſold are kept under Lock and Key[h], or by the bare will of the Seller and Buyer, if the things could not be tranſported[i]; or if the Buyer had already the thing ſold in his cuſtody by another Title, as if it was depoſited into his hands, or if he had borrowed it[l].

[g] Tradendo transfert. *l.* 20. *ff. de acq. rer. dom. l.* 9. §. 3. *eod.*

[h] Si quis merces in horreo depoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem. §. 45. *inſt. de rer. diviſ. l.* 1. §. 21. *in f. ff. de acq. vel amitt. poſſ. l.* 74. *ff. de contr. empt.*

[i] Non eſt enim corpore & actu neceſſe apprehendere poſſeſſionem, ſed etiam oculis & affectu. Et argumento eſſe eas res quæ propter magnitudinem ponderis moveri non poſſunt, ut columnas: nam pro traditis eas haberi, ſi in re præſenti conſenſerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſ.*

[l] Interdum ſine traditione, nuda voluntas domini ſufficit ad rem transferendam. Veluti ſi rem quam commodavi, aut locavi tibi, aut apud te depoſui, vendidero tibi. Licet enim ex ea cauſa tibi eam non tradiderim, eo tamen quòd patior eam ex cauſa emptionis apud te eſſe, tuam efficio. *l.* 9. §. 5. *ff. de acq. rer. dom.* §. 44. *inſt. de rer. diviſ.*

VII.

7. Delivery of Immoveables.

The Delivery of Immoveables is made by the Seller, when he quits the Poſſeſſion of the Thing that the Buyer may take it[m]: whether it be by delivering the Deeds and Writings, if there be any[n]: or the Keys, if it is a place ſhut up, ſuch as a Houſe, a Park, a Garden[o]: or by carrying the Buyer upon the place: or only ſhewing him it at a diſtance[p]: or by conſenting that he take poſſeſſion of it[q]: or by the Seller's acknowledging that if he continue to poſſeſs it, it ſhall be only precariouſly; that is, in the ſame manner as he who poſſeſſes a thing belonging to another perſon, on condition to reſtore it to the

Owner, whenever he ſhall be pleaſed to call for it[r]. And if the Seller reſerves for himſelf the Uſe and Profits, this Reſervation ſhall likewiſe be in the place of Delivery[ſ].

[m] Qui fundum dari ſtipularetur, vacuam quoque poſſeſſionem tradi oportere, ſtipulari intelligitur. *l.* 3. §. 1. *ff. de act. empt. & vend.*

[n] Emptionum mancipiorum inſtrumentis donatis, & traditis, & ipſorum mancipiorum donationem, & traditionem factam intelligis. *l.* 1. *C. de don.*

[o] Simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem. *l.* 9. §. 6. *ff. de acq. rem. dom.*

[p] Si vicinum mihi fundum mercato, venditor in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat: non minus poſſidere cœpi, quam ſi pedem finibus intuliſſem. *l.* 18. §. 2. *ff. de acq. vel amitt. poſſ.*

[q] Secundùm conſenſum auctoris, in poſſeſſionem ingreſſus, rectè poſſidet. *l.* 12. *C. de contr. empt.*

[r] Is qui rogavit ut precario in fundo moretur, non poſſidet: ſed poſſeſſio apud eum qui conceſſit, remanet. *l.* 6. §. 2. *ff. de precario. l. ult. eod.* Precarium eſt quod precibus petentis utendum conceditur tamdiu quamdiu is qui conceſſit patitur. *l.* 1. *eod.* See the ſecond Article of the firſt Section of the Loan of things to be reſtored in ſpecie, and of a precarious Loan.

[ſ] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, etiamſi ſtipulatus non fuerit, eam continuò tradidiſſe credatur: nec quid ampliùs requiratur, quo magis videatur facta traditio. *l.* 28. *C. d. donat. l.* 35. §. *ult. eod.* See the third Article of the ſecond Section of Donations.

This Article regards only the Delivery, and not the ways of taking Poſſeſſion; of which mention ſhall be made in the Title of Poſſeſſions.

VIII.

8. *The Clauſe of precarious Poſſeſſion tacitly underſtood.*

If the Clauſe of precarious Poſſeſſion has been omitted in a Contract for ſelling an Immoveable Thing, it is tacitly underſtood, as to the effect of giving the Buyer a right to take Poſſeſſion of the Thing, if it is not already poſſeſſed by others. For the Sale transferring the Property of the thing, it implies the conſent of the Seller, that the Buyer ſhould take Poſſeſſion of it[t].

[t] Qui fundum dari ſtipularetur, vacuam quoque poſſeſſionem tradi oportere, ſtipulari intelligitur. *l.* 3. §. 1. *ff. de act. empt. & vend.* ſecundùm conſenſum auctoris in poſſeſſionem ingreſſus rectè poſſidet. *l.* 12. *C. de contr. empt.*

IX.

9. *Delivery of Things Incorporeal.*

Things incorporeal, ſuch as an Inheritance, a Debt, or any other Right, cannot properly be delivered[u], no more than touched[x]; but the power of uſing them is in lieu of Delivery. Thus, the Seller of a Right of Service does as it were deliver it, when he ſuffers the Buyer to make uſe of it[y]. Thus, he who ſells or transfers a Debt, or any other right, gives to the Buyer, or Aſſignee, a kind of Poſſeſſion by the power which he gives them to exerciſe this Right, in cauſing the Transfer, or Aſſignment, to be intimated to the Debtor, who after the ſaid intimation, cannot own any other Maſter, or Poſſeſſor of this Right, but the Aſſignee to whom it is transferred.

[u] Incorporales res traditionem & uſucapionem non recipere manifeſtum eſt. *l.* 43. §. 1. *ff. de acq. rer. dom.*

[x] Incorporales ſunt, quæ tangi non poſſunt, qualia ſunt ea quæ in jure conſiſtunt. §. 2. *inſt. de reb. corp.*

[y] Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe. *l. ult. ff. de ſervit.*

X.

10. *The firſt effect of the Delivery, is the tranſlation of the full Property.*

The firſt effect of the Delivery is, that if the Seller is the right Owner of the thing ſold, the Buyer becomes at the ſame time fully Maſter of it, and acquires a right to enjoy it, to uſe it, and to diſpoſe of it[z], he paying the Price, or giving Surety to the Seller; unleſs the Seller is contented with the ſimple Bond, or Promiſe of the Buyer[a]. And it is this effect of the Delivery which is the perfect accompliſhment of the Contract of Sale.

[z] Traditionibus, & uſucapionibus dominia rerum, non nudis pactis transferuntur. *l.* 20. *C. de pact.* per traditionem jure naturali res nobis acquiruntur. Nihil enim tam conveniens eſt naturali æquitati, quàm voluntatem domini volentis rem ſuam in alium transferre, ratam haberi. Et ideo, cujuſcunque generis ſit corporalis res, tradi poteſt; & à domino tradita, alienatur. §. 40. *inſt. de rer. diviſ.* Nunquam nuda traditio transfert dominium, ſed ita ſi venditio, aut aliqua juſta cauſa præceſſerit, propter quam traditio ſequeretur. *l.* 31. *ff. de acq. rer. dom.*

[a] Venditæ res, & traditæ non aliter emptori acquiruntur, quàm ſi is venditori pretium ſolverit, vel alio modo ei ſatisfecerit. §. 41. *inſt. de rer. div.* Quod vendidi non aliter ſit accipientis, quàm ſi aut pretium nobis ſolutum ſit, aut ſatis eo nomine factum, vel etiam fidem habuerimus emptori ſine ulla ſatisfactione. *l.* 19. *ff. de contr. empt. l.* 53. *eod.*

This Article is not contrary to what has been ſaid in the ſecond Article of the firſt Section, that the Sale is perfected by the bare conſent. For we muſt diſtinguiſh in the Contract of Sale, and in all other Contracts which are perfected by the bare conſent, two ſorts, or two degrees of perfection.

The firſt ſort is that which is mentioned in the ſecond Article of the firſt Section; and the ſecond is that which is here ſpoken of in this tenth Article. The difference betwixt them conſiſts in this, that the bare conſent forms only the Engagement of the Contracters to perform reciprocally what they promiſe to one another. Thus, the Seller is bound to deliver the thing ſold, and the Buyer to pay the Price; and it is in this ſenſe, that the Contract of Sale is perfected by the bare conſent. But there is ſtill wanting a ſecond accompliſhment which conſiſts in the execution of theſe Engagements, and has this effect; that whereas the Contract of Sale without Delivery does not make the Buyer Maſter and Poſſeſſor, and does not give him a right to enjoy, to uſe, and to diſpoſe of the thing ſold, but only a right to demand the Delivery of it; this Delivery of the thing, together with the Payment of *the Price, conſummates the Sale, and makes the Buyer fully Maſter and Poſſeſſor of the thing; which was the end of the Contract of Sale.* See concerning theſe accompliſhments of the Sale, the fourteenth and fifteenth Articles of the twelfth Section, as alſo the ſixth Law. *Cod. de hæred. vel act. vend.*

XI.

11. Another effect of the Delivery, with reſpect to him who has bought the thing honeſtly from one who was not the right Owner; and that is the right of enjoying it.

If the Seller was not the right Owner of the thing ſold, the Buyer does not become Maſter of it, by having it delivered to him[b]. But if he has bought the thing honeſtly and fairly, believing that the Seller was Maſter of it; he looks upon himſelf, and is ſo lookt upon by others, as if he were in effect the true Owner of the thing. And this Poſſeſſion of the Buyer's, which he has ground to believe to be a rightful and lawful Poſſeſſion, ought to have the ſame effect as if he were really and truly Maſter of the thing. Thus he poſſeſſes it, enjoys it, and makes the fruits his own, without being in danger of reſtoring what he has uſed and conſumed during the time he was ignorant that the thing belonged to another perſon[c].

[b] Traditio nihil amplius transferre debet, vel poteſt ad eum qui accipit, quàm eſt apud eum qui tradit. *l. 20. ff. de acquir. rer. dom.*

[c] Si quis à non domino quem dominum eſſe crediderit, bona fide fundum emerit, vel ex donatione, aliâve qualibet juſta cauſa, æquè bona fide acceperit, naturali ratione placuit, fructus quos percepit ejus eſſe pro cultura & cura. Et ideò ſi poſtea dominus ſupervenerit, & fundum vindicet: de fructibus ab eo conſumptis agere non poteſt. §. 35. *inſt. de rer. div.* Dolum authoris, bonæ fidei emptori non nocere, certi juris eſt, *l. 3. C. de per. & com. rei vend.*

To underſtand rightly the meaning of theſe words, prò cultura & cura, *which are in the thirty-fifth Section, Inſt. de rer. diviſ. it is fit to take notice of the words of the twenty-fifth Law, ff. de uſur.* omnis fructus non jure ſeminis, ſed jure ſoli percipitur: *And likewiſe the Poſſeſſor who comes fairly and honeſtly by the Poſſeſſion does enjoy the Fruits which grow without ſowing, and without cultivating.*

XII.

12. Another effect of the Delivery, the right to preſcribe.

Another effect of the Delivery of the thing ſold, altho' the Seller were not the Maſter of it, is, that the Buyer, who believes the Seller to be the right Owner, preſcribes; and acquires the Property after a ſufficient Poſſeſſion, that is conformable to the Rules which ſhall be explained in the Title of Poſſeſſion, and Preſcriptions[d].

[d] Pars quæ putatur eſſe vendentis, per longam poſſeſſionem ad emptorem tranſit, *l. 43. ff. de acq. vel amitt. poſſ. l. 26. eod.*

XIII.

13. Another effect of the Delivery between two Buyers of the ſame thing.

If the ſame thing is ſold to two Buyers, whether by the ſame perſon, or by two different Sellers; the firſt of the two to whom it has been delivered, and who is in poſſeſſion of it, will be preferred, altho' the thing was ſold firſt to the other perſon; unleſs it be that one of the Sellers was not the Maſter of the thing ſold, and that the other was; for in this caſe he who bought it of the Maſter will be preferred to him to whom the thing was delivered[e]. And in all the caſes, the other Buyer will have his Action of Warranty againſt his Seller[f].

[e] Si duobus quis ſeparatim vendiderit bona fide ementibus, videamus quis magis publiciana uti poſſit, utrum is cui priori res tradita eſt, an is qui tantùm emit. Et Julianus libro ſeptimo digeſtorum ſcripſit, ut, ſi quidem ab eodem non domino emerint, potior ſit cui priori res tradita eſt: quod ſi à diverſis non dominis melior cauſa ſit poſſidentis, quàm petentis. Quæ ſententia vera eſt. *l. 9. §. 4. ff. de public. in rem act.* uterque noſtrûm eamdem rem emit à non domino: cùm emptio venditioque ſine dolo malo fieret, traditaque eſt: ſive ab eodem emimus, ſive ab alio, atque alio; is ex nobis tuendus eſt, qui prior jus ejus apprehendit. Hoc eſt, cui primùm tradita eſt. Si alter ex nobis à domino emiſſet, is omnimodo tuendus eſt. *l. 31. §. 2. ff. de act. empt. & vend.* Quoties duobus in ſolidum prædium jure diſtrahitur, manifeſti juris eſt, eum cui priori traditum eſt, in detinendo dominio eſſe potiorem. *l. 15. C. de rei vend.*

[f] Quoniam contractus fidem fregit: ex empto actione conventus, quanti tua intereſt præſtare cogetur. *l. 6. C. de hæred. vel act. vend.*

This Rule may ſeem contrary to that which is contained in the ſecond Article of the firſt Section, and to the Rule of the ſecond Article of the ſeventh Section. For by theſe two Rules the Sale is ſo far accompliſhed by the bare effect of the conſent, that if the thing ſold periſhes before it is delivered, the loſs is the Buyer's; from whence it would ſeem to follow that the Buyer was already Maſter of the thing; and that therefore by the ſecond Sale the Seller ſold the thing belonging to another perſon, and that the firſt Buyer may claim it as his. But, as we have already remarked on the tenth Article of this Section, it is only by the Delivery that the Sale receives its full Accompliſhment, which makes the Purchaſer Maſter of the thing ſold. Thus, he who buys the laſt, but of the Seller who has the thing ſtill in his poſſeſſion, and gets poſſeſſion of the thing, is preferred to the firſt Buyer, who has himſelf to blame for not taking poſſeſſion of the thing, in order to make himſelf Maſter of it. And it is likewiſe for the intereſt of the Publick, that perſons ſhould not be diſturbed in their poſſeſſions by Sales tranſacted in private, or antidated. It is upon theſe Principles that ſome Cuſtoms have expreſly determined, that a ſecond Purchaſer of an Eſtate, who gets firſt Poſſeſſion of it, is preferred to him who had bought it firſt.

XIV.

14. Of the Time of Delivery.

The Delivery of the thing ſold ought to be at the time regulated by the Contract. And if the Contract ſays nothing of it, the Seller ought to deliver the thing without delay; unleſs the Delivery ſhould require that the thing be tranſported into another place, for the doing of which a delay would be neceſſary[g].

[g] Quoties in obligationibus dies non ponitur, præſenti die pecunia debetur. Niſi ſi locus adjectus, ſpatium temporis inducat: quo illo poſſit perveniri. *l.* 41. §. 1. *ff. de verb. obl.* §. 2. *inſt. eod.*

See the fifth Article of the third Section of Covenants.

XV.

15. *Of the Place of Delivery.* The Delivery ought to be in the Place agreed on. And if the Contract makes no mention of the Place of Delivery, the Seller ought to deliver the thing ſold in the place where it happens to be at the time; unleſs the intention of the Contracters ſeems to demand, that the Delivery ſhould be made in another place[h].

[h] *See the ſixth Article of the third Section of Covenants.* V. l. ult. ff. de con. trit. l. 22. in fine ff. de reb. cred.

XVI.

16. *Damages for the delay of Delivery.* If the Seller fails to deliver the thing ſold on the day, and at the place where the Delivery ought to be made; he ſhall be bound to make good the Damages which the Buyer ſhall ſuſtain by his delay[i], purſuant to the Rules which follow.

[i] Si res vendita non tradatur, in id quod intereſt, agitur. Hoc eſt, quod rem habere intereſt emptoris. *l.* 1. *ff. de act. empt. vend. l.* 11. §. 9. *eod. l.* 4. *&* 10. *C. eod.*

XVII.

17. *Wherein conſiſt the Damages.* The Seller who is in delay to deliver the thing ſold, is accountable for the damage which his delay ſhall have occaſioned, according to the condition of the things, and the circumſtances. Thus, the Seller of an Eſtate who is in delay to deliver it, ought to reſtore to the Buyer the value of the Fruits which he has hindered him from enjoying. Thus, he who was obliged to deliver on a certain day, in a certain place, Corn, Wine, or other Proviſions, of which the Price was riſen on the day, and at the place where they were to have been delivered, is bound to pay to the Buyer the value at which they were on the day, and at the place appointed for delivery, in order to make up either the profit which the Buyer might have made by ſelling the things again at that place; or the loſs which he ſuffers, if for his own uſe he was obliged to buy others at a higher price than what he had agreed to give at the time of the Sale[l].

[l] Non ſolum quod ipſe per eum acquiſii, præſtare debeo: ſed & id quod emptor, jam tunc ſibi tradito ſervo acquiſiturus fuiſſet. *l.* 31. §. 1. *ff. de act. empt. & vend.* cum per venditorem ſteterit, quominus rem tradat, omnis utilitas emptoris in æſtimationem venit, quæ modo circa ipſam rem conſiſtit. *l.* 21. §. 3. *ff. de act. empt. & vend.* Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die quo dari debuit. *l. ult. ff. de condict. trit.* idemque juris in loco eſſe, ut æſtimatio ſumatur ejus loci, quo dari debuit. *d. l.* Quoties in diem, vel ſub conditione oleum quis ſtipulatur, ejus æſtimationem eo tempore ſpectari oportet, quo dies obligationis venit tunc enim ab eo peti poteſt. *l.* 59. *ff. de verb. obl.*

XVIII.

18. *Conſequences of Gain, or Loſs, which enter not into the Damages.* The Profit or Loſs, which is to be computed as part of the Damages of the Buyer, ought to be reſtrained to that which may be imputed to the delay, and which is a natural and ordinary conſequence of it, and which it was eaſy to foreſee: Such as the Damages explained in the caſe of the preceding Article; and ſuch as would likewiſe be in the ſame caſe, the charges which the Buyer had been at, in going to receive, and to tranſport the Proviſions which he had bought, and the other immediate conſequences which it is natural to expect from the delay. But we ought not to extend the Damages to conſequences that are more remote, and altogether unforeſeen, which are rather an extraordinary effect of ſome event, and of ſome conjuncture of affairs flowing from the Divine Providence, than of the delay of the Delivery. Thus, for example, if the Seller not delivering at the time and place Corn which he has ſold, the Buyer has, for want of having the Corn delivered to him, miſſed an opportunity of ſending that Corn to another place, and of ſelling it there at a higher rate than it was at in the place where it ought to have been delivered: Or if for want of having that Corn, he has been obliged to ſend away Workmen, and put a ſtop to a Work, the interruption of which occaſions him a conſiderable loſs; the Seller will not be bound to make good neither this Gain which the Buyer has miſſed of, nor this Damage which he has ſuffered, which are not ſo much Conſequences that may be imputed to the delay of the Delivery, as Effects of the Divine Providence, and Accidents for which no man ought to be accountable[m].

[m] Cùm per venditorem ſteterit, quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit: quæ modò circa ipſam rem conſiſtit. Neque enim ſi potuit ex vino putà negotiari, & lucrum facere, id æſtimandum eſt, non magis quàm ſi triticum emerit, & ob eam rem quòd non ſit traditum, familia ejus fame laboraverit. Nam pretium

tritici, non ſervorum fame necatorum, conſequitur. *l.* 21. §. 3. *ff. de act. empt. & vend.* ut non ſit cogitatum à venditore de tanta ſumma. *l.* 43. *in f. ff. eod.*

See the Title of Intereſts, Coſts, and Damages, and Reſtitution of Fruits.

XIX.

19. *Damages are due, whether the Sale ſubſiſts, or not.* Beſides the Damages which the Seller is liable to for not delivering the thing ſold, he incurs likewiſe on the ſame account another Penalty, which is, that the Sale may be annulled, if there is ground for it. As, for inſtance, if he who was obliged to deliver a Merchandize on the day of an Imbarkation, or on the day of a Fair, fails to do it, he will be obliged to take back his Goods if the Buyer pleaſes, and to reſtore the Price, if he has already received it. And he will be moreover bound to make good the Damages, for not having delivered the Goods at the time and place appointed. And even in the caſes where the Sale ſubſiſts, the Seller is nevertheleſs bound to make good the Damages. Thus, the Seller who by delaying to deliver an Eſtate which he has ſold, deprives the Purchaſer of the enjoyment of the Fruits, is bound in the Value of the Fruits, although this delay be not enough to annul the Sale[n].

[n] *This Rule is a Conſequence of the former.*

XX.

20. *It does not depend on the Seller to annul the Sale, by his failing to deliver the thing.* It never depends on the Buyer to elude the effect of the Sale, by his failing to make delivery of the thing; and he may be always forced to deliver it, if it is poſſible; provided that the Buyer performs his part of the Contract. In the ſame manner likewiſe the Buyer cannot procure the Sale to be annulled, by his not paying the Price at the term appointed[o], as ſhall be made appear in the proper place.

[o] *V. l.* 2. *&* 3. *ff. de lege commiſſ.* quod ab initio ſponte ſcriptum, aut in pollicitationem deductum eſt, hoc ab invitis poſtea compleatur. *l. ult. C. ad Vell. l.* 5. *C. de obl. & act.* See the nineteenth Article of the fourth Section of Covenants; and the ninth Article of the following Section.

XXI.

21. *The Delivery hindered by an accident.* If the Delivery is hindered by an accident; as if the Seller has been robbed of the thing ſold *(that is, if it has been taken from him by force)* the Seller will not be liable to Damages[p]; unleſs the accident happened after he was in fault for not delivering it, according to the Rule explained in the third Article of the ſeventh Section.

[p] Si ea res quam ex empto præſtare debebam, vi mihi adempta fuerit, quamvis eam cuſtodire debuerim: tamen propius eſt, ut nihil amplius quàm actiones perſequendæ ejus, præſtari à me emptori oporteat. Quia cuſtodia adverſus vim parùm proficit. *l.* 31. *ff. de act. empt. & vend.* Quidquid ſine dolo & culpa venditoris accidit in eo venditor ſecurus eſt. §. 3. *inſt. de empt.*

XXII.

22. *If the Seller is in hazard of loſing the Price, he is not obliged to deliver the Thing.* If the Seller is in manifeſt danger of loſing the Price, thro' the Inſolvency of the Buyer, or for other cauſes, he may keep the thing ſold, by way of Pledge, until the Buyer has given him Security for his payment[q].

[q] *In the ſame manner as the Buyer cannot be obliged to pay the Price, if he is in danger of an Eviction.* Ante pretium ſolutum, dominii quæſtione mota, pretium emptor ſolvere non cogetur: niſi fidejuſſores idonei à venditore ejus evictionis offerantur. *l.* 18. §. 1. *ff. de per. & com. r. v.* venditor, pignoris loco, quod vendidit, retinet, quoad emptor ſatisfaciat. *l.* 31. §. 8. *ff. de ad. ed. v. l.* 22. *ff. de hered. vel act. vend.* See the eleventh Article of the third Section.

XXIII.

23. *The Seller and Buyer both in delay.* If the Buyer and Seller are equally in delay, the one in receiving, and the other in delivering; the Buyer, whoſe fault it is that he did not ſooner receive the thing ſold, cannot complain of the delay of the Delivery[r].

[r] Si & per emptorem & venditorem mora fuiſſet quominus vinum præberetur, & traderetur: perinde eſſe ait, quaſi ſi per emptorem ſolum ſtetiſſet. Non enim poteſt videri mora, per venditorem emptori facta eſſe, ipſo moram faciente emptore. *l.* 51. *ff. de act. empt. vend. l.* 17. *ff. de contr. empt.*

Of the CUSTODY *of the Thing ſold.*

XXIV.

24. *What care the Seller ought to take of the thing ſold.* If the thing ſold remain in the cuſtody of the Seller, he is obliged to take care of it until the Delivery; not only in the ſame manner as he takes care of what is his own, but he is to take the ſame care of it as he who has borrowed a thing for his own uſe[ſ]. And he is to be accountable, not only for what he may do knaviſhly, but for every neglect, and every fault which a careful and diligent Maſter of a Family would not readily fall into[t]. Becauſe the Contract of Sale is as much for the intereſt of the Seller, as of the Buyer[u].

[ſ] Cuſtodiam venditor talem præſtare debet, quam præſtant hi quibus res commodata eſt. Ut diligentiam præſtet exactiorem, quam in ſuis rebus adhiberet. *l.* 3. *ff. de per. & commodo rei vend.* See the ſecond Article of the ſecond Section of the Loan of things to be reſtored in ſpecie.

[t] Si venditor eam diligentiam adhibuiſſet in inſula cuſtodienda, quam debent homines frugi, & diligentes præſtare; ſi quid accidiſſet, nihil ad eum pertinebit. *L.* 11. *eod.* Dolum, & culpam *recipiunt* mandatum, commodatum, venditum. *l.* 23. *ff. de reg. jur.* In his quidem & diligentiam. *d. l.* 23. Talis cuſtodia deſideranda eſt à venditore, qualem bonus paterfamilias ſuis rebus adhibet. *l.* 35. §. 4. *ff. de contr. empt.*

[u] Ubi utriuſque utilitas vertitur ut in empto — & dolus de culpa præſtatur. *l.* 5. §. 2. *ff. commod.*

XXV.

25. *The care which the Seller is to take, may be regulated by agreement.*

If it is agreed to eaſe the Seller of the trouble of looking after the thing ſold, or if the parties have regulated the manner in which the Seller ſhall be bound to take care of it; he will be no farther obliged, than to take ſuch care as is ſpecified in the Agreement[x]. And moreover, he will be accountable for whatever may happen thro' his Knavery[y]; or thro' any Neglect of his which is ſo groſs as to border upon Fraud[z].

[x] Sed hæc ita, niſi ſi quid nominatim convenit, vel plus, vel minus in ſingulis contractibus. Nam hoc ſervabitur, quod initio convenit. Legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* *l.* 35. §. 4. *ff. de contr. empt.*

[y] Non valere ſi convenerit ne dolus præſtetur. *d. l.* 23. *ff. de reg. jur.*

[z] Diſſoluta negligentia prope dolum eſt. *l.* 29. *ff. mand.*

XXVI.

26. *If it is the Buyer's fault that he does not receive the Goods, the Seller is discharged from his Obligation to take care of them.*

If the Buyer is in delay to receive the thing ſold, whether it be after the term fixed for the Delivery, or after giving the Buyer warning, if no term is fixed; the Seller ſhall be diſcharged from his Obligation to take care of it; and ſhall be no farther liable than for what may happen thro' his Knavery[a].

[a] Illud ſciendum eſt, cùm moram emptor adhibere cœpit, jam non culpam ſed dolum malum tantùm præſtandum à venditore. *l.* 17. *ff. de per. & com.* Vino per averſionem vendito finis cuſtodiæ eſt avehendi tempus, quod ita erit accipiendum, ſi adjectum tempus, eſt. Cæterùm ſi non ſit adjectum, videndum ne infinitam cuſtodiam non debeat venditor. Et eſt verius, ſecundum ea quæ ſupra oſtendimus, aut intereſſe quid de tempore actum ſit, aut denuntiare ei; ut tollat vinum. *l.* 4. §. *ult. eod.*

Of WARRANTY.

WArranty being a conſequence of Eviction, the Rules concerning it ſhall be explained in the tenth Section, which treats of this Matter.

Of declaring the Faults of the Thing ſold.

THE Engagement which the Seller is under to declare the Faults of the thing ſold, is a part of the matter of Redhibition; and the Rules concerning it ſhall be explained in the eleventh Section.

The engagement of the Seller not to ſell too dear.

I have not ſet down in the number of Engagements under which the Seller is to the Buyer, the natural duty of not ſelling too dear*: Becauſe there would be too many inconveniencies in annulling Sales on account of exceſs in the Price. And the Civil Policy connives at an Injuſtice which the Buyers uſually ſuffer willingly; and reſtrains it only in the Sale of ſuch things as have their Price regulated by the Publick.

* And if thou ſell ought unto thy neighbour, or buyeſt ought of thy neighbour's hand, ye ſhall not oppreſs one another. *Levit.* xxv. 14.
That no Man go beyond and defraud his brother in any matter. 1 *Theſſ.* iv. 6.

SECT. III.

Of the Engagements which the Buyer is under to the Seller.

The Engagement of the Buyer, not to buy at too low a price.

THE principal Engagement which the Buyer is under to the Seller, is that of Humanity, and of the Law of Nature, which obliges him not to take advantage of the neceſſitous condition of the Seller, to buy the thing at too low a Price[a]. But becauſe of the difficulties in fixing the juſt Price of things, and of the inconveniencies which would be too many and too great if all Sales were annulled, in which the things were not ſold at their juſt value; the Laws connive at the injuſtice of Buyers, with reſpect to the Price of Sales, except in the Sale of Lands, where the Price given for them is leſs than the half of their juſt value[b]; purſuant to the Rules which ſhall be explained in the ninth Section; and in this Section we ſhall only inſert the other Engagements which the Buyer is under to the Seller.

[a] And if thou ſell ought unto thy neighbour, or buyeſt ought of thy neighbour's hand, ye ſhall not oppreſs one another. *Levit.* xxv. 14.

[b] *See the Preamble to the Title of the Vices in Covenants, and the ſecond Article of the third Section of the ſame Title.*

The CONTENTS.

1. *Engagement of the Buyer to pay the Price.*
2. *The time and place of Payment.*
3. *The Seller may detain the thing sold for lack of payment.*
4. *Delay caused by an accident.*
5. *The Interest of the Money is instead of all Damages occasioned by the delay of payment of the Price.*
6. *Three cases in which the Buyer owes the Interest of the Price.*
7. *If the Seller takes back his Goods for want of payment.*
8. *Dissolution of the Sale for Non-Payment.*
9. *It does not depend on the Buyer to elude the Sale by his not paying.*
10. *Another Engagement which the Buyer is under, as to the expences which fall to his share to pay, and the damage for which he is accountable.*
11. *The Buyer is not obliged to pay the Price, if he is in danger of an Eviction.*
12. *Another Engagement of the Buyer.*

I.

1. Engagement of the Buyer to pay the Price.

THE first Engagement which the Buyer is under, is to pay the Price, and to pay it on the day, and at the place regulated by the Sale; whether it be at the time of the delivery of the thing sold, or before, or after, according as has been agreed on. For the Buyer does not become Master of the thing sold but by this Payment, or by some other Surety which is in lieu of it[a].

[a] Pretium in numerata pecunia consistere debet. *§. 2. inst. de empt. & vend.* Quod vendidi non aliter fit accipientis quàm si aut pretium nobis solutum sit, aut satis eo nomine factum. *l. 19. l. 53. ff. de contr. empt. §. 41. inst. de rer. div.*

II.

2. The time and place of Payment.

If there is nothing regulated by the Sale, as to the time and place of Payment; the Buyer ought to pay the Price at the time and place where the Goods are delivered[b].

[b] In omnibus obligationibus in quibus dies non ponitur, præsenti die debetur. *l. 14. ff. de reg. jur. l. 41. §. 1. ff. de verb. obl.* See the fifth and sixth Articles of the third Section of Covenants.

III.

3. The Seller may detain the thing sold for lack of payment.

If the Buyer does not pay at the time appointed, and the Seller has not as yet delivered the Goods; he may keep them by way of Pledge until he be paid[c].

[c] Venditor pignoris loco quod vendidit retinet, quoad emptor satisfaciat. *l. 31. §. 8. ff. de æd. ed. l. 13. §. 8. ff. de act. empt. & vend.*

IV.

4. Delay caused by an accident.

The Buyer is not faulty for not making payment, if he delays it only because of an obstacle which he meets with from some accident. As if the overflowing of a River hinders him from going to the place where he ought to make payment[d].

[d] *See the twenty-first Article of the preceding Section.* Mora videtur esse, si nulla difficultas venditorem impediat. *l. 3. §. ult. ff. de act. empt.*

V.

5. The Interest of the Money is instead of all Damages occasioned by the delay of payment of the Price.

The Buyer is bound in no other damages, for the bare delay of paying the Price, but the Interest of the Money[e]. And whatever loss the failure of payment may have caused, or whatever profit it may have prevented, the Reparation of the Damage occasioned by the failure of Payment is reduced to the Interest of the Money; this being regulated by the Law to be instead of all Damages of this kind, as shall be explained in the Title of Damages.

[e] Venditori si emptor in pretio solvendo moram fecerit, usuras dumtaxat præstabit, non omne omnino quod venditor mora non facta, consequi potuit. Veluti, si negotiator fuit, & pretio soluto ex mercibus, plusquam ex usuris quærere potuit. *l. ult. ff. de per. & comm. rei vend.*

VI.

6. Three cases in which the Buyer owes the Interest of the Price.

The Buyer owes the Interest of the Price in three cases. By Agreement, if it is stipulated. By a Legal Demand, if after the term of Payment is come, he pays not: And by the nature of the thing sold, if it produces Fruits or other Revenues, such as a Field, or a House, the Interest of the Price is due without either Covenant, or Legal Demand[f].

[f] Initio venditionis si pactus es, ut is cui vendidisti, possessionem, pretii tardiùs exoluti, tibi usuras pensitaret: non immerito existimas etiam eas tibi adito præside Provinciæ, ab emptore præstari debere. Nam si initio contractus non es pactus, si cœperis experiri, deberi ex mora dumtaxat usuras. *l. 5. C. de pact. inter empt. & vend. comp.* Curabit præses Provinciæ compellere emptorem qui nactus possessionem, fructus percepit, partem pretii quam penes se habet, cum usuris restituere. *l. 5. C. de act. empt. & vend. l. 2. C. de usur. l. 13. §. 20. ff. de act. empt. & vend. l. 16. §. 1. ff. de usur.*

VII.

7. If the Seller takes back his Goods for want of payment.

If in default of Payment of the Price, the Seller finds himself obliged to detain, or to take back the thing sold, and its value be diminished; the Buyer will be bound to indemnify the Seller for this diminution,

tion, as far as the Price which was agreed on amounts to[g].

[g] *This Rule is a conſequence of the nature of the Contract of Sale. For the Sale being perfected, the full Price is due, whatever change may happen to the thing ſold, as ſhall be afterwards ſhewn in the ſecond Article of the ſeventh Section.*

Si vinum venditum acuerit, vel quid aliud vitii ſuſtinuerit: emptoris erit damnum. *l. 1. ff. de per. & com. r. v.* Poſt perfectam venditionem, omne commodum, & incommodum quod rei venditæ contingit, ad emptorem pertinet. *l. 1. C. de per. & com. r. v.*

VIII.

8. *Diſſolution of the Sale for Non-Payment.*

If the Buyer does not pay at the term of Payment after the delivery of the Goods, the Seller may demand the Sale to be annulled, for want of Payment. And the Judge will decree it to be void, either immediately, if there is danger that the Seller loſe both the Thing and the Price; or if there is no danger of this, after a delay according to the circumſtances. And this delay is not refuſed, altho' it ſhould be expreſly mentioned in the Contract, that the Sale ſhould be diſſolved if punctual payment were not made at the time appointed[h].

[h] Spatium datum videri: hoc idem dicendum & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l. 23. in f. ff. de obl. & act.*

See the eleventh and twelfth Articles of the twelfth Section of this Title. V. l. 38. ff. de min. in his verbis, lex commiſſoria diſplicebat ei.

IX.

9. *It does not depend on the Buyer to elude the Sale by his not paying.*

It never depends on the Buyer to elude the effect of the Sale, by his failing to pay the Price. And the Seller hath it always in his choice to force him to make payment, if on his part he performs what he is bound to by the Contract[i].

[i] Ita accipitur inemptus eſſe fundus, ſi venditor inemptum eum eſſe velit, quia id venditoris cauſa caveretur. *l. 2. ff. de leg. commiſſ. l. 3. eod.*

X.

10. *Another Engagement which the Buyer is under, as to the Expences which fall to his ſhare to pay, and the damage for which he is accountable.*

If betwixt the time of the Sale and Delivery the Seller is obliged to be at any charge in preſerving the thing ſold: or if he ſuſtains any damage by the delay of the Buyer to take it away; as if Materials that were ſold take up a place, the Rent of which muſt be paid, or the place being the Seller's own, he loſes the Rent of it, the Buyer ſhall be bound to refund this Charge, and to make good this Damage[l].

[l] Præterea ex vendito agendo conſequetur etiam ſumptus, qui facti ſunt in re diſtracta, ut puta ſi quid in ædificia diſtracta erogatum eſt. *l. 13. §. 22. ff. de act. empt. & vend.* Si is qui lapides ex fundo emerit, tollere eos nolit ex vendito, agi cum eo poterit, ut eos tollat. *l. 9. ff. eod.*

XI.

11. *The Buyer is not obliged to pay the Price, if he is in danger of an Eviction.*

If the Buyer diſcovers before Payment, that he is in danger of an Eviction, and if he makes this appear, he cannot be compelled to pay the Price, till after he is ſecured in his Poſſeſſion[m].

[m] Ante pretium ſolutum, dominii quæſtione motâ, pretium emptor ſolvere non cogetur; niſi fidejuſſores idonei à venditore, ejus evictionis offerantur. *l. 18. §. 1. ff. de per. & comm. r. vend.* See the twenty-ſecond Article of the ſecond Section.

XII.

12. *Another Engagement of the Buyer.*

This is another Engagement which the Buyer is under to the Seller, that he is bound to take care of the thing which he has bought, in all the caſes where it may happen that the Sale may be diſſolved; whether by his own act and deed, as by his failing to pay the Price, or by the effect of a Clauſe of the Contract, as if there was inſerted in it a Power of Redemption. And in theſe and the like caſes, the Buyer ought to be reſponſible for the bad condition in which the thing may happen to be thro' his fault, or negligence[n].

[n] *In the ſame manner, and for the ſame reaſons, that the Seller is obliged to take care of the thing ſold, before the Delivery.*

See the twenty-fourth Article of the foregoing Section.

SECT. IV.

Of the Merchandize, or Thing which is ſold.

The CONTENTS.

1. *What Things may be ſold.*
2. *Things incorporeal, ſuch as Rights, may be ſold.*
3. *Sale of things to come.*
4. *Sale of an uncertain Expectation.*
5. *Sale in groſs and by the bulk.*
6. *Sale by Number, Weight, and Meaſure.*
7. *How Sales by Wholeſale and Retail are accompliſhed.*
8. *Sale upon Tryal.*
9. *The Acceſſories of a thing ſold are included in the Sale.*
10. *Things ſeparate from the Edifice, which are included in the Sale.*
11. *Acceſſories of Moveables.*
12. *In the Sale of one of two things, the choice belongs to the Seller.*
13. *Sale of a thing belonging to another perſon.*

I.

1. What Things may be ſold.

ALL ſorts of things may be ſold, except thoſe of which the Commerce is impoſſible, or prohibited by Nature, or by ſome Law[a], purſuant to the Rules which ſhall be explained in the eighth Section.

[a] Omnium rerum quas quis habere, vel poſſidere, vel perſequi poteſt, venditio rectè fit. Quas verò natura, vel gentium jus, vel mores civitatis commercio exuerunt, earum nulla venditio eſt. *l.* 34. §. 1. *ff. de contr. empt.*

II.

2. Things Incorporeal, ſuch as Rights, may be ſold.

We may ſell not only things Corporeal, ſuch as Moveables and Immoveables, Animals, Fruits; but likewiſe Things Incorporeal, ſuch as a Debt, an Inheritance, a Service, and all other Rights[b].

[b] Toto titulo *ff. &* C. de hæreditate vel actione vendita.

III.

3. Sale of things to come.

Sometimes Things to come are ſold, as the Fruits which ſhall be gathered in a Ground, the Animals which ſhall be born, and other things of the like nature, altho' they are not as yet in being[c].

[c] Fructus, & partus futuri, rectè emuntur. *l.* 8. *ff. de contr. empt.*

IV.

4. Sale of an uncertain Expectation.

It happens likewiſe ſometimes that people ſell an uncertain Expectation, as when a Fiſherman ſells a draught of Fiſhes, before he throws his net. And altho' he catch nothing, yet the Sale ſubſiſts; for it was the Expectation that was ſold, and the right of having whatever ſhould be taken[d].

[d] Aliquando tamen & ſine re venditio intelligitur, veluti cùm quaſi alea emitur. Quod fit cùm captus piſcium, vel avium, vel miſſilium emitur. Emptio enim contrahitur, etiamſi nihil inciderit: quia ſpei emptio eſt. *l.* 8. §. 1. *ff. de contr. empt.*

V.

5. Sale in groſs and by the bulk.

We may ſell a great many things at the ſame time, in one and the ſame Sale, and for one and the ſame Price, in groſs and by the bulk; as if we ſell all the Goods that are in a Shop, or in a Ship, all the Corn that is in a Granary, or all the Wine that is in a Cellar[e].

[e] Univerſum quod in horreis erat poſitum. *l.* 2. *C. de per. & com. rei vend.* Si omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque eſſet uno pretio venierit. *l.* 35. §. 5. *ff. de contr. empt.*

VI.

6. Sale by Number, Weight, and Measure.

Proviſions, or other things which are counted, weighed, or meaſured, may be ſold either in groſs or by the bulk, for one and the ſame price; or at the rate of ſo much for every Piece, for every Pound, for every Buſhel, or other Meaſure[f].

[f] Quod ſi vinum ita venierit, ut in ſingulas amphoras, item oleum ut in ſingulos metretas, item frumentum ut in ſingulos modios, item argentum ut in ſingulas libras certum pretium diceretur. *l.* 35. §. 5. *ff. de contr. empt.* Grex in ſingula corpora. *d. l.* §. 6.

VII.

7. How Sales by Wholeſale and Retail are accompliſhed.

When Proviſions, or other Commodities are ſold by the bulk, the Sale is perfect at the ſame time that the parties are agreed about the Goods, and the Price, as in the Sale of other things; becauſe it is known preciſely what is ſold. But if the Price is regulated at the rate of ſo much for every Piece, for every Pound, and for every Meaſure; the Sale is not perfect but as to ſo much as is counted, weighed, meaſured[g]. For the delay to count, weigh, and meaſure, is as it were a condition which ſuſpends the Sale, till it be known by that what is ſold.

[g] Si omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque eſſet, uno pretio venierit, idem juris eſt, quod in cæteris rebus. Quod ſi vinum ita venierit, ut in ſingulas amphoras: item oleum, ut in ſingulos metretas: item frumentum, ut in ſingulos modios: item argentum, ut in ſingulas libras, certum pretium diceretur: quæritur quando videatur emptio perfici: Quod ſimiliter ſcilicet quæritur & de his quæ numero conſtant: ſi pro numero corporum, pretium fuerit ſtatutum. Sabinus & Caſſius tunc perfici emptionem exiſtimant, cùm adnumerata, admenſa adpenſave ſint. *l.* 35. §. 5. *ff. de contr. empt.* See the fifth Article of the ſeventh Section.

VIII.

8. Sale upon tryal.

The things which the Buyer reſerves for ſight and tryal, altho' the Price be agreed on, are not ſold till after the Buyer is ſatisfied with the tryal, which is a kind of Condition, on which the Sale depends[h]. But if the Sale is already accompliſhed under this Reſervation, that if the Buyer is not content with the thing ſold within a certain time, the Sale ſhall be diſſolved; it will be a condition the event of which will annul the Sale, which in the mean while is held to ſubſiſt[i].

[h] Alia cauſa eſt deguſtandi, alia metiendi, guſtus enim ad hoc proficit ut improbare liceat. *l.* 34. §. 5. *ff. de contr. empt.*

[i] Si res ita diſtracta ſit, ut ſi diſplicuiſſet, inempta eſſet, conſtat non eſſe ſub conditione diſtractam, ſed reſolvi emptionem ſub conditione. *l.* 3. *ff. de contr. empt.* Si quid ita venierit, ut niſi placuerit, inter præfinitum tempus redhibeatur: ea conventio rata habetur. *l.* 31. §. 22. *ff. de ædil. ed.* See the thirty-eighth Article of the eleventh Section.

IX.

9. The Acceſſories of a thing ſold are included in the Sale.

Whatever makes a part of the thing ſold, or is an acceſſory to it, is included in the Sale, unleſs it be reſerved. Thus, the Trees which are in a Ground, the hanging Fruits, the Vine-props which are in a Vineyard, the Keys of a Houſe, the Pipes which convey water to it, the Services, and whatever is fixed to the Houſe with a deſign that it ſhould remain there for ever, and the Acceſſories of this kind, make a part of that which is ſold, and belong to the Purchaſer[l].

[l] Fructus pendentes pars fundi videntur. *l.* 44. *ff. de rei vind.* Fructus emptori cedere. *l* 13. §. 10. *ff. de act. empt. & vend.* Ædibus diſtractis, ea eſſe ædium ſolemus dicere quæ quaſi pars ædium, vel propter ædes habentur. *d. l.* 13. §. *ult.* Pali qui vineæ cauſa parati ſunt, antequam collocentur, fundi non ſunt. Sed qui exempti ſunt, hac mente, ut collocentur, fundi ſunt. *l.* 17. *in fine ff. de act. empt. & vend.* Labeo generaliter ſcribit, ea quæ perpetui uſus cauſâ in ædificiis ſunt, ædificii eſſe. *d. l.* 17. §. 7.

See upon this and the following Article, the eighth Article of the firſt Section of the Title of things.

X.

10. Things ſeparate from the Edifice which are included in the Sale.

Things which are not fixed to the Edifice, but whoſe uſe is an Acceſſory to it, as the Rope, and Buckets belonging to a Well; the Cocks of a Fountain, its Vaſe, and other things of the ſame kind; and likewiſe thoſe things which have been ſeparated from the Edifice with intention to fix them to it again, are Acceſſories, and are included in the Sale; but not ſuch things as were intended to be fixed to it, and never were actually fixed. And in order to make a particular judgment of the caſes in which all theſe ſorts of Acceſſories enter into the Sale, or do not enter; it is neceſſary to conſider the circumſtances of the uſe of thoſe things, of their deſtination to that Uſe, of the place where they are at the time of the Sale, of the condition of the Places that are ſold, and above all that of the Intention of the Contracters, thereby to diſcover what they intended ſhould be comprehended in the Sale, and what not[m].

[m] Caſtella plumbea, putea, opercula puteorum, epitonia fiſtulis applumbata: aut quæ terra continentur, quamvis non ſint affixa, ædium eſſe conſtat. *l.* 17. §. 8. *ff. de act. empt. & vend.*

Ea quæ ex ædificio detracta ſunt, ut reponantur, ædificii ſunt: at quæ parata ſunt ut imponantur, non ſunt ædificii. *d. l.* §. 10. Semper in ſtipulationibus, & in cæteris contractibus id ſequimur, quod actum eſt. *l.* 34. *ff. de reg. jur.* Quod factum eſt cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l.* 168. §. 1. *eod.* See the eighth Article of the ſecond Section of Covenants.

XI.

11. Acceſſories of Moveables.

The Acceſſories of Moveables, which may be ſeparated from them, are included in the Sale, or are not included, according to the circumſtances. Thus, a Horſe being expoſed to Sale without his Harneſs, the Buyer will only have the bare Horſe; and if he is offered to ſale with his Harneſs on, the Buyer will have all, unleſs in both caſes it has been otherwiſe agreed on[n].

[n] Uti quæ optimè ornata vendendi cauſâ fuerint (jumenta) ita emptoribus tradentur. *l.* 38. *ff. de æd. ed.*

Vendendi autem cauſâ ornatum jumentum videri Cælius ait, non ſi ſub tempus venditionis, hoc eſt biduo ante venditionem ornatum ſit: ſed ſi in ipſâ venditione ornatum ſit. Aut ideò inquit venale cùm eſſet, ſic ornatum inſpiceretur. *d. l.* 38. §. 11.

XII.

12. In the Sale of one of two things, the choice belongs to the Seller.

If a Sale is made of one or other of two things, as of one of two Horſes, without mentioning whether the choice ſhall belong to the Seller, or Buyer, the Seller may give which of the two he pleaſes[o]. For he is in the place of a Debtor, and conſequently may give that which is of leaſt value[p].

[o] Si emptio ita facta fuerit, eſt mihi emptus Stichus, aut Pamphilus: in poteſtate eſt venditoris, quem velit dare, ſicut in ſtipulationibus. *l.* 34. §. 6. *ff. de contr. empt.*

[p] *See the fifteenth Article of the ſecond Section of the Title of Covenants; and the ſeventh Article of the ſeventh Section of this Title.*

XIII.

13. Sale of a thing belonging to another perſon.

Since it often happens that the Poſſeſſors are not the right Owners of what they poſſeſs; and that likewiſe the Purchaſers may not know whether the Sellers are, or are not, the true Owners of the things which they ſell; it is natural that one ſhould have power to ſell a thing of which he is not Maſter; and the Sale ſubſiſts till the true Owner makes his right appear, and diſſolves the Sale[q].

[q] Rem alienam diſtrahere quem poſſe nulla dubitatio eſt: nam emptio eſt & venditio, ſed res emptori auferri poteſt. *l.* 28. *ff. de contr. empt.*

SECT. V.

Of the PRICE.

The CONTENTS.

1. *The Price of the Sale can be nothing elſe but Money.*
2. *If inſtead of the Price agreed on, the Seller*

Seller receives another thing in Payment.
3. *One or more Prices of one and the ſame Sale.*
4. *Price uncertain, and unknown.*
5. *The Price of Sales is arbitrary.*

I.

1. The Price of the Sale can be nothing elſe but Money.

THE Price of the Sale can never be any other thing than Current Money, which makes the Eſtimate of the thing ſold; and if for the Price any other thing is given, or any work done; it will be either an Exchange, or ſome other Contract, but not a Sale[a].

[a] Emptionem rebus fieri non poſſe pridem placuit. *l. pen. C. de rer. perm.*

Pretium in numerata pecunia conſiſtere debet. §. 2. *inſt. de empt. & vend.*

II.

2. If inſtead of the Price agreed on, the Seller receives another thing in payment.

Altho' a Sale cannot be made but by fixing the Price in Current Money, yet the Contracters may by the ſame Contract agree to give in payment of the Price of the Sale, either Moveables, or Debts, or other Effects. And in this caſe there are as it were two Sales, which it is neceſſary to diſtinguiſh. The firſt is, where the Price is not paid in ready Money; and the ſecond, is that in which he who owes the Price, is as it were the Seller of that which he gives to diſcharge himſelf of the Price[b]. But altho' there are two Sales in effect which are tranſacted between the ſame perſons; yet to avoid the multiplicity of acts, they are conſidered as one only act, in which the two Sales are confounded, the ſecond Sale being eclipſed under the firſt. Thus, by contracting the Ideas which diſtinguiſh theſe Sales, the two are taken for one alone[c]. Becauſe it happens that the ſame Sum of Money makes the Price of both Sales, and that each Buyer diſcharges himſelf of the Price of that which is ſold to him without giving Money, by giving, in lieu of the Price, the thing which he ſells on his part.

[b] *This is a conſequence of the preceding Article.*

[c] Nam celeritate conjungendarum inter ſe actionum, unam actionem occultari. *l.* 3. §. 12. *ff. de donat. inter vir. & ux.*

There happens often ſuch like occaſions of confounding two acts into one, even among divers Contracters. Thus, for example, if any perſon having a mind to give to another a Sum of Money, orders the Money to be carried to him by a third perſon, who is his Debtor; the ſame act of the delivery of the Money which this Debtor makes to the Donee, will conſummate both the Deed of Gift, and the Payment of the Debt. V. d. §. 12.

III.

3. One or more Prices of one and the ſame Sale.

There is only one Price of the Sale, when one thing alone is bought, or many things by the bulk. But when things are bought by Number, Weight, or Meaſure, each Piece, each Pound, each Buſhel hath its price, according to the agreement[d].

[d] *See the ſixth Article of the fourth Section, and the Law which is there quoted.*

IV.

4. Price uncertain, and unknown.

The Price of the Sale is almoſt always certain and known; but it may happen that it may be uncertain and unknown: as if it is referred to a third perſon to adjuſt the Price, or if the Buyer gives for the Price, the Money which he ſhall make of ſuch a buſineſs. In theſe and ſuch like caſes, the Price will not be certain and known, but by the Eſtimation, or other Event, which ſhall fix it[e].

[e] Certum eſſe pretium debet. Alioqui, ſi inter aliquos ita convenerit, ut quanti Titius rem æſtimaverit, tanti ſit empta —— ſiquidem ille qui nominatus eſt, pretium definierit, tunc omni modo ſecundùm ejus æſtimationem & pretium perſolvatur, & res tradatur. §. 1. *inſtit. de empt. & vend. l. ult. C. de contr. empt.* Hujuſmodi emptio, quanti tu eum emiſti, quantum pretii in arca habeo, valet. Nec enim incertum eſt pretium tam evidenti venditione. Magis enim ignoratur, quanti emptus ſit, quam in rei veritate incertum eſt. *l.* 7. §. 1. *ff. de contr. empt. v. l.* 7. §. 1. & §. *ult. ff. de contr. empt.* See the eleventh Article of the third Section of Covenants.

V.

5. The Price of Sales is arbitrary.

There are ſome Commodities of which the Price may be regulated for the Publick Good; as it is, for example, in Bread, and other things in ſome Countries. But ſetting aſide theſe Regulations, the Price of things is undetermined. And ſince it ought to be differently regulated according to the different qualities of the things, and according to the plenty or ſcarcity both of Money, and of the Commodities, the eaſineſs or difficulty of the Carriage, and the other cauſes which increaſe or diminiſh the value; this uncertainty of the Price makes an extent of more and of leſs, which requires that the Seller and Buyer ſhould adjuſt between themſelves the Price of the Sale. And the injuſtices in the Price are not reſtrained, except in ſo far as has been remarked in the beginning of the third Section[f].

[f] Cura carnis omnis ut juſto pretio præbeatur, ad curam præfecturæ pertinet. *l.* 1. §. 11. *ff. de off. præf. urbi.*

Hoc ſolum quod paulo minore pretio, fundum venditum ſignificas, ad reſcindendam venditionem invalidum eſt. *l.* 8. *C. de reſc. vend.*

SECT. VI.

Of CONDITIONS, and other Pacts, in a Contract of Sale.

The CONTENTS.

1. *We may add to the Contract of Sale what Pactions we will.*
2. *Effect of the condition on which the Sale depends.*
3. *Effect of the Condition which diſſolves the Sale.*
4. *The Earneſt hath its effect according to agreement.*
5. *The effect of the Earneſt, when there is nothing ſaid of it in the Contract.*

Clauſe of Nullity.
Power of Redemption.

I.

1. We may add to the Contract of Sale what Pactions we will. WE may add to the Contract of Sale, as well as to all other Contracts, all manner of Covenants, and Pactions that are lawful. Such as Conditions, Clauſes of Nullity, a Power of Redemption, and others[a].

[a] *See the ſecond Article of the ſecond Section, and the firſt Article of the fourth Section of the Title of Covenants.*

Of CONDITIONS.

THE Rules touching Conditions in Sales, are the ſame with thoſe which have been explained in the fourth Section of the Title of Covenants[b], to which we need only add the following Rules.

[b] *See the ſixth Article, together with thoſe that follow, of the fourth Section of the Title of Covenants.*

II.

2. Effect of the condition on which the Sale depends. In the Sales whoſe accompliſhment depends on the event of a Condition, all things remain in the ſame ſtate, as if there had been no Sale, until the Condition comes to paſs. Thus, the Seller remains Maſter of the thing, and the Fruits are his. But the Condition being fulfilled, the Sale is perfected, and hath the effects which it ought to produce[c].

[c] Conditionales venditiones, tunc perficiuntur, cum impleta fuerit conditio. *l. 7. ff. de contr. empt.* Fructus medii temporis venditoris ſunt. *l. 8. ff. de per. & com.*

III.

3. Effect of the Condition which diſſolves the Sale. In Sales which are accompliſhed, and which may be diſſolved by the event of a condition, the Buyer remains Maſter until that event. And in the mean while he poſſeſſes, enjoys, and makes the Fruits his own; and he preſcribes likewiſe, but his Preſcription is of no prejudice to the Right of the perſon who is to become Maſter by the event of the Condition[d].

[d] Si hoc actum eſt, ut meliore allata conditione diſcedatur, erit pura emptio quæ ſub conditione reſolvitur. *l. 2. ff. de in diem add.* Ubi igitur ſecundùm quod diſtinximus pura venditio eſt, Julianus ſcribit, hunc, cui res in diem addicta eſt, & uſucapere poſſe, & fructus, & acceſſiones lucrari. *d. l.* § 1.

Of EARNEST.

IV.

4. The Earneſt hath its effect according to agreement. THE Earneſt Penny is at it were a Pledge which the Buyer gives to the Seller in Money, or ſome other thing; whether it be to ſignify more certainly that the Sale is perfected[e]: or to be in place of payment of a part of the Price: or to regulate the Damages to be recovered of the Party who ſhall fail to perform the articles of the Sale. Thus the Earneſt given in the Sale has the effect which the parties have agreed it ſhould have.

[e] Quod ſæpe arrhæ nomine pro emptione datur non eo pertinet, quaſi ſine arrha conventio nihil proficiat: ſed ut evidentiùs probari poſſit conveniſſe de pretio. *l. 35. ff. de contr. empt.* Quod arrhæ nomine datur argumentum eſt emptionis & venditionis contractæ. *inſt. de empt. & vend.* See the following Article.

V.

5. The effect of the Earneſt, when there is nothing ſaid of it in the Contract. If there be no expreſs agreement which regulates the effect which the Earneſt ſhall have, againſt the party who ſhall fail in performing the Contract of Sale; if it is the Buyer, he ſhall loſe his Earneſt. And if it is the Seller, he ſhall give back the Earneſt, with as much more[f].

[f] Is qui recuſat adimplere contractum, ſi quidem eſt emptor, perdit quod dedit: ſi verò venditor, duplum reſtituere compellitur: licet ſuper arrhis nihil expreſſum eſt. *inſt. de empt. & vend.* In poſterum ſi quæ arrhæ ſuper facienda emptione cujuſcunque rei datæ ſunt, ſive in ſcriptis, ſive ſine ſcriptis, licet non ſit ſpecialiter adjectum, quid ſuper iiſdem arrhis non procedente contractu fieri oporteat: tamen & qui vendere pollicitus eſt, venditionem recuſans, in duplum eas reddere cogatur: & qui emere pactus eſt, ab emptione recedens, datis à ſe arrhis cadat, repetitione earum deneganda. *l. 17. in f. C. de fid. inſtr.*

Of the Clauſe of NULLITY in caſe of Non-Payment.

Clauſe of Nullity. IT is an uſual Agreement made in Contracts of Sale, that if the Buyer does not pay the Price at the time appointed,

pointed, the Sale ſhall be void. And ſince this Agreement makes a part of the matter of the Diſſolution of Sales, it ſhall be explained in the twelfth Section.

Of the Power of REDEMPTION.

Power of Redemption. THE Power of Redemption is an Agreement, by which the Seller is at liberty to take back the thing, he reſtoring the Price. And this is another way of diſſolving the Sale, which ſhall be explained in the ſame place.

SECT. VII.

Of the changes of the thing ſold; and how the Loſs, or Gain accruing thereby belongs to the Seller, or to the Buyer.

Change of the thing ſold. IT often happens that before the Sale is intirely conſummated, ſeveral events change the ſtate of the thing ſold; make it better, or worſe, augment or diminiſh it; and even that the thing periſhes, either thro' its own nature, or by ſome caſualty. And ſince theſe changes occaſion Profit, or Loſs, which regards differently either the Seller, or Buyer; proviſion is made for adjuſting that matter by the Rules which follow.

The CONTENTS.

1. *The changes before the accompliſhment of the Sale, regard the Seller.*
2. *The changes after the Sale regard the Buyer.*
3. *The changes which happen after the Seller is in delay for not delivering the thing, are at his peril.*
4. *If both are in delay.*
5. *Of things ſold by Number, Weight, or Meaſure.*
6. *Sale upon trial.*
7. *If in the Sale of one of two things, the one happens to periſh.*
8. *If the thing periſhes before the event of the condition which ought to accompliſh the Sale.*
9. *If in the ſame caſe the thing is diminiſhed, or becomes better.*
10. *It does not depend on the perſon who ought to perform a condition, to take advantage by his not performing it.*
11. *Loſs occaſioned by the fault of one of the Contracters.*
12. *The Fruits belong always to him who is Maſter at the time they are gathered.*
13. *If the parties have regulated by agreement, on whom the loſs ſhall fall, they muſt hold to that.*
14. *What is to be conſidered, in order to judge who ought to bear the loſs, and reap the profit.*

I.

1. The changes before the accompliſhment of the Sale, regard the Seller. ALL the changes which happen before the Sale is accompliſhed, regard the Seller, becauſe the thing is ſtill his, and the Buyer has no right to it. And as the Seller is at liberty not to finiſh and perfect the Sale, if the thing happens to be better, ſo likewiſe the Buyer has the ſame liberty, if there happens a change which makes it worſe[a].

II.

2. The changes after the Sale, regard the Buyer. All the changes which happen after the Sale is accompliſhed, regard the Buyer. And if the thing periſhes before the delivery, he bears the loſs, and is nevertheleſs bound to pay the Price. And he reaps the profit likewiſe of all the changes, which make the thing better[b]. For after the Sale, the thing is look'd upon to be his, and the Seller keeps poſſeſſion of it only with the Buyer's conſent, and with deſign to reſtore it to him.

III.

3. The changes which happen after If the changes which diminiſh the thing ſold, or which deſtroy it, between the time of Sale and the Delivery, hap-

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[a] Donec enim aliquid deeſt ex his, & pœnitentiæ locus eſt, & poteſt emptor, vel venditor, ſine pœna, recedere ab emptione, & venditione. *inſt. de empt. & vend.*

[b] Periculum rei venditæ ſtatim ad emptorem pertinet, tametſi adhuc ea res emptori tradita non ſit. §. 3. *inſt. de empt. & vend.* Cui neceſſe eſt, licet rem non fuerit nactus, pretium ſolvere. *d.* §. 3. Poſt perfectam venditionem, omne commodum & incommodum, quod rei venditæ contingit, ad emptorem pertinet. *l.* 1. *C. de per. & com.* Id quod, poſt emptionem fundo acceſſit per alluvionem, vel periit, ad emptoris commodum, incommodumque pertinet. *l.* 7. *ff. eod.* See the following Article.

Altho' the Buyer is not properly made Maſter of the thing till after the Delivery, he does nevertheleſs bear the loſſes which happen between the Sale and the Delivery. For the Contract being finiſhed, it has this effect, that the Buyer may force the Seller to deliver the thing ſold, and that the Seller poſſeſſes it only precariouſly, being under a neceſſity of delivering it up to the Buyer. See the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

the Seller is in delay for not delivering the thing, are at his peril. pen after the Seller is in fault for not delivering it, he bears the loſs, altho' the changes ſhould happen without any fault of his, and even by pure chance[c]. And he loſes both the Thing, and the Price, which he ought to reſtore, if he had received it. For if the thing had been delivered, the Buyer might have either ſold it, or prevented the loſs ſome other way; and in a word, the Seller ought to blame himſelf for his delay, in not delivering it in due time.

[c] Lectos emptos Ædilis, cùm in via publica poſiti eſſent, concidit——ſi neque traditi eſſent, neque emptor in mora fuiſſet, quominus traderentur, venditoris periculum erit. *l.* 12. *&* 14. *ff. de per. & com. v. l. ult. C. eod.*

Si ſervus petitus, vel animal aliud demortuum ſit ſine dolo malo, & culpa poſſeſſoris, pretium non eſſe præſtandum plerique aiunt. Sed eſt verius, ſi fortè diſtracturus erat petitor, ſi accepiſſet, moram paſſo debere præſtari: nam ſi ei reſtituiſſet, diſtraxiſſet, & pretium eſſet lucratus. *l.* 15. §. *ult. ff. de rei vindic.*

See the tenth Article of the third Section of a *Depoſitum*, and the ſecond Article of the fourth Section of the Title of Damages occaſioned by faults.

IV.

4. *If both are in delay.* If the delivery of the thing being delay'd by the fault both of the Seller and Buyer, there happens a change which leſſens the thing ſold, or which deſtroys it altogether; the Buyer cannot charge the Seller with delay, ſince he himſelf being in delay, either by reaſon of his abſence, or becauſe of ſome other hindrance, or even thro' his negligence, he cannot ſay that the Seller ought to have delivered the thing to him. But if the Seller having been in delay, offers afterwards to deliver the thing, matters being ſtill entire, and the Buyer delays to receive it; or if, on the contrary, the Buyer having been in delay, and afterwards uſing his diligence, the Seller does not deliver the thing; the changes which have happened during the laſt delay, will fall upon him who has been laſt in fault for the thing's not being delivered[d].

[d] Si & per emptorem, & venditorem mora fuiſſet, quominus vinum præberetur, & traderetur, perinde eſſe ait, quaſi ſi per emptorem ſolum ſtetiſſet: non enim poteſt videri mora per venditorem emptori facta eſſe, ipſo moram faciente emptore. *l.* 51. *ff. de act. empt. & vend.* Poſteriorem moram venditori nocere. Quod ſi per venditorem, & emptorem mora fuerit, Labeo quidem ſcribit emptori potius nocere, quàm venditori moram adhibitam. Sed videndum eſt, ne poſterior mora damnoſa ei ſit. Quid enim, ſi interpellavero venditorem, & non dederit, id quod emeram: deinde, poſteriore offerente illo, ego non acceperim? Sanè hoc caſu nocere mihi deberet. Sed ſi per emptorem mora fuiſſet, deinde cùm omnia in integro eſſent, venditor moram adhibuerit, cùm poſſet ſe exolvere, æquum eſt, poſteriorem moram venditori nocere. *l.* 17. *ff. de per. & comm. r. v.*

V.

5. *Of things ſold by Number, Weight, or Meaſure.* In the Sales of things which are ſold by Number, Weight, or Meaſure, all the diminutions, and all the loſſes which happen before the things are counted, weighed, or meaſured, fall upon the Seller; for until then, there is no Sale. And the changes which happen afterwards regard the Buyer[e].

[e] Priuſquam admetiatur vinum, prope quaſi nondum venit. Poſt menſuram factam, venditoris deſinit eſſe periculum. *l.* 1. §. 1. *ff. de per. & com.*

See the ſeventh Article of the fourth Section.

VI.

6. *Sale upon trial.* If a thing is ſold upon trial for a certain time, on condition that it ſhall not be ſold, but in caſe it pleaſes the Buyer; all the changes, and the profit or loſs which happen before, or during the time of trial, the Sale not being as yet accompliſhed, will accrue to the Seller, who is ſtill the Maſter[f].

[f] Si mulas tibi dedero, ut experiaris: & ſi placuiſſent emeres, ſi diſplicuiſſent, ut in dies ſingulos aliquid præſtares, deinde mulæ à graſſatoribus fuerint ablatæ, intrà dies experimenti, quid eſſet præſtandum? Utrùm pretium & merces, an merces tantùm? Et ait Mela, intereſſe utrùm emptio jam erat contracta, an futura, ut ſi facta, pretium petatur, ſi futura, merces petatur. *l.* 20. §. 1. *ff. de præſc. verb. d. l. in princ.* Si quem quæſtum fecit is qui experiendum quid accepit, veluti ſi jumenta fuerint, eaque locata ſint, idipſum præſtabit ei qui experiendum dedit. Neque enim ante eam rem quæſtui cuique eſſe oportet, priuſquàm periculo ejus ſit. *l.* 13. §. 1. *ff. commod.*

VII.

7. *If in the Sale of one of two things, the one happens to periſh.* If of two things one is ſold, whether the choice be left to the Seller, or Buyer, and after the Sale one of the two periſhes, during the delay regulated for the choice; the Seller is bound to give the other, altho' it ſhould happen to be the beſt; for he owes one of the two. And if both periſh, the Buyer owes nevertheleſs the Price; for had it not been for this Engagement, the Seller might have rid himſelf of both the things; and that which the Buyer was to have had, is loſt to him[g].

[g] Si emptio ita facta fuerit, eſt mihi emptus Stychus aut Pamphilus; in poteſtate eſt venditoris quem velit dare, ſicut in ſtipulationibus: ſed uno mortuo, qui ſupereſt, dandus eſt. Et ideo prioris periculum, ad venditorem, poſterioris ad emptorem reſpicit. Sed & ſi pariter deceſſerunt, pretium debebitur: unus enim utique periculo emptoris vixit. Idem dicendum eſt etiam ſi emptoris fuit arbitrium, quem vellet habere. *l.* 34. §. 6. *ff. de contr. empt.*

VIII.

8. If the thing periſhes before the event of the condition which ought to accompliſh the Sale.

In the Sales of which the accompliſhment depends on a condition, if the thing ſold periſhes before the event of the condition, the loſs ſhall be the Seller's, although the condition ſhould come to paſs afterwards. For he was ſtill the Maſter of it, and the thing being deſtroyed, it cannot any more be ſold. And in fine, it was underſtood by the Contracters, that that was only ſold which ſhould be in being at the time that the condition ſhould come to paſs[h].

[h] Si ante nuptias mancipia æſtimata deperierint: an mulieris damnum ſit? Et hoc conſequens eſt dicere. Nam cùm ſit conditionalis venditio, pendente autem conditione mors contingens extinguat venditionem, conſequens eſt dicere mulieri periſſe, quia nondum erat impleta venditio. *l.* 10. §. 5. *ff. de jur. dot.*

IX.

9. If in the ſame caſe the thing is diminiſhed, or becomes better.

If in the ſame caſe the thing is not deſtroyed, but diminiſhed; and the condition comes to paſs, which accompliſhes the Sale; the loſs ſhall fall upon the Buyer[i]. For the Seller has been obliged to keep the thing for him, until the event of the condition. And ſeeing this event makes the Buyer Maſter of the thing, he ought to bear this loſs in the ſame manner as he would have reaped the benefit of the changes, which would have made the thing better[l].

[i] Si extet res (vendita ſub conditione) licèt deterior effecta, poteſt dici eſſe damnum emptoris. *l.* 8. *ff. de per. & com. r. v.*

[l] Secundùm naturam eſt commoda cujuſque rei, eum ſequi, quem ſequuntur incommoda. *l.* 10. *ff. de reg. jur.*

X.

10. It does not depend on the perſon who ought to perform a condition, to take advantage by his not performing it.

When a condition is put in favour of one of the Contracters, or that it may turn to his advantage, if this condition depends on the deed of the other party, either in part or in whole, the perſon who ought to fulfil the condition is not at liberty to fail in the performance of this Engagement, that he may take advantage therefrom to the prejudice of the Party whoſe intereſt it is that the condition be fulfilled. Thus, for example, if in a Sale made on condition that the thing ſhould be delivered on a certain day, and in a certain place, it happens in the mean while that the thing increaſes in price, it does not depend on the Seller to annul the Sale, and to keep that which he had ſold, by failing to deliver it on the day, and at the place appointed, that he may make advantage of this change; for it was the Buyer's intereſt that this condition ſhould be fulfilled. And if, on the contrary, the thing diminiſhes in price, it does not depend on the Buyer to hinder the effect of the Sale, by abſenting himſelf at the time, and from the place where the delivery was to be made; becauſe it was the Seller's intereſt that the Goods ſhould be delivered. Thus, in a Sale made on condition that if the Buyer does not pay at the time fixed, the Sale ſhall be void; if it happen in the mean while that the thing diminiſhes in its price, it does not depend on the Buyer to annul the Sale by failing to make payment, that he may thereby avoid taking the thing, and bearing the loſs: For this condition was in favour of the Seller, and not of the Buyer[m].

[m] Quod favore quorundam conſtitutum eſt, quibuſdam caſibus ad læſionem eorum nolumus inventum videri. *l.* 6. *C. de legib.*

Nam legem commiſſoriam, quæ in venditionibus adjicitur, ſi volet venditor exercebit, non etiam invitus. *l.* 3. *ff. de leg. commiſſ.* See the nineteenth Article of the fourth Section of Covenants.

XI.

11. Loſs occaſioned by the fault of one of the Contracters.

In all ſorts of caſes, where the thing ſold periſhes, or becomes worſe by the fault of the Seller, or Buyer, he whoſe fault has occaſioned the loſs, ought to bear it, and to blame himſelf for it[n].

[n] Quod quis ex culpa ſua damnum ſentit, non intelligitur damnum ſentire. *l.* 203. *ff. de reg. jur.*

XII.

12. The Fruits belong always to him who is Maſter at the time they are gathered.

We muſt not reckon among the changes which happen to things ſold under condition, the Fruits and Revenues which they may produce. For they belong always to the perſon who is Maſter of the thing at the time they are gathered, although it happen that by the event of the condition he is no longer Maſter of it. Thus in the Sales of which the accompliſhment depends on a condition, the Fruits do in the mean while belong to the Seller; altho' if the condition happens which ought to accompliſh the Sale, the Loſs and the Gain, which may fall out in the mean while by the changes of the thing ſold, belong to the Buyer. And in the Sales which are perfected, and which may be annulled, by the event of a Condition, the Fruits in the mean while belong to the Buyer; altho' if the condition happens which diſſolves the Sale, the Loſs and Gain which may accrue from the changes of the thing ſold, regard the Seller[o]. Becauſe in all theſe caſes, the changes that happen to the thing regard the perſon who is to be Maſter of it, and he ought to have it in the condition in which it is; but the Fruits and other Revenues which fell due before the event of the Condition, having been ſeparated from the thing ſold, they remain with him who was at that time Maſter of the thing.

[o] Si quidem hoc actum eſt ut meliore allata conditione, diſcedatur; erit pura emptio, quæ ſub conditione reſolvitur. Sin autem hoc actum eſt, ut perficiatur emptio, niſi melior conditio offeratur, erit emptio conditionalis. Ubi igitur ſecundum quod diſtinximus pura venditio eſt, Julianus ſcribit, hunc cui res in diem addicta eſt, & uſucapere poſſe, & fructus, & acceſſiones lucrari. *l.* 2. *ff. de in diem add.* Ubi autem conditionalis venditio eſt, negat Pomponius uſucapere eum poſſe, nec fructus ad eum pertinere. *l.* 4. *eod. See the text of the twentieth Law*, §. 1. ff. de præſcr. verb. *already quoted on the ſixth Article of this Section.*

XIII.

13. *If the parties have regulated by agreement, on whom the Loſs ſhall fall, they muſt hold to that.*

If there is any Agreement in the Contract of Sale which derogates from the preceding Rules, and which obliges either the Seller, or Buyer, to bear the loſs which naturally did not belong to him; they muſt ſtick to the Agreement[p]. For every one may renounce what is for his own advantage[q].

[p] Si venditor ſe periculo ſubjecit, in id tempus periculum ſuſtinebit, quoad ſe ſubjecit. *l.* 1. *ff. de per. & com.* Si in venditione conditionali, hoc ipſum conveniſſet, ut res periculo emptoris ſervaretur, puto pactum valere. *l.* 10. *eod.*

[q] Omnes licentiam habent, his quæ pro ſe introducta ſunt, renuntiare. *l.* 29. C. *de pact. l.* 41. *ff. de min.* See the fourth Article of the fourth Section of Covenants.

XIV.

14. *What is to be conſidered, in order to judge who ought to bear the loſs, and reap the profit.*

It follows from all theſe Rules concerning the changes that happen to the thing ſold, that in order to judge who ought to bear the Loſs, or reap the Profit, it is neceſſary to conſider what the thing is which is ſold, and what enters into the Sale: if the Sale be perfected, or not: if it is pure and ſimple, or conditional: if the Sale being once accompliſhed, it is afterwards diſſolved: if there is any delay in the delivery: if any Fault has given occaſion to the change: and the other circumſtances, in order to know by the ſtate of things, who was the Maſter at the time of the change, or who, without being Maſter, ought to bear the Loſs, or reap the Profit[r].

[r] Neceſſariò ſciendum eſt, quando perfecta ſit emptio, tunc enim ſciemus cujus periculum ſit. Nam perfecta emptione periculum ad emptorem reſpiciet; & ſi id quod venierit appareat quid, quale, quantum ſit, ſit & pretium, & purè venit, &c. *l.* 8. *ff. de per. & com.* See the eleventh Article of the firſt Section of the Loan of Money.

SECT. VIII.

Of Sales that are null.

What Sales are Null.

BY Sales that are null is meant thoſe which never did ſubſiſt; whether it be becauſe of the Incapacity of one of the Contracters; or becauſe the thing ſold is not Vendible, or thro' ſome Vice in the Sale, as if it be contrary to Law and Good Manners: or thro' ſome defect, as if the Sale ought not to take place, but upon the exiſtence of a Condition which does not happen.

All the Cauſes which annul Covenants in general, do likewiſe annul Sales, purſuant to the Rules which have been explained in the fifth Section of the Title of Covenants; and it will be ſufficient here to take notice of the Rules that are peculiar to Nullities in Sales.

[*In* England, *no Mannors, Lands, Tenements, or other Hereditaments, can paſs, alter or change, from one to another, whereby any ſtate of Inheritance or Freehold ſhall be made, by Bargain and Sale, unleſs it be by Writing indented, ſealed and inrolled in one of the King's Courts of Record at* Weſtminſter. Stat. 27. Hen. 8. cap. 16.]

Of Perſons who can neither ſell nor buy.

IT was forbid by the *Roman* Law, to thoſe who were in any publick Office, to purchaſe in the places where they exerciſed their Juriſdiction, either Lands, or even Moveables, during the time of their Adminiſtration, without expreſs leave to do it; except it was in what they conſumed for Diet and Cloathing. And the ſame Prohibitions extended likewiſe to their Domeſticks[a]. But in *France*, Offices being perpetual, the Officers may purchaſe of any perſons that are willing to ſell; and ſuch like Prohibitions with reſpect to them are limited to the Purchaſes of Eſtates, or Rights, litigated in the Courts of which they are Judges, and to other Acquiſitions which they may have extorted by Concuſſion, or any other Miſdemeanor[b].

[a] *L. un. Cod. de contract. Jud. d. l.* §. 2. *&* 3. *l.* 46. *l.* 62. *ff. de contra. empt. l.* 46. §. 2. *de jure fiſci.*

[b] *By the Ordinances of St.* Lewis *in* 1254, *of* Philip *the Fair in* 1320, *and of* Charles VI. *in* 1388. *it is prohibited to all Bailiffs and Seneſchals to purchaſe Immoveables, during the time of their Adminiſtration.*

By many Ordinances, it is prohibited to Officers, and Perſons of great Power and Authority, or who have any privilege of having their Cauſes tried only before certain Judges, to accept of Sales, or Aſſignments of Rights, *in order to carry the Parties from one Tribunal to another. And all Judges, Advocates and Proctors are likewiſe forbid to accept of Sales, or Aſſignments of litigious Rights. See the Ordinances of* Charles V. *in* 1356, *of* Francis I. *in* 1535. *Ch.* 12. *Art.* 23. *of* Orleans, *Art.* 54. *of* Lewis XII. *in* 1498. *Art.* 3. *and in* 1510. *Art.* 17. See likewiſe the ſecond Article of the third Section of Payments, and the Remark that is there made.

It is likewiſe proper to take notice here of the Prohibitions in the Ordinance of Orleans, *Art.* 109. *to Gentlemen, and Officers of Juſtice, to deal in Merchandizing, and to take Farms, either in their own Names, or in the Names of others for their behoof, under penalty to the Gentlemen, of forfeiting their Nobility; and to the Officers of Juſtice, of loſing their Places.*

See the fourth Article of the ſecond Section of the Vices of Covenants.

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9. *Things of which the Commerce is forbid.*
10. *Sales null through the default of a Condition.*
11. *Error in the Contracters.*
12. *Error in the qualities of the Thing ſold.*
13. *Fraud and Violence.*

I.

1. Tutors and Guardians cannot buy the Goods of thoſe who are committed to their care.

TUtors, Guardians, and other Adminiſtrators, can purchaſe nothing of the Goods of Minors, and other Perſons who are under their charge; neither directly in their own Names, nor by the interpoſition of other Perſons[a].

[a] Tutor rem pupilli emere non poteſt. Idemque porrigendum eſt ad ſimilia, id eſt, ad curatores, &c. *l.* 34. §. *ult. ff. de contr. empt.* Si (tutor) per interpoſitam perſonam, rem pupilli emerit, in ea cauſa eſt, ut emptio nullius momenti ſit, quia non bona fide videretur rem geſſiſſe. *l.* 5. §. 3. *ff. de auth. & conſ. tut.* Si filius tutoris vel quæ alia perſona juri ejus ſubjecta, emerit, idem erit atque ſi ipſe emiſſet. *d. l.* §. *ult.*

II.

2. Factors are under the ſame incapacity.

Factors, and thoſe who are entruſted with the Care of the Affairs of others, cannot purchaſe the Goods of thoſe whoſe affairs are committed to their management[b], unleſs they purchaſe them of the Owners themſelves.

[b] Idemque porrigendum eſt ad ſimilia, id eſt ad curatores procuratores, & qui negotia aliena gerunt. *d. l.* 34. §. *ult. ff. de contr. empt.*

III.

3. The Heir burdened with a Subſtitution.

The Heir or Executor who is burdened with a Subſtitution, cannot ſell the Eſtate which he poſſeſſes only on condition to reſtore it[c].

[c] Sancimus ſive lex alienationem inhibuerit, ſive teſtator hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolum dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam: ſed, &c. *l.* 7. *C. de reb. al. n. al.*

IV.

4. Minors, and others.

Minors, Madmen, Prodigals, and other Perſons who are debarred from the Adminiſtration of their Eſtates, cannot ſell them: and their Sales are null[d], if they have not been made in due form.

[d] Si ſciens emam ab eo cui bonis interdictum ſit—— dominus non ero. *l.* 26. *ff. de contr. empt.* Furioſus nullum negotium genere poteſt. §. 8. *inſt. de inutil. ſtip. Tit. ff. de reb. eor. qui ſub tut. vel cura.*

Of Things which cannot be ſold.

V.

5. Things Publick.

WHatever Nature and the Laws make common, either to all Mankind in general, or to a Kingdom, or a Town, cannot be ſold. Thus, Sea-Ports, Highways, publick Market-Places, with the Walls and Ditches of Towns, and all other Things which this common and publick Uſe incapacitates for Sale, cannot be ſold[e].

[e] (Emi non poſſunt) quorum commercium non ſit. Ut publica, quæ non in pecunia populi, ſed in publico uſu habeantur. Ut eſt Campus Martius. *l.* 6. *ff. de contr. empt.*

VI.

6. Things conſecrated; Immoveables belonging to Churches, and Corporations.

Things conſecrated, Immoveables belonging to Churches, and to Corporations, to Minors, Mad-men, declared Prodigals, and to other perſons who cannot diſpoſe of their Eſtates, cannot be ſold, nor otherwiſe alienated, unleſs for neceſſary cauſes; and the formalities preſcribed in theſe kinds of Sales, muſt be ſtrictly obſerved[f].

[f] Jubemus nulli poſthac Archiepiſcopo, &c. *l.* 14. *C. de ſacroſ. Eccl. Nov.* 7. *Nov.* 120. Emi non poſſunt ſacra. *l.* 6. *ff. de contr. empt. Tit. ff. de reb. eor. qui ſub tut. Tit. C. de præd. & al. reb. min. V. l.* 21. *C. de ſacr. Eccleſ.*

VII.

7. An Eſtate entailed.

An Eſtate entailed, cannot be ſold, whilſt the Entail laſts[g].

[g] *See the third Article of this Section.*

VIII.

8. *Dower Lands.* The Lands which a married Woman brings along with her in Dowry to her Huſband, cannot be ſold, in the places where it is prohibited to alienate them, unleſs it be in caſes that are excepted, and where the Rules preſcribed for ſuch Sales, are obſerved[h].

[h] *Titul. ff. de fundo dotal. l. un. in f. C. de rei uxor. act.* See the thirteenth Article of the firſt Section of Dowries.

IX.

9. *Things of which the Commerce is forbid.* Things of which the Commerce is prohibited by ſome Law, cannot be ſold: Such as Arms to an Enemy, and other Things of the like nature[i].

[i] *Tit. C. quæ res ven. non poſſunt, & tit. quæ res export. non debent.*

We have not ſet down here among the Rules, touching Things which cannot be ſold, that Rule of the Roman *Law, which prohibits the Alienation of things that are litigious, and annuls all ſuch Sales, to whomſoever they are made. Becauſe our Cuſtom has limited theſe Prohibitions to Sales made to Perſons, who by their Authority, or Quality, are able to create trouble to thoſe who pretend a Right to what is in diſpute; ſuch as the Judges, and other Officers who have a ſhare in the Adminiſtration of Juſtice.* V. tit. ff. & Cod. de litigioſ. and the Preamble to this Section.

Of the other Cauſes which annul Sales.

X.

10. *Sales null thro' the default of a Condition.* THE Sales of which the accompliſhment depends on a Condition, remain null, if the condition does not come to paſs; and it is the ſame thing if the thing ſold periſhes before the condition happens[l].

[l] Si ſub conditione res venierit, ſi quidem defecerit conditio, nulla eſt emptio. *l. 8. ff. de per. & com.*

XI.

11. *Error in the Contracters.* If the Seller and Buyer have erred, ſo that it appears that the Seller meant to ſell one thing, and the Buyer thought of purchaſing another, the Sale will be null[m]. And much more will it be ſo, if the Seller ſold knaviſhly one Commodity for another[n].

[m] Si error aliquis intervenit. ut aliud ſentiat putà qui emit, aut qui conducit: aliud qui cum his contrahit; nihil valet quod acti ſit. *l. 57. ff. de obl. & act. l. 9. ff. de contr. empt.* See the tenth Article of the fifth Section of Covenants.

[n] Si æs, pro auro veneat, non valet (venditio) *l. 14. in f. ff. de contr. empt.*

XII.

12. *Error in the qualities of the Thing ſold.* If the Error is not in the Subſtance of the thing ſold, but in its Qualities; we muſt judge by the circumſtances, whether the Sale ought to ſubſiſt, or not[o]. And this depends on the Rules which ſhall be explained in the eleventh Section.

[o] *V. totam l. 9. & ſeq. ff. de contr. empt.*

XIII.

13. *Fraud and Violence.* If the Sale has been tranſacted by Fraud, or Violence, it will be null; purſuant to the Rules which ſhall be explained in the Title of the Vices in Covenants[p].

[p] Si voluntate tua fundum tuum filius tuus venundedit, dolus ex calliditate atque inſidiis emptoris, argui debet: vel metus mortis, vel cruciatus corporis imminens detegi, ne habeatur rata venditio. *l. 8. C. de reſc. vend.*

SECT. IX.

Of the Reſciſſion of Sales, on account of the lowneſs of the Price.

1. *Damage in more than half the Price.*
2. *Time of Eſtimation.*
3. *In what manner the true Value is to be eſtimated.*
4. *The Buyer has it in his choice, to give back the thing, or make up the full Price.*
5. *This Reſciſſion is independent of Fraud.*
6. *Reſtitution of the Fruits againſt the perſon who knows he has no good title to the poſſeſſion.*

I.

1. *Damage in more than half the Price.* IN the Sales of Immoveables, if the Price be leſs than the half of the real Value, the Seller may get the Sale to be declared void[a].

[a] Rem majoris pretii, ſi tu vel pater tuus minoris diſtraxerit: humanum eſt, ut, vel pretium te reſtituente emptoribus, fundum venundatum recipias, authoritate judicis intercedente: vel, ſi emptor elegerit, quod deeſt juſto pretio recipias. Minus autem pretium eſſe videtur, ſi nec dimidia pars verì pretii, ſoluta ſit. *l. 2. C. de reſc. vend. l.* 8. *eod.*

See the fourth Article.

This Reſciſſion of Sales on account of the lowneſs of the Price, is limited to the Sales in which the Price does not amount to half the Value of the Lands; and the Civil Policy ſuffers the Sales, where the damage is leſs, to ſubſiſt; becauſe it is for the intereſt of the Publick not to diſturb the Commerce of Sales, by too frequent Reſciſſions.

II.

2. *Time of Eſtimation.* The true Price by which the Damage is to be eſtimated, is the Value of the thing at the time of the Sale[b].

[b] Pretii quod fuerat tempore venditionis. *l.* 8. *C. de reſc. vend.*

III. Since

III.

3. *In what manner the true value is eſtimated.* Since there is always more and leſs in the Price of things, the Eſtimation of the true Price by which we muſt examine if there is any Damage, ought to be made according to the higheſt Price that the thing might juſtly be worth at the time of Sale. Becauſe that Price is juſt, and we ought to favour the Seller who is wronged[c].

[c] *It is a conſequence of the Motive of Humanity which has made this Reſciſſion to be received.*

IV.

4. *The Buyer has it in his choice, to give back the thing, or make up the full Price.* If the Thing is ſold for leſs than the half of its juſt Price, the Buyer ſhall have it in his choice, either to reſtore the Thing, and to take back the Price which he had paid; or to make up the juſt Price, and to keep the Thing[d].

[d] Vel pretium te reſtituente emptoribus, fundum venundatum recipias —— vel ſi emptor elegerit, quod deeſt juſto pretio, recipias. *l. 2. C. de reſc. vend.*

V.

5. *This Reſciſſion is independent of Fraud.* This Reſciſſion on account of the lowneſs of the Price, is independent on the Honeſty or Knavery of the Buyer. And whether he knew, or was ignorant of the value of the thing ſold; it ſuffices for reſcinding the Sale, that the Price be leſs than the half of the true value[e].

[e] *d. l. 8. C. de reſc. vend.* Et ſi nullus dolus interceſſit ſtipulantis, ſed ipſa res in ſe dolum habet. *l. 36. ff. de verb. obl.* This is what is called *dolus re ipſâ.*

VI.

6. *Reſtitution of the Fruits againſt the perſon who knows he has no good title to the poſſeſſion.* If there is no other defect in the Sale beſides the Damage of more than the half of the juſt Price, the Buyer will be obliged to reſtore the Fruits only from the time of the Demand, or the Intereſt of the remaining part of the Price, if he keeps the thing. But if there were other Vices in the Sale, ſuch as Uſury, Fraud, or Violence; he will be bound to make Reſtitution of the Fruits even from the time of his Poſſeſſion of the Thing; deducting the Intereſt of the Price which he had paid for it[f].

[f] Si fundum veſtrum vobis per denuntiationem admonentibus, volentem ad emptionem accedere, quod diſtrahentis non fuerit, non rectè is contra quem preces funditis, comparavit, vel alio modo mala fide contraxit: tam fundum veſtrum conſtitutum probantibus, quàm fructus quos cum mala fide percepiſſe fuerit probatum, aditus præſes provinciæ reſtitui jubebit. *l. 17. C. de reſc. vend.*

SECT. X.

Of Eviction, and other Troubles to the Purchaſer.

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I.

1. Definition of Eviction. Eviction is the loſs which the Buyer ſuffers, either of the whole thing that is ſold, or of a part of it, becauſe of the right which a third perſon has to it[a].

[a] *This Definition reſults from the whole tenour of this Section.*

II.

2. Of the other Troubles. The other Troubles are thoſe, which, without touching the Property of the Thing ſold, diminiſh the Right of the Purchaſer; as if any one pretends a right to the Uſufruct of Lands that are ſold, to a Ground-Rent, a Service, or other charges of the like nature[b].

[b] *Theſe charges diminiſhing the right of the Purchaſer, are Troubles againſt which the Seller ought to warrant him.*

III.

3. Warranty. The Buyer from whom the thing is evicted, or who is troubled in his Poſſeſſion of it, or in danger of being ſo, has his recourſe againſt the Seller, who ought to warrant him: That is, to put a ſtop to the Eviction, and other Troubles, as ſhall be ſhewn in the following articles[c].

[c] Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l. 1. ff. de evict.*

See the third Article of the ſecond Section.

IV.

4. No Warranty againſt Violence, Caſualty, or the Act of the Sovereign. The Seller is not bound to warrant the Buyer againſt acts of meer Force and Violence, Caſualties, or againſt the Act of the Sovereign[d].

[d] Lucius Titius prædia in Germania trans Rhenum emit, & partem pretii intulit: cùm in reſiduam quantitatem hæres emptoris conveniretur, quæſtionem retulit, dicens has poſſeſſiones ex præcepto principali partim diſtractas, partim veteranis in præmia aſſignatas: quæro an hujus rei periculum ad venditorem pertinere poſſit. Paulus reſpondit, futuros caſus evictionis poſt contractam emptionem, ad venditorem non pertinere. Et ideo ſecundùm ea quæ proponuntur, pretium prædiorum peti poſſe. *l. 11. ff. de evict.*

V.

5. Two ſorts of Warranty; Warranty in Law, and Warranty by Deed. Warranty being a conſequence of the Contract of Sale, there is a firſt kind of Natural Warranty, which is called Warranty *in Law*, becauſe the Seller is obliged to it by Law, altho' the Sale make no mention of it. And it being in our power to augment or diminiſh our Natural Engagements by Covenants, there is a ſecond kind of Warranty, which is a Warranty *by Deed*, or *Covenant*, ſuch as the Seller and Buyer are pleaſed to regulate among themſelves[e].

[e] Imprimis ſciendum eſt in hoc judicio, id demum deduci quod præſtari convenit. Cùm enim ſit bonæ fidei judicium, nihil magis bonæ fidei congruit, quàm id præſtari, quod inter contrahentes actum eſt. Quòd ſi nihil convenit, tunc ea præſtabuntur, quæ naturaliter inſunt hujus judicii poteſtate. *l. 11. §. 1. ff. de act. empt. & vend.*

VI.

6. Warranty in Law. Warranty in Law, or Natural Warranty, is the Security which every Seller is bound to give, for maintaining the Buyer in the free Poſſeſſion and Enjoyment of the Thing ſold; and for putting a ſtop to Evictions, and other Troubles that ſhall be given to the Buyer by any perſon whatſoever, who ſhall pretend either a Right of Property, or any other Right in the thing ſold, by which the Right, which ought naturally to be acquired by the Sale, would be diminiſhed. And the Seller is obliged to this Warranty, altho' it be not ſtipulated by Covenant[f].

[f] Non dubitatur, etſi ſpecialiter venditor evictionem non promiſerit, re evicta ex empto competere actionem. *l. 6. C. de evict.*

Imprimis ipſam rem præſtare venditorem oportet. Id eſt, tradere, quæ res, ſi quidem dominus fuit venditor, facit & emptorem dominum. Si non fuit tantùm evictionis nomine, venditorem obligat. *l. 11. §. 2. ff. de act. empt. & vend.* Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l. 1. ff. de evict. v. l. 10. eod.* Ex empto actionem eſſe, ut habere licere emptori caveatur. *l. 11. §. 8. ff. de act. empt. & vend.* Ut emptori habere liceat, & non ſolùm per ſe, ſed per omnes. *l. 11. §. 17. ff. de act. empt. & vend.*

VII.

7. Warranty by Deed. Warranty by Deed or Covenant, is the Security which the Seller promiſes, either greater or leſſer than what he is bound to by Law, according as the Parties have agreed between themſelves. Thus, they may add to the Warranty in Law; as if it be agreed, that the Seller ſhould warrant the Buyer againſt the act of the Sovereign. And they may likewiſe reſtrain the Warranty in Law; as if it be agreed, that the Seller ſhould only warrant againſt his own proper deed, and not againſt the Rights of other perſons: or that he ſhall only reſtore the Price in caſe of Eviction, and not the Damages[g]. And all theſe Agreements have their Juſtice, in that the Buyers purchaſe at a cheaper or dearer rate, or upon other views: and in that the Purchaſer buys in effect only what is ſold, and ſuch as the Seller is willing to warrant it.

[g] Nihil magis bonæ fidei congruit, quàm id præſtari quòd inter contrahentes actum eſt. *l. 11. §. 1. ff. de act. empt. & vend.*

Qui autem habere licere vendidit, videamus quid debeat præſtare, & multùm intereſſe arbitror utrùm hoc polliceatur per ſe venienteſque à ſe perſonas non fieri, quominùs habere liceat, an verò per omnes:

nam ſi per ſe, non videtur id præſtare ne alius evincat. *d. l.* 11. §. 18. Si aperte in venditione comprehendatur, nihil evictionis nomine præſtatum iri, pretium quidem deberi, re evicta, utilitatem non deberi. *d.* §. 18. Niſi fortè ſic quis omnes iſtas ſupraſcriptas conventiones recipiet. *d.* §. 18.

VIII.

8. The Seller cannot be diſcharged from the Warranty againſt his own proper Deed.

The Seller cannot be diſcharged from the Warranty againſt his own proper fact and deed, not even by an expreſs Agreement; for it would be contrary to Good Manners that he ſhould be allowed to act a diſhoneſt part[h].

[h] Illud non probabis, dolum non eſſe præſtandum ſi convenerit. Nam hæc conventio contra bonam fidem, contraque bonos mores eſt. Et ideò nec ſequenda eſt. *l.* 1. §. 7. *ff. de pact.* Pacta quæ turpem cauſam continent, non ſunt obſervanda. *l.* 27. §. 4. *ff. de pact.*

IX.

9. Warranties regulated by particular Cuſtoms.

If beſides the Natural Warranty, and the Warranty by Agreement, there is any particular Cuſtom, or Uſage, in a place, which regulates any ſort of Warranty, the Seller ſhall be bound to ſuch Warranty[i].

[i] Quia aſſidua eſt duplæ ſtipulatio, idcircò placuit etiam ex empto agi poſſe, ſi duplam venditor mancipii non caveat. Ea enim quæ ſunt moris, & conſuetudinis, in bonæ fidei judiciis debent venire. *l.* 31. §. 20. *ff. de ed. ed.* Si fundus venierit ex conſuetudine ejus regionis, in qua negotium geſtum eſt, pro evictione caveri oportet. *l.* 6. *ff. de evict.*

X.

10. Damages for Eviction, and other Troubles.

If the Purchaſer loſes the Thing by Eviction, or is troubled in his Poſſeſſion, the Warranty ſhall have its effect[l], purſuant to the Rules explained in the articles which follow.

[l] Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l.* 1. *ff. de evict.*

XI.

11. Divers effects of the Troubles which are given to the Seller.

There are Troubles which of their nature diſſolve the Sale; as when the Proprietor evicts the thing from the Purchaſer[m]. Others there are which of their nature may diſſolve, or not diſſolve the Sale, according to the circumſtances. Thus, an Action in right of a Mortgage does not annul the Sale, if either the Seller or Purchaſer acquits the Debt; but if the Eſtate is adjudged to the Creditors, the Sale is diſſolved. And in all theſe caſes, whether it be that the Sale ſubſiſts, or is diſſolved, the Seller is anſwerable for the Damages according to the effect of the Trouble[n].

[m] Sive tota res evincatur, ſive pars. *l.* 1. *ff. de evict.*

[n] Ad id quod intereſt. *l.* 70. *ff. de evict.*

XII.

12. Reſtitution of the Price, with Damages.

If the Sale is diſſolved by an Eviction, the Seller is bound to reſtore the Price, and to indemnify the Buyer of the Damages which he may ſuſtain thereby[o], as ſhall be explained in the following Articles.

[o] Evicta re ex empto actio non ad pretium dumtaxat recipiendum, ſed ad id quod intereſt, competit. *l.* 70. *ff. de evict. l.* 60. *eod.*

XIII.

13. If the thing is not changed at the time of the Eviction.

If the thing ſold is in the ſame condition, and of the ſame value, at the time of the Eviction, as it was at the time of Sale, the Seller ſhall be bound only to reſtore the Price which he received, the charges of the ingroſſement of the Deed, thoſe of taking Poſſeſſion, and to make good the other Damages, if there are any; as if the Purchaſer of an Eſtate in Lands, which are evicted, had paid a Fine of Alienation[p].

[p] Si in venditione dictum non ſit, quantum venditorem pro evictione præſtare oporteat, nihil venditor præſtabit præter ſtipulam evictionis nomine, & ex natura ex empto actionis, hoc, quod intereſt. *l.* 60. *ff. de evict.*

XIV.

14. If the thing is diminiſhed at the time of the Eviction.

If, on the contrary, the thing ſold is waſted or diminiſhed, whether by its own Nature, as an old Houſe, or by a Caſualty, as if a Flood has carried away a part of an Eſtate; or if the thing being in the ſame condition, its value is diminiſhed by the effect of time; in all theſe caſes, and others of the like nature, where the thing ſold is worth leſs at the time of the Eviction, than the Price which the Buyer paid for it; he can recover againſt the Seller, only the preſent value of the Thing, ſuch as it is at the time of the Eviction[q]. For it is only in this preſent Value that the Buyer's loſs doth conſiſt. And as the diminution which preceded the Eviction, regarded the Buyer, he ought not to be a gainer by the Eviction.

[q] Si minor eſſe cœpit, damnum emptoris erit. *l.* 70. *ff. de evict.* Ut quanti ſua intereſt, actor conſequatur, ſcilicet ut melioris, aut deterioris agri facti cauſa, finem pretii, quo fuerat tempore diviſionis æſtimatus, diminuat vel excedat. *l.* 66. *in f. ff. eod.*

Ex mille jugeribus traditis ducenta flumen abſtulit. Si poſtea pro indiviſo, ducenta evincantur, duplæ ſtipulatio pro parte quinta, non quarta præſtabitur. Nam quod periit, damnum emptori non venditori attulit. *l.* 64. *eod.* Minuitur præſtatio, ſi ſervus deterior apud emptorem effectus ſit, cùm evincitur. *l.* 45. *ff. de act. empt. & vend.*

XV. But

XV.

15. If the thing has increaſed in Price.

But if the thing happens to be worth more at the time of the Eviction, than it was at the time of Sale, the Price having been augmented by the effect of time; the Seller ſhall be bound to the Buyer for what the thing is worth at the time of the Eviction. For he loſes in effect this Value, the thing being evicted from him; and his condition ought not to be made worſe by this event, againſt which the Seller is bound to warrant him.

[e] Quanti ſua intereſt actor conſequatur, &c. *l. 66. in f. ff. de evict.* See the preceding Article, where this Law is quoted.

Si quid ex his finibus evinceretur pro bonitate ejus emptori præſtandum. *l. 45. eod. l. 1. eod.*

XVI.

16. If the Purchaſer has made Improvements.

If the thing ſold happens to be improved at the time of the Eviction, by the deed of the Purchaſer, as if he has either planted or built on an Eſtate, he ſhall be indemnified by the Seller as to what the Eſtate would have been worth at the time of the Eviction, if it had not been improved: and he will moreover recover the Expences he has been at in improving it; and he cannot be turned out of Poſſeſſion, till he is reimburſed of the ſaid Expences, either by the perſon who evicts the Eſtate, for he ought not to reap the profit of thoſe Improvements; or by the Seller, who is bound to warrant him againſt the Eviction. And he ſhall have his Action both againſt the one and the other[f].

[f] Conſequeris (à venditore) quanti tuâ intereſt. In quo continetur etiam eorum perſecutio, quæ in rem emptam à te, ut melior fieret, erogata ſunt. *l. 9. C. de evict. l. 16. eod.*

Si mihi alienam aream vendideris, & in ea ego ædificavero, atque ita eam dominus evincit; nam quia poſſum petentem dominum, niſi impenſam ædificiorum ſolvat, doli mali exceptione ſummovere, magis eſt, ut ea res ad periculum venditoris non pertineat. *l. 45. §. 1. ff. de act. empt. & vend. l. 16. C. de evict.* See the following Articles, as alſo the twelfth and following Articles of the third Section of the Title of Dowries.

It is ſaid in this ninth Law, Cod. de evict. *that the Seller is bound to refund the charges of the Improvements to the Buyer from whom the Eſtate is evicted: And in this forty fifth Law,* §. 1. ff. de act. empt. & vend. *that this Reimburſement is to be made by the perſon who evicts, and ought not to fall upon the Seller. Which ought to be underſtood in the ſenſe explained in the Article: and in ſuch a manner, as that if, for example, he who would recover the Lands, pretends that he is not bound to refund the charges of the Improvements, or raiſes any other diſpute about them, the Purchaſer has his Action of Warranty againſt his Seller.*

XVII.

17. The regard which is to be had to the fruits which have been reaped, in order to make an Eſtimate of the Improvements.

In making an Eſtimate of the Charges laid out by the Purchaſer of an Eſtate on Improvements, as if he has made a Plantation in it, we muſt balance the Charges laid out, with the Fruits ariſing from the Improvements, and which have increaſed the Rent of the Eſtate. So that if the Fruits which the Purchaſer has reaped from the Improvements, acquit the Principal Sum, and Intereſt, of the Monies laid out on them, there will be no Reimburſement due; it being enough for the Buyer that he loſes nothing. And if the Fruits come ſhort of the Charges laid out on the Improvements; the Purchaſer will recover the Remainder of the Money he has laid out, both Principal and Intereſt[g]; for he ought to loſe nothing. But if the Fruits which the Purchaſer has reaped from the Improvements exceed the charges he has been at, he ſhall have the advantage of them.

[g] Super empti agri quæſtione diſceptabit Præſes Provinciæ: & ſi portionem diverſæ partis eſſe cognoverit, impenſas, quas ad meliorandam rem vos erogaſſe conſtiterit, habita fructuum ratione, reſtitui vobis jubebit. *l. 16. C. de evict.* Sumptus in prædium, quod alienum eſſe apparuit, à bonæ fidei poſſeſſione facti, neque ab eo qui prædium donavit, neque à domino peti poſſunt: verùm exceptione doli appoſita, per officium judicis, æquitatis ratione ſervantur: ſi fructuum ante litem conteſtatam perceptorum ſummam, excedant; etenim admiſſa compenſatione, ſuperfluum ſumptum, meliore prædio facto, dominus reſtituere cogitur. *l. 48. ff. de rei vind.* Emptor prædium, quod à non domino emit, exceptione doli poſita non aliter reſtituere domino cogetur, quàm ſi pecuniam creditori ejus ſolutam, qui pignori datum prædium habuit, uſurarumque medii temporis ſuperfluum, recuperaverit: ſcilicet ſi minus in fructibus ante litem perceptis fuit. Nam eos uſuris nobis duntaxat compenſari, ſumptuum in prædio factorum exemplo, æquum eſt. *l. 65. ff. de rei vindic.*

What is ſaid in this Article, that the Buyer ſhall reap the profit of the Fruits which are over and above his Reimburſement, ought to be underſtood of the Fruits which he reaped while he knew nothing of his Title being called in queſtion, and before any Legal Demand was made. See the third Section of the Title of Intereſt, Coſts and Damages, and Reſtitution of Fruits.

XVIII.

18. The circumſtances oblige us to regulate differently the difficulties relating to the Improvements.

If the charges laid out upon the Improvements are leſs than their value, the Purchaſer who is evicted will recover only the charges he has laid out. And if on the contrary the charges exceed the value of the Improvements, he will recover no more than the real value of the Improvements. But according to the circumſtances, it will be prudent in the Judge not to deprive the Buyer of reaſonable Charges, ſuch as the Maſter of the thing might, and ought to have laid out: and likewiſe not to overburden the Seller, or the perſon who evicts. And it is neceſſary to regulate theſe matters according as the nature of the Expences may require, or the quality of the Perſons, the neceſſity or uſefulneſs of the Improvements, and whatever elſe may be fit to be conſidered in the State of the things[u].

[u] In fundo alieno, quem imprudens emeras ædificaſti, aut conſeviſti: deinde evincitur, bonus judex variè ex perſonis, cauſiſque conſtituet. Finge & dominum eadem facturum fuiſſe, reddat impenſam, ut fundum recipiat: uſque eo duntaxat quò pretioſior factus eſt. Et ſi plus pretio fundi acceſſit, ſolum quod impenſum eſt. Finge pauperem, qui, ſi reddere id cogatur laribus, ſepulchriſque avitis carendum habeat? Sufficit tibi permitti tollere ex his rebus, quæ poſſis: cum ita ne deterior ſit fundus, quàm ſi initio non foret ædificatum. *l.* 38. *ff. de rei vind.*

Mediè igitur hæc à judice diſpicienda, ut neque delicatus debitor, neque oneroſus creditor audiatur. *l.* 25. *in f. ff. de pign. act.* See the nineteenth Article of the third Section of Mortgages.

XIX.

19. If the Seller has ſold the Goods of another perſon, knowing them to be ſuch.

If in the caſes of the preceding Article, the Seller had ſold that which belonged to another perſon, knowing it to be ſo, he would be bound to refund without any diſtinction all the charges laid out by the Purchaſer[x].

[x] In omnibus tamen his caſibus, ſi ſciens quis alienum vendiderit, omnino teneri debet. *l.* 45. §. 1. *in f. ff. de act. empt. & vend.*

XX.

20. He who is bound to warrant, cannot evict.

The perſons who are obliged in Warranty to the Buyer, cannot diſturb him in his Poſſeſſion, whatever right they may have to the thing ſold. Thus, the Heir of the Seller, being in his own right Proprietor of the Thing ſold, cannot evict it from the Buyer, whom he is obliged, by his quality of Heir, to warrant in his Poſſeſſion[y].

[y] Si alienum fundum vendideris & tuum poſteà factum petas, hac exceptione rectè repellendum. *l.* 1. *ff. de except. rei vend.* Sed & ſi dominus fundi hæres venditori exiſtat, idem erit dicendum. *d. l.* §. 1. *l.* 14. *C. de rei vind.*

XXI.

21. If the Purchaſer who is moleſted, does not give notice of it, or does any other prejudice to the condition of his Vouchee.

If the Purchaſer who is moleſted, ſuffers himſelf to be condemned by default, if he defends himſelf ill, if he does not give notice to the Seller of the Action that is brought againſt him, if he conſents to a Reference, or Tranſaction, without the Seller's knowledge, or if he in any other manner prejudices the condition of his Vouchee, he cannot demand Warranty againſt an Eviction, which he has no body to blame for but himſelf[z].

[z] Si ideò contrà emptorem judicatum eſt, quòd defuit, non committitur ſtipulatio. Magis enim propter abſentiam victus videtur, quàm quòd malam cauſam habuit. *l.* 55. *ff. de evict.* Si cùm poſſet emptor, auctori denuntiare, non denuntiaſſet, idemque victus fuiſſet, quoniam parùm inſtructus eſſet, hoc ipſo videtur dolo feciſſe. Et ex ſtipulatu agere non poteſt. *l.* 53. §. 1. *eod.* Si compromiſero, & contrà me data fuerit ſententia, nulla mihi actio de evictione danda eſt adverſus venditorem. Nulla enim neceſſitate cogente id feci. *l.* 56. §. 1. *eod. v. l.* 63. *eod.*

XXII.

22. The Buyer is only bound to give notice to the Seller of the diſturbance that is given him.

After that the Buyer has intimated to the Seller the Action that is brought againſt him, he is not bound either to defend it, or to Appeal, if he is condemned. And whether he defends it, or not, the Seller will remain bound to warrant him againſt the Event[a].

[a] Gaia Seia fundum à Lucio Titio emerat, & quæſtione mota fiſci nomine, auctorem laudaverat, & evictione ſecutâ fundus ablatus, & fiſco adjudicatus eſt venditore præſente. Quæritur, cùm emptrix non provocaverat, an venditorem poterit convenire? Herennius Modeſtinus reſpondit, ſive quòd alienus fuit, cùm veniret, ſive quòd tunc obligatus, evictus eſt, nihil proponi, cur emptrici adverſus venditorem actio non competat. *l.* 63. §. 1. *ff. de evict.*

XXIII.

23. Warranty may be demanded before the Purchaſer is moleſted.

If the Purchaſer diſcovers that the Seller has ſold him that which belongs to another perſon, and which the Seller knew to be ſuch, he may bring his Action againſt the Seller, altho' he be not as yet diſturbed in his poſſeſſion, to oblige him to remove the danger of the Eviction; and to recover the Damages which he may ſuffer by ſuch a ſale[b].

[b] Si ſciens alienam rem ignoranti mihi vendideris, etiam priuſquam evincatur utiliter me ex empto acturum putavit, in id quanti mea interſit, meam eſſe factam. Quamvis enim alioquin verum ſit, venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut ejus faciat: quia tamen dolum malum abeſſe præſtare debeat, teneri eum qui ſciens alienam, non ſuam ignoranti vendidit. Idem eſt maximè, ſi manumiſſuro, vel pignori daturo vendiderit. *l.* 30. §. 1. *ff. de act. empt. & vend.*

XXIV.

24. Warranty of Law in the Sale of Rights.

As in the Sales of Moveables and Immoveables, Natural Warranty obliges the Seller to deliver, and warrant a Thing which is in being; ſo likewiſe in the Sales, or Conveyances of Rights, ſuch as a Debt, an Action, an Inheritance, Natural Warranty obliges the Transferor to transfer a Right which ſubſiſts, a Debt which is due, an Inheritance which has fallen, an Action which may be proſecuted. And if the Transferor had not the Right which he ſells and transfers, the Sale would be null; and he would be bound to reſtore the Price, and to make good the Damages of the Buyer, or Transferee[c].

[c] Si hæreditas venierit ejus qui vivit, aut nullus ſit nihil eſſe acti, quia in rerum natura non ſit, quod venierit. *l.* 1. *ff. de hæred. vel act. vend.*

Cùm hæreditatem aliqus vendidit, eſſe debet hæreditas, ut ſit emptio. Nec enim alia emitur, ut in venatione & ſimilibus, ſed res: quæ ſi non eſt, non contrahitur emptio: & ideo pretium condicetur: *l.* 7. *ff. de hæred. vel act. vend.* Si quid in eam rem impenſum eſt, emptor à venditore conſequatur: & ſi quid emptoris intereſt. *l.* 8. *in f. & l.* 9. *eod.* Si nomen ſit diſtractum, Celſus libro nono Digeſtorum ſcribit, locupletem eſſe debitorem, non debere præſtare: debitorem autem eſſe præſtare, niſi aliud convenit. *l.* 4. *eod.* See the twenty ſixth Article.

XXV.

25. Warranty in the Sale of an Inheritance. The Heir who ſells and transfers an Inheritance, without ſpecifying the Goods contained in it, the Rights, or the Charges, is bound to warrant nothing, but his Quality, and Right of Heir; for it is that which he ſells. And he is not bound to warrant either any Charge, or any particular Goods, or any Right belonging to the Inheritance; unleſs he be expreſly obliged to it by Covenant[d]. But if he had already received any Profit from any thing belonging to the Inheritance, he ought to reſtore it to the perſon to whom he ſells the Inheritance, as being included in the Sale, unleſs he has expreſly reſerved it[e].

[d] Venditor hæreditatis ſatis dare de evictione non debet, cùm id inter ementem & vendentem agatur, ut neque ampliùs, neque minus juris emptor habeat, quàm apud hæredem futurum eſſet. *l.* 2 *ff. de hæred. vel. act. vend.*

Emptor hæreditatis rem à poſſeſſoribus ſumptu ac periculo ſuo perſequi debet. Evictio quoque non præſtatur in ſingulis rebus, cùm hæreditatem jure veniſſe conſtat, niſi aliud nominatim inter contrahentes convenit. *l.* 1. *C. de evict. l.* 14. *in f. & l.* 15. *de hæred. vel act. vend.* Sicuti lucrum omne ad emptorem hæreditatis reſpicit, ita damnum quoque debet ad eumdem reſpicere. *l.* 2. §. 9. *eod.*

[e] Hoc agi videtur, ut quod ex hæreditate pervenit, in id tempus quo venditio fit, id videatur veniſſe. *l.* 2. §. 1. *eod.*

XXVI.

26. Warranty in the Sale of a Debt. He who ſells and transfers a Debt, ought only to warrant that what he transfers is really and truly due to him. And he is not to warrant the Debtor to be ſolvent, unleſs he is obliged to it by the Conveyance he has made to him of the Debt[f]. For it is only a Right which he ſells.

[f] Si nomen ſit diſtractum, Celſus libro nono Digeſtorum ſcribit, locupletem eſſe debitorem, non debere præſtare: debitorem autem eſſe præſtare, niſi aliud convenit. *l.* 4. *ff. de hæred. vel act. vend.* Qui nomen, quale fuit, vendidit: dumtaxat ut ſit, non ut exigi etiam aliquid poſſit, & dolum præſtare cogitur. *l.* 74. *in f. ff. de evict.*

SECT. XI.

Of Redhibition, and Abatement of the Price.

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I.

1. Definition of Redhibition. BY Redhibition is meant, the diſſolution of the Sale becauſe of ſome fault or defect in the thing ſold, which is ſuch that it is ſufficient to oblige the Seller to take back the Thing, and to annul the Sale[a].

[a] Redhibere eſt, facere ut rurſus habeat, venditor, quod habuerit. Et quia reddendo id fiebat, idcirco redhibitio eſt appellata. *l.* 21. *ff. de ædil. ed.* Judicium dabimus ut redhibeatur. *l.* 1. §. 1. *in fine eod.*

II.

2. The Seller ought to declare the defects of the thing ſold. The Seller is obliged to declare to the Buyer the defects of the thing ſold, which are known to him[b]. And if he has not done it, either the Sale ſhall be annulled, or the Price diminiſhed, according to the quality of the defects; and the Seller ſhall be bound to make good the Damages of the Buyer, by the Rules which follow.

[b] Certiores faciant emptores quid morbi vitiive cuique ſit. *l.* 1. §. 1. *ff. de ædil. ed.* Eademque omnia cum mancipia venibunt palam rectè pronuntianto. *d.* §. 1.

III.

3. Diſtinction of the defects of the things ſold. Since it is not poſſible to reſtrain all the perfidious dealings of Sellers, and that the inconveniences would be too great to diſſolve, or call in queſtion Sales, for all manner of Defects in the things ſold; we conſider therefore only thoſe Defects which render the things altogether unfit for the uſe for which they are bought and ſold, or which diminiſh that uſe in ſuch a manner, or render it ſo inconvenient, that if they had been known to the Buyer, he would have either not bought them at all, or at leaſt not given ſo great a price for them. Thus, for Example, a Beam that is rotten, is unfit for the uſe for which it is deſigned. Thus a broken-winded Horſe does leſs Service, and it is too troubleſome to make uſe of him. And theſe defects are ſufficient to diſſolve a Sale. But if a Horſe is only dull in anſwering the Spur, this defect will make no manner of change. And in general, it depends on the Cuſtom of the place, if there is any ſuch touching this matter; or on the prudence of the Judge, to diſcern by the quality of the defects, whether the Sale ought to be diſſolved, or the Price leſſened, or whether any regard at all ought to be had to the defect[c].

[c] Res bona fide vendita, propter minimam cauſam inempta fieri non debet. *l.* 54. *ff. de contr. empt.* Si quid tale fuerit vitii, ſive morbi, quod uſum, miniſteriumque hominis impediat: id dabit redhibitioni locum: dummodo meminerimus, non utique quodlibet quam leviſſimum efficere, ut morboſus, vitioſuſve habeatur. *l.* 1. §. 8. *ff. de ædil. ed.* Qui fortaſſe, ſi hoc cognoviſſet, vel empturus non eſſet, vel minoris empturus eſſet. *l.* 39. *ff. de act. empt. & vend. l.* 35. *in f. ff. de contr. empt.*

IV.

4. Redhibition of Immoveables. In the Sales of Immoveables, there may be ground for Redhibition, or Abatement of the Price, if there are any defects which give occaſion to it. Thus, the Purchaſer of a Field may get the Sale diſſolved, if there ariſe out of that Ground malignant Vapours which render the uſe of it dangerous. Thus, for a Service which did not appear, and which the Seller did not declare, the Purchaſer may procure an Abatement of the Price[d], and even a Diſſolution of the Sale, if the Service is ſo very burdenſome as to give occaſion for it.

[d] Etiam in fundo vendito redhibitionem procedere nequaquam incertum eſt. Veluti ſi peſtilens fundus diſtractus ſit. Nam redhibendus erit. *l.* 49. *ff. de ædil. ed. l.* 4. C. *de ædil. act. l.* 2. §. 29. *ff. ne quid in loc. publ.* Si quis in vendendo prædio confinem celaverit, quem emptor ſi audiſſet, empturus non eſſet: teneri venditorem. *l.* 35. *in f. ff. de contr. empt.* Quoties de ſervitute agitur, victus tantum debet præſtare, quanti minoris emiſſet emptor, ſi ſciſſet hanc ſervitutem impoſitam. *l.* 61. *ff. de ædil. ed.*

V.

5. Altho' the Seller be ignorant of the defects, the Buyer has his Action. Altho' the defects of the thing ſold were unknown to the Seller, yet the Buyer may procure the Diſſolution of the Sale, or an Abatement of the Price, if theſe defects are ſuch as give occaſion for it[e]. For ſince people buy a thing only for its uſe, if it chance to have any defect which hinders this uſe, or leſſens it, the Seller ought not to reap the advantage of an apparent Value, which the thing ſold ſeemed to have, and yet had it not.

[e] Sciamus venditorem etiam ſi ignoravit ea quæ ædiles præſtari jubent, tamen teneri debere, nec eſt hoc iniquum. *l.* 1. §. 2. *ff. de ædil. ed. l.* 21. §. 1. *ff. de act. empt. & vend.*

Si quidem ignorabat venditor, ipſius rei nomine teneri. *l.* 45. *ff. de contr. empt.*

Si quidem ignorans fecit, id tantum ex empto actione præſtaturum quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem. *l.* 13. *ff. de act. empt. & vend.*

VI.

6. Damages, if the Seller is ignorant of the defects. In the ſame caſe where the defects of the thing ſold were unknown to the Seller, he ſhall be bound not only to take back the Thing, or to abate the Price; but likewiſe to indemnify the Buyer, as to the charges which the Sale has put him to; ſuch as Expences for Carriages, the Duties for Entry, or others of the like nature[f].

[f] Si quas acceſſiones (emptor) præſtiterit, ut recipiat. *l.* 1. §. 1. *ff. de ædil. ed l.* 23. §. 1. & 7. *eod.*

Debet (emptor) recipere pecuniam quam dedit. *l.* 27. *eod.*

Sed & ſi quid emptionis cauſâ erogatum eſt. *d. l.* 27.

Quid ergo ſi fortè vectigalis nomine datum eſt, quod emptorem fortè ſequeretur? dicemus hoc quoque reſtituendum. Indemnis enim emptor debet diſcedere. *d. l.* 27. *in fine.* See the following Article.

VII.

7. Damages, if the Seller knows the defects. If the Seller knew the defects of the thing ſold, he ſhall be bound not only in Damages according to the foregoing Rule; but he will farther be accountable for the conſequences which the defect of the thing may have occaſioned. Thus, he who had ſold a Flock of Sheep, which he knew to be infected with a contagious diſtemper, without declaring it, would be bound to make up the loſs of the other Sheep belonging to the Buyer, which had been infected with this contagious diſtemper. And it would be the ſame thing, if the Seller was obliged to know the defects of the thing ſold, altho' he pretended to be ignorant of them; as if an Architect who furniſhes Materials for a Building, had made uſe of ſuch as were not ſound and in good condition, he would be accountable for the Damage that ſhould enſue thereupon[g].

[g] Si ſciens reticuit, & emptorem decepit; omnia detrimenta quæ ex ea emptione emptor traxerit: præſtaturum ei. Sive igitur ædes vitio tigni corruerunt, ædium æſtimationem: ſive pecora contagione morboſi pecoris perierunt, quod interfuit idoneæ veniſſe erit præſtandum. *l.* 13. *ff. de act. empt. & vend. l.* 1. *C. de ædil. act.*

Si quidem ignorabat venditor, ipſius rei nomine teneri: ſi ſciebat, etiam damni quod ex eo contingit. *l.* 45. *ff. de contr. empt.*

Celſus etiam imperitiam culpæ adnumerandam libro octavo digeſtorum ſcripſit. *l.* 9. §. 5. *ff. loc.* Quod imperitia peccavit, culpam eſſe, quippe ut artifex conduxit. *d.* §. 5. See the ſecond Article of the eighth Section of Hiring and Letting to hire.

VIII.

8. *All things reſtored to the ſame condition by the Redhibition.*

If the defect of the thing ſold, gives occaſion to the Redhibition, and Diſſolution of the Sale, the Seller and Buyer ſhall be reſtored to the ſame condition, as if there had been no Sale at all. The Seller ſhall reſtore the Price, with the Intereſt of it, and ſhall reimburſe the Buyer of whatever he has laid out for the preſervation of the thing ſold, and on the other conſequences of the Sale, according to the foregoing Rules. And the Buyer ſhall reſtore the Thing to the Seller, together with all the profit which he has reaped from it. And in a word, all things ſhall be reciprocally reſtored on both ſides to the ſame condition they were in before the Sale[h].

[h] Si quid aliud in venditione acceſſerit: ſive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia reſtituat. *l.* 1. §. 1. *ff. de ædil. ed.* Jubent ædiles reſtitui & quod venditioni acceſſit, & ſi quas acceſſiones ipſe præſtiterit: ut uterque reſoluta emptione, nihil amplius conſequatur, quam non haberet, ſi venditio facta non eſſet. *l.* 23. §. 1. *eod.* Facta redhibitione, omnia in integrum reſtituuntur, perinde ac ſi neque emptio, neque venditio interceſſit. *l.* 60. *eod. d. l.* 23. §. 7. See the following Article.

IX.

9. *Change of the thing before the Redhibition.*

All the changes which happen to the Thing ſold, after the Sale, and before the Redhibition, whether the thing periſhes or is diminiſhed, without the fault of the Buyer, and of the perſons for whom he is anſwerable, affect the Seller, who is bound to take back the Thing; and he likewiſe reaps the profit of the changes which make the thing better[i].

[i] Si mortuum fuerit jumentum, pari modo redhiberi poterit, quemadmodum mancipium poteſt. *l.* 38. §. 3. *ff. de ædil. ed. l.* 31. §. 6. *eod.*

Si mancipium, quod redhiberi oportet, mortuum erit hoc quæretur, numquid culpa emptoris, vel familiæ ejus, vel procuratoris, homo demortuus ſit. *d. l.* 31. §. 11. *l.* 10. *ff. de reg. jur.*

X.

10. *If the defects are evident, or declared by the Seller.*

If the defects of the thing ſold are evident, as if a Horſe has his eyes put out, the Buyer cannot complain of theſe ſorts of defects, which being viſible he could not be ignorant of[l]; no more than of thoſe defects which the Seller told him of[m].

[l] Si quis hominem luminibus effoſſis emat, & de ſanitate ſtipuletur, de cætera parte corporis potius ſtipulatus videtur, quàm de eo, in quo ſe ipſe decipiebat. *l.* 43. §. 1. *ff. de contr. empt.*

Si intelligatur vitium, morbuſve mancipii, ut plerumque ſignis quibuſdam ſolent demonſtrare vitia: poteſt dici edictum ceſſare. Hoc enim tantùm intuendum eſſe, ne emptor decipiatur. *l.* 1. §. 6. *ff. de æd. ed. l.* 14. §. *ult. eod.*

[m] Si venditor nominatim exceperit de aliquo morbo, & de cætero ſanum eſſe dixerit, aut promiſerit, ſtandum eſt eo quod convenit. *d. l.* 14. §. 9.

XI.

11. *If the defects may be known or preſumed.*

If the defects of the thing ſold are ſuch as the Buyer might have eaſily known, and been certain of, as if a Field is ſubject to be overflowed; if a Houſe is old; if the Beams of it are rotten; if it is ill built; the Buyer cannot complain of theſe ſorts of defects, nor of others of the like nature. For the thing is ſold to him, ſuch as he ſees it[n].

[n] Si intelligatur vitium morbuſve mancipii ut plerumque ſignis quibuſdam ſolent demonſtrare vitia, poteſt dici edictum ceſſare. Hoc enim tantùm intuendum eſt, ne emptor decipiatur. *l.* 1. §. 6. *ff. de æd. ed.*

Ad ea vitia pertinere edictum ædilium probandum eſt, quæ quis ignoravit, vel ignorare potuit. *l.* 14. §. *ult. eod.*

XII.

12. *If the Seller has declared that the thing has ſome quality which renders it better.*

If the Seller has declared the thing ſold to have ſome other quality, beſides thoſe which he is bound to warrant naturally; and that quality happens to be wanting, or that even the thing ſold happens to have the contrary defects; we ought to judge of the effect of this declaration of the Seller, by the circumſtances of the conſequence of the qualities which he has expreſs'd, of the knowledge which he might or ought to have of the truth, contrary to what he has ſaid, of the manner in which he engaged the Buyer; and above all, it is neceſſary to conſider if theſe qualities have made a condition without which the Sale would not have been concluded. And according to the circumſtances, either the Sale ſhall be diſſolved, or the Price diminiſhed; and the Seller ſhall be bound in Damages, if there is ground for it. Thus, for Example, if the Seller of an Eſtate has declared it to be Allodial, and has ſold it as ſuch, and that this Eſtate happens to be ſubject to a Quit-Rent, and that the Buyer is obliged to pay a Fine of Alienation; the Seller ſhall be bound to indemnify the Purchaſer from theſe charges, and the other conſequences, according to the circumſtances, even altho' he had been ignorant that the Lands were ſubject to this Quit-Rent. But if the Seller has only made uſe of thoſe expreſſions which are uſual to Sellers, who praiſe at random their Goods which they have a mind to ſell, the Buyer, who ought not to have taken his meaſures upon expreſſions of that kind, cannot procure the Sale to be diſſolved upon any ſuch pretext[o].

[o] Si quid venditor de mancipio affirmaverit, idque non ita eſſe emptor queratur, aut redhibitorio, aut æſtimatorio, id eſt, quanto minoris judicio agere poteſt. *l.* 18. *ff. de ædil. ed.* Si prædii venditor non dicat de tributo ſciens, tenetur ex empto.— Venditor teneri debet, quanti intereſt non eſſe deceptum, etſi venditor quoque neſciet: veluti, ſi menſas quaſi citreas emat, quæ non ſunt. *l.* 21. §. 1. *&* 2. *ff. de act. empt. & vend.*

Sciendum tamen eſt, quædam etſi dixerit præſtare eum non debere. Scilicet ea quæ ad nudam laudem ſervi pertinent. *l.* 19. *eod.* Ut enim Pedius ſcribit, multum intereſt commendandi ſervi cauſâ, quid dixerit, an vero præſtaturum ſe promiſerit, quod dixit. *d. l.* 19. *eod. d. l.* §. 3. *l.* 43. *eod. v. l.* 16. *ff. de hæred. vel. act. vend.* Quid tamen, ſi ignoravit quidem furem eſſe, aſſeveravit autem bonæ frugi & fidum, & caro vendidit? Videamus an ex empto teneatur? Et putem teneri. At qui ignoravit. Sed non debuit facilè quæ ignorabat, adſeverare. Inter hunc igitur, & qui ſcit, intereſt. Qui ſcit, præmonere debuit furem eſſe, hic non debuit facilis eſſe ad temerariam indicationem. *l.* 13. §. 3. *ff. de act. empt.*

See the twelfth and fourteenth Articles of the third Section of Covenants; and the ſecond Article of the third Section of the Vices of Covenants.

XIII.

13. An Eſtate ſold ſuch as it is. If an Eſtate in Land is ſold ſuch as it is, or in the ſame condition as the Seller has fairly enjoyed it, or with its rights and conditions; theſe expreſſions, and others of the like nature, are no hindrance why the Seller ſhould not remain obliged to warrant the Lands againſt hidden Services, and all unknown Charges; ſuch as a Ground-Rent to which the Land ſhould be found to be liable[p].

[p] Lucius Titius promiſit de fundo ſuo centum millia modiorum frumenti annua præſtare prædiis Gaii Seii. Poſteà Lucius Titius vendidit fundum, additis verbis his, quo jure, quaque conditione ea prædia Lucii Titii hodie ſunt, ita veneunt, itaque habebuntur. Quæro, an emptor Gaio Seio ad præſtationem frumenti ſit obnoxius? Reſpondit, emptorem Gaio Seio, ſecundùm ea quæ proponerentur, obligatum non eſſe. *l. ult.* §. *ult. ff. de contr. empt. v. l.* 69. §. 5. *ff. de evict. l.* 61. *ff. de ædil. ed.* See the following Article.

XIV.

14. Defect in expreſſion by the Seller. The Seller is obliged to explain clearly, and diſtinctly, which is the thing that is ſold, in what it conſiſts, its qualities, its defects, and every thing that may give occaſion to any error, or miſtake. And if there is in his words any ambiguity, obſcurity, or other defect; they are to be interpreted againſt him[q].

[q] Veteribus placet, pactionem obſcuram, vel ambiguam, venditori, & qui locavit, nocere, in quorum fuit poteſtate, legem apertius conſcribere. *l.* 39. *ff. de pact. l.* 21. *l.* 33. *ff. de contr. empt.* See the thirteenth Article of the ſecond Section of Covenants; and the tenth Article of the third Section of Hiring and Letting to Hire.

XV.

15. Deceit in the thing. He who has ſold one thing for another; an old thing for a new; a leſs quantity than what he mentioned; whether he was ignorant of the defect, or conſcious of it, is bound to take back the Thing, or to abate of the Price, and to make good the damages which the Buyer ſhall have ſuffered[r].

[r] Si veſtimenta interpola quis pro novis emerit, Trebatio placere ita emptori præſtandum quod intereſt, ſi ignorans interpola emerit. *l.* 45. *ff. de contr. empt.*

Venditor teneri debet, quanti intereſt non eſſe deceptum, etſi venditor quoque neſciat. Veluti ſi menſas quaſi citreas emat, quæ non ſunt. *l.* 21. §. 2. *ff. de act. empt. & vend.* In fundo vendito, cùm modus pronuntiatus deeſt, ſumitur portio ex pretio. *l.* 69. §. *ult. ff. de evict.*

XVI.

16. Redhibition because of the defect of one of many things which ſort with one another. If of ſeveral things which match one another, ſuch as the pieces of a Sute of Hangings, Horſes belonging to one and the ſame Set, and other things of the like nature, one of them happens to have the defects which are ſufficient to diſſolve the Sale; it ſhall be diſſolved for the whole. For it is equally the intereſt both of Seller and Buyer, not to unmatch theſe kinds of things[s].

[s] Cùm jumenta paria veniunt, Edicto expreſſum eſt, ut cùm alterum in ea cauſa ſit, ut redhiberi debeat; Utrumque redhibeatur. In qua re tam emptori, quam venditori conſulitur, dum jumenta non ſeparantur. Simili modo, & ſi triga venierit, redhibenda erit tota, & ſi quadriga, redhibeatur. *l.* 38. §. *ult. ff. de ædil. ed. l.* 34. *l.* 35. *eod.*

XVII.

17. Redhibition does not take Redhibition, and diminution of the Price, becauſe of the defects of the

thing

place in Sales which are made by order of Court. thing ſold, do not take place in publick Sales, which are made by a Decree of a Court of Juſtice: For in theſe Sales, it is not the Proprietor who ſells, but it is the Authority of Juſtice, which is in the place of the Seller, and which adjudges the thing only ſuch as it is[t].

[t] Illud ſciendum eſt, edictum hoc non pertinere ad venditiones fiſcales. *l. 1. §. 3. ff. de ædil. ed. Although this Law has no direct relation to this Article, yet it may be applied to it.*

XVIII.

18. *The time for bringing an Action of Redhibition.* The time which the Buyer is allowed for bringing his Action of Redhibition, commences only after that the Buyer has been able to diſcover the defects of the thing ſold; unleſs this time were regulated by ſome Cuſtom, or that it has been agreed that the Buyer ſhould not bring his complaint, except within a certain time. But even in the caſe of a delay that is regulated, the Buyer may be received to make his complaint after that time is expired, and the Judge will decide in the matter according to the circumſtances[u].

[u] Si quid ita venierit, ut niſi placuerit, intra præfinitum tempus, redhibeatur; ea conventio rata habetur. Si autem de tempore nihil convenerit, in factum actio intra ſexaginta dies utiles, accommodatur emptori ad redhibendum, ultra non. Si verò convenerit ut in perpetuum redhibitio fiat, puto hanc conventionem valere. Item ſi tempus ſexaginta dierum, præfinitum redhibitioni præterierit, cauſa cognita judicium dabitur. *l. 31. §. 22. ff. de æd. ed.* See the eighth Article of the fourth Section; and the ninth Article of the twelfth Section.

SECT. XII.

Of other cauſes of the Diſſolution of Sales.

Divers cauſes of the Diſſolution of Sales. Sales may be diſſolved for ſeveral cauſes.

By the Seller's failing to deliver the Thing ſold.

By the Buyer's failing to pay the Price.

On account of the defects of the Thing ſold.

On account of the lowneſs of the Price.

Becauſe of Evictions.

Becauſe of the event of a Condition.

By the Revocation which the Creditors of Sellers make of Sales made to defraud their Creditors.

By the power of Redemption veſted in the Heir of Line, which diſſolves the Sale with reſpect to the Buyer, and transfers it to the lineal Heir, who is ſubſtituted in the place of the Buyer.

By the Power of Redemption which Lords have in regard to their Feudal Lands, and others.

By a power of Redemption ſtipulated by Covenant.

By virtue of a conditional Agreement to diſſolve the Sale in caſe of a certain event.

By reaſon of the Non-performance of ſome of the Covenants ſtipulated in the Sale.

By the mutual conſent of Seller and Buyer.

By reaſon of Fraud, Force, Error, and the other grounds of Reſtitution, Reſciſſion, or Nullity.

Of all theſe Cauſes, the ſix firſt, and the laſt, which is that of Nullity, have been explained under this Title. The Revocation of Sales made to defraud Creditors, comes under the Title of things done to defraud Creditors. The power of Redemption veſted in the Heir of Line, and that which attends Feudal Lands, do not come properly within the deſign of this Work; for they are peculiar to our Cuſtoms, and the Power of Redemption belonging to the Heirs of Line is aboliſhed by the *Roman* Law*; Reſciſſions and Reſtitutions ſhall have their reſpective Titles in their proper places. And there remains only to be explained here, the Power of Redemption ſtipulated by Covenant, the conditional Agreement to diſſolve the Sale in caſe of a certain event, the Non-performance of the Covenants, and the Conſent of Buyer and Seller. But we muſt in the firſt place explain ſome Rules that are common to all the ways of diſſolving Sales.

* *L. 14. Cod. de contr. empt. v. l. 16. ff. de reb. auth. jud. poſſid.*

[This power of Redemption which the Heirs of Line had to redeem Lands that were alienated out of the Family, altho' it was aboliſhed by the *Roman* Emperors, as appears from the texts above quoted; yet it was afterwards revived under the Feudal Law, and is ſtill in force in moſt Countries, *England* excepted. *Vid. lib. 5. Feud. tit.* 13, 14, 15, 16. *Groenweg. in lib. 4. Cod. de contr. empt. l.* 14.]

Rules common to the Diſſolution of Sales.

The CONTENTS.

1. *Difference between the Nullity, and Diſſolution of a Sale.*
2. *The Poſſeſſor cannot be turned out of Poſſeſſion, but by the authority of Juſtice.*

3. *Damages, if there is ground for any.*
4. *The Diſſolution of the Sale reſtores all things as they were.*
5. *The Seller is reinſtated in his Right.*
6. *Power of Redemption by Covenant.*
7. *Sale with the Power of Redemption, implies a Condition.*
8. *The Power of Redemption granted ſome time after the Contract is paſt.*
9. *The continuance of the Power of Redemption.*
10. *The Fruits after an Offer made to redeem.*
11. *Conditional Agreement to diſſolve the Sale.*
12. *Effect of theſe conditional Diſſolutions.*
13. *The Sale vacated altho' there be no Glauſe of Diſſolution.*
14. *Diſſolution of the Sale by conſent, before performance of Articles.*
15. *Diſſolution of the Sale by conſent, after performance of Articles.*

I.

1. Difference between the Nullity, and Diſſolution of a Sale.

THere is this difference between the Diſſolution, and Nullity of a Sale, that the Nullity makes it to have been no Sale from the beginning[a]; and the Diſſolution makes the Sale to ceaſe which had been accompliſhed; but does not make it never to have been, even altho' it ſhould be diſſolved by the will of the Seller and Buyer[b].

[a] *See the first Article of the fifth Section of Covenants.*

[b] Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus quin integris omnibus, conſenſu eorum qui inter ſe obligati ſint, recedi poſſit, dubium non eſt. *l. 58. ff. de pact. l. 1. C. quando lic. ab empt. diſc. l. 2. eod.*

Infectam emptionem facere non poſſumus. *l. 2. in f. ff. de reſc. vend.* See on this and the following Articles, the ſixth Section of Covenants.

II.

2. The Poſſeſſor cannot be turned out of Poſſeſſion, but by the Authority of Juſtice.

Whatever be the cauſe of the Diſſolution of a Sale, if it is controverted, and that the Buyer, or any other perſon having his right, is in Poſſeſſion; the Seller cannot take back the thing ſold but by the Authority of Juſtice[c].

[c] *See the ſixteenth Article of the fifth Section, and the fifteenth Article of the ſixth Section of Covenants.*

III.

3. Damages, if there is ground for any.

If the Sale is vacated by the deed of one or t'other of the parties, who has been the occaſion of ſome damage; he ſhall be bound to make it good, purſuant to the Rules which have been explained in this Title[d].

[d] *This is a conſequence of ſeveral Rules which have been explained in this Title.*

IV.

4. The Diſſolution of the Sale reſtores all things as they were.

The Sale being diſſolved, the Seller and Buyer are reinſtated in their Rights; and all things are reſtored to the ſame condition they were in before the Sale, as far as the circumſtances will allow[e].

[e] Ut uterque, reſoluta emptione, nihil amplius conſequatur, quam non haberet, ſi venditio facta non eſſet. *l. 23. §. 1. ff. de ædil. ed. d. l. §. 7.* See the following Article.

V.

5. The Seller is reinſtated in his Right.

When the Sale is annulled, the Seller takes back that which he had ſold, without any of the Charges which the Buyer may have burthened it with. Becauſe the Seller is reinſtated in his Right, as if he had never been diveſted of it[f].

[f] Omnia in integrum reſtituuntur, perinde ac ſi neque emptio, neque venditio interceſſit. *l. 60. ff. de æd. ed.*

This Rule is underſtood only of the Charges to which the Buyer had ſubjected the thing by his own proper deed; as if he had ſubjected the Lands he had bought to a Quit-Rent, to a Service, if he had mortgaged them to his Creditors; and it does not concern the Fine of Alienation which belongs to the Lord of the Mannor on account of the Sale. For this Charge of paying the Fine of Alienation was a conſequence of the Contract, which was as much the deed of the Seller, as of the Buyer. So that the Eſtate which was ſold, remains burden'd with it, if the Buyer did not pay it. But if the Sale was annulled for a cauſe which proceeded ſolely from the deed of the Seller, as if his Creditors ſeized upon the Lands which were ſold, it is juſt in this caſe that the Buyer be indemnified by the Seller, as to the Fine of Alienation which he has paid. There are even ſome Cuſtoms which give him the Fine of Alienation in the caſe of Eſtates ſold by a Decree of the Court, leaving the Lord at liberty to take the ſame, he reſtoring to the Purchaſer, the firſt Fine of Alienation he had received of him.

See upon this Article the fourteenth and fifteenth articles which follow. See the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section, with the remarks made thereon.

Of the Power of Redemption by Covenant.

VI.

6. Power of Redemption by Covenant.

THE Power of Redemption by Covenant, is a Paction, by which it is agreed, that the Seller ſhall have the liberty to take back the thing ſold, he reſtoring the Price to the Buyer, or ſo much of it as has been paid[g].

[g] Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur, teque parato ſatisfacere conditioni directæ, hæres emptoris non paret, ut contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito, tibi dabitur. *l. 2. C. de pact. int. empt. & vend. comp. l. 7. eodem l. 12. ff. de præſc. verb. l. 1. C Quando decr. non eſt op.*

VII.

7. A Sale with the Power of Redemption, implies a Condition.

A Sale with a Power of Redemption, implies a Condition, that the Sale ſhall be void, if the Seller buys the thing back again[h]. And when he does ſo, he enters again into his Right, by virtue of that condition. Thus, he takes back the Thing, free from the Charges to which the Buyer may have ſubjected it.

[h] (Si) ſoluta fuerit data quantitas, ſit res inempta. *l. 7. C. de pact. int. empt. & vend. comp.* te parato ſatisfacere conditioni, &c. *l. 2. eod.*

VIII.

8. The Power of Redemption granted ſome time after the Contract is paſt.

If the Power of Redemption was granted only after the Contract of Sale was finiſhed, it will be of no manner of prejudice to the Charges and Mortgages to which the Buyer may have ſubjected the thing after the Contract was paſt, and before he granted the Power of Redemption[i].

[i] *This is a neceſſary conſequence of the accompliſhment of the Sale which was pure and without condition, and which had transferred the Right to the Buyer, purſuant to the Rules of the Nature of the Contract of Sale.*

IX.

9. The continuance of the Power of Redemption.

The Power of Redemption may be granted, either indefinitely, without marking the time within which the Seller may redeem, or fixing a certain time, after which this Power of Redemption ſhall ceaſe[l]. If the Power is granted indefinitely, it laſts as long as the time limited for Preſcription[m]. If it is reſtrained to a certain time, the Seller is not immediately excluded when the time expires; but a delay is granted to him in the ſame manner as to the Buyer, when the Sale ought to be diſſolved for want of payment at the term[n].

[l] Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur, &c. *l. 2. C. de pact. inter empt. & vend. comp.*

[m] Hæ actiones annis triginta continuis extinguantur, quæ perpetuæ videbantur. *l. 3. C. de præſcr. 30. vel 40. ann.*

[n] *See the eighteenth Article of the foregoing Section, the eighth Article of the third Section, and the thirteenth Article of this Section.*

X.

10. The Fruits after an Offer made to redeem.

The Seller exerciſing his Power of Redemption of Lands which he had ſold, the Purchaſer ought to reſtore to him the Fruits from the day that he made his Demand, with a Tender of the Price in due form[o].

[o] Habita ratione eorum quæ poſt oblatam, ex pacto quantitatem, ex eo fundo ad adverſarium pervenerunt. *d. l. 2. C. de pact. int. empt. & vend. comp.*

Of the conditional Agreement to diſſolve the Sale, and of Non-performance.

XI.

11. Conditional Agreement to diſſolve the Sale.

THE Paction, or conditional Agreement to diſſolve the Sale, is that Covenant which is ſo uſual in Sales, that if the Buyer does not pay the Price at the time prefixed, the Sale ſhall be void[p]. And this ſame Penalty of the Diſſolution of the Sale, may be likewiſe ſtipulated in caſe of the Non-performance of any other Covenant that is part of the Contract of Sale. As if it is ſaid, that if a Houſe which is ſold, and declared to be free from a Service, ſhall appear to be ſubject to it, the Seller ſhall be bound to take it back again.

[p] Cùm venditor fundi in lege ita caverit, ſi ad diem, pecunia ſoluta non ſit, ut fundus inemptus ſit. *l. 2. ff. de leg. commiſſ.*

XII.

12. Effect of theſe conditional Diſſolutions.

The Clauſes for diſſolving the Sale, in caſe of Non-payment at the time appointed, or of Non-performance of any other Article of the Contract, have not the effect to diſſolve immediately the Sale, upon the failure of Performance; but a delay is granted for fulfilling what has been promiſed; unleſs the thing cannot admit of a delay; as if the Seller fails to deliver the Goods which he promiſed to have ready againſt the day of an Imbarkation[q].

[q] *See the eighth Article of the third Section, and the nineteenth Article of the ſecond Section.*

XIII.

13. The Sale vacated, altho' there be no Clauſe of Diſſolution.

Altho' there be no Clauſe of Diſſolution for Non-payment at the ſet time, or Non-performance of any other Article of the Contract, yet the Sale ſhall nevertheleſs be diſſolved, if the failure of Payment, and the Non-performance give occaſion for it, after the delays, according to the circumſtances[r]. For the Parties do not intend that the Contract ſhould ſubſiſt, unleſs each of them performs his Engagement[ſ].

[r] *See the ſecond and fourth Articles of the third Section of Covenants.*

Non impleta promiſſi fide, dominii tui jus in ſuam cauſam reverti conveniat. *l. 6. C. de pact. int. empt. & vend. compoſ.*

[ſ] *See the fifth Article of the firſt Section of Covenants.*

Of the Diſſolution of the Sale by the mutual Conſent of Seller and Buyer.

XIV.

14. Diſſolution of the Sale by conſent, before performance of articles. IF the Seller and Buyer diſſolve the Sale, before the thing ſold has been delivered, and the Price paid, the Sale not being as yet conſummated, and all things being entire, both Parties are diſcharged from their Engagements; and are by mutual conſent reſtored to the ſame ſtate as if there had been no Sale[t].

[t] Poteſt, dum res integra eſt, conventione noſtra infecta fieri emptio. *l. 2. ff. de reſc. vend.* Si Titius & Sejus inter ſe conſenſerint, ut fundum Tuſculanum emptum Sejus haberet centum aureis: deinde re nondum ſecuta, id eſt, neque pretio ſoluto, neque fundo tradito, placuerit inter eos, ut diſcederetur ab emptione, & venditione, invicem liberantur. *§. ult. inſt. quibus modis tollitur oblig.* Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus, quin integris omnibus, conſenſu eorum qui inter ſe obligati ſint, recedi poſſit, dubium non eſt. *l. 58. ff. de pact.* In emptione cæteriſque bonæ fidei judiciis, re nondum ſecuta, poſſe abiri ab emptione. *l. 7. §. 6. eod. l. 1. & 2. C. quando licet ab empt. diſcedere.*

See the following Article, and the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

It is neceſſary to obſerve on this Article, that if the Contracters diſſolve the Sale of Lands, within a ſhort time after the Contract, and before the Purchaſer has taken poſſeſſion of them, it is but equitable, and likewiſe agreeable to Cuſtom, that there ſhould be no Fine of Alienation due on account of the ſaid Sale. And there are ſome Cuſtoms which give a certain time, ſuch as the ſpace of eight days, for diſſolving the Contract, before any Fine of Alienation be due. But ſeeing this time is not regulated in the other Provinces, and that a diſtinction may be made between the condition of a Purchaſer who has taken poſſeſſion, and of one who has not, there ariſes frequently different queſtions, whether the Fine of Alienation be due or not, according to the ſtate that things are in at the time of the Diſſolution of the Sale. And it were to be wiſhed, that there were a certain and uniform Rule for all theſe caſes; and likewiſe for the other caſes where ſuch Rules are wanting, as we have taken notice of in ſeveral places.

XV.

15. Diſſolution of the Sale by conſent, after performance of articles. If the Sale being conſummated, the Price paid, the Thing delivered, and the Buyer in poſſeſſion, the Seller and Buyer agree afterwards to diſſolve the Contract, without any other cauſe than their bare will; it is not ſo much a Diſſolution of this Sale, as a ſecond Sale which the Buyer makes to the perſon who had ſold the thing to him. Thus, this firſt Seller does not take back a thing that is his own, ſince his Sale of it had diveſted him of his Right to it; but he buys in effect the thing belonging to another perſon; and it goes to him burdened with the charges and Mortgages, to which the perſon who bought the thing of him, and ſells it back to him again, may have ſubjected it in the mean while[u].

[u] Re quidem integra, ab emptione & venditione, utriuſque partis conſenſu recedi poteſt. Etenim quod conſenſu contractum eſt, contrariæ voluntatis adminiculo diſſolvitur. At enim poſt traditionem interpoſitam, nuda voluntas non reſolvit emptionem, ſi non actus quoque priori ſimilis retroagens venditionem intercesſerit. *l. 1. C. quando lic. ab empt. diſc.* Poſt pretium ſolutum infectam emptionem facere non poſſumus. *l. 2. ff. de reſc. vend.*

See the preceding Article, and the Remark that is there made on it; and the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

SECT. XIII.

Of ſome Matters which have relation to the Contract of Sale.

Of Forced Sales.

IT happens very often that things which belong to particular perſons, are found to be neceſſary for ſome publick Uſe: and if in theſe caſes they refuſe to ſell them, they are forced to it by the Authority of Juſtice. *Cauſes of forced Sales.* Becauſe that all things being made for the uſe of the Society, before any thing paſſes to the uſe of particular perſons; they poſſeſs them only upon this condition, that their private Intereſt ſhall give way to the publick Intereſt, in the neceſſities which may require it. Thus, a private man is bound to ſell his Lands, or Tenements, if they be found neceſſary for ſome Publick Work. And there are alſo other cauſes for which the Publick Juſtice obliges perſons to ſell their Poſſeſſions, and that even for the Intereſt of Private Perſons, as in the caſe of the fourth Article of this Section. We may obſerve in the *Roman* Law, concerning the ſubject of forced Sales, ſome ſingular caſes where the Proprietors were forced to ſell. Thus, by a Conſtitution of the Emperor *Antonin*, Maſters who uſed their Slaves ill, were obliged to ſell them[a]. Thus, when one of ſeveral Maſters of a Slave, who belonged in common to many, was willing to give him his Liberty, the other Maſters were forced to ſell him their Portions[b]. Thus, when a thing belonged in common to the Exchequer, and to private perſons, the Exchequer might of it ſelf ſell the whole thing, altho' the ſhare it had in it were never ſo ſmall, and the other Proprietors were obliged to part with their Shares to the Purchaſer, for their proportionable part of the Price agreed on[c].

[a] *V. §. 2. inſt. de his qui ſui vel al. jur. ſunt.*

[b] *L. 1. §. 1. C. de comm. ſerv. man. l. 16. ff. de Sen. Silan.*

[c] *L. un. C. de vend. rer. fiſc. cum priv. comm. l. 2. C. de com. rer. alien.*

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I.

1. Forced Sales.

FOrced Sales are thoſe to which perſons are compelled by Authority of Juſtice, for the Publick Good, or ſome other juſt cauſe.[a].

II.

2. A forced Sale for the Publick Good.

If a Houſe, or other Tenement, appears to be neceſſary for a Publick Uſe, ſuch as the building of a Pariſh Church, or enlarging it, to make a Church-yard, for making a Street, or enlarging it, for making any Fortification, or other Work, for the Publick Conveniency; the Proprietor is compelled by Publick Authority to ſell the ſaid Houſe, or Tenement, at a reaſonable Price[b].

III.

3. Sale of Proviſions.

In the caſe of a Publick Neceſſity, and at a time when there is a great ſcarcity of Corn, ſuch perſons as have great plenty of it by them, are compelled to ſell it at a reaſonable Price[c]. And the Civil Policy obliges Butchers and Bakers to ſell their Goods likewiſe at a reaſonable Rate[d].

IV.

4. A forced Sale for a particular Neceſſity.

If the ſituation of two Fields happen to be ſuch, that there is no going to the one without paſſing through the other; the Proprietor of the Field thro' which it is neceſſary to paſs, is obliged to ſell this Service, in the place which will be the leaſt inconvenient for him[e]. For it is not reaſonable that the other Field ſhould remain altogether uſeleſs.

V.

5. If the perſon who might be compelled, conſents to the Sale.

If in the caſe where the Proprietor of a Field may be forced to ſell it, he conſents voluntarily to the Sale; this will be a Covenant, of which the conditions will be ſuch as the Parties ſhall have regulated them by common conſent in the Contract[f].

VI.

6. If he refuſes to ſell.

If the Proprietor refuſes to ſell, and ſuffers himſelf to be forced to it by a Court of Juſtice, the Sentence or Decree which ſhall be pronounced againſt him, ſhall be in the place of a Sale, and of a Title of Alienation, which ſhall diveſt this Proprietor of his Right, and transfer the Land or Tenement to the uſe for which it is deſtined[g].

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[a] *See the following Articles.*

[b] *This is a conſequence of what has been remarked in the beginning of this Section.* V. l. 11. ff. de evict. in verbo, *Poſſeſſiones ex præcepto principali diſtractas.* Poſſeſſiones quas pro Eccleſiis, aut domibus Eccleſiarum parochialium de novo fundandis, aut ampliandis, infra villas, non ad ſuperfluitatem, ſed convenientem neceſſitatem acquiri contingat, de cætero apud Eccleſias remaneant, abſque coactione vendendi, vel extra manum ipſarum ponendi. Et poſſeſſores illarum poſſeſſionum ad eas dimittendum juſto pretio compellantur. Pro Eccleſiis parochialibus, cœmeteriis, & domibus parochialibus Rectorum extra villam fundandis vel applicandis, illud idem concedimus. *Ordinance of* Philip the Fair *of the Year* 1303.

See an Example of the uſe of a Ground belonging to a private man, for the Publick conveniency, and for the wants of particular perſons, in the thirteenth Law, §. 1. ff. com. præd. tam urban. quam ruſtic. *where it is ſaid, that a private Man who has a Quarry in his Ground, is not obliged to ſell the Stone he digs out of it, unleſs he be bound by a Cuſtom to give Stone out of his Quarry at a certain Price to thoſe who demand it. But if it were in a place where the uſe of this Quarry were neceſſary to the Publick, would it not be juſt to oblige the Proprietor to give the Stone at a reaſonable Price, altho' no ſuch Uſage were eſtabliſhed?*

[c] Lege Julia de annona, pœna ſtatuitur adverſus eum, qui contra annonam fecerit. *l. 2. ff. de leg. Jul. de ann.* Præterea debebis cuſtodire, ne Dardanarii ullius mercis ſint, ne aut ab his qui coemptas merces ſupprimunt, aut à locupletioribus: qui fructus ſuos æquis pretiis vendere nollent, dum minus uberes proventus expectant, ne annona oneretur *l. 6. ff. de extraord. crim.*

[d] Cura carnis omnis, ut juſto pretio præbeatur, ad curam Præfecturæ pertinet. *l. 1. §. 11. ff. de off. præf. urb. There are ſeveral Ordinances on this Subject.*

[e] Si quis ſepulchrum habeat, viam autem ad ſepulchrum non habeat, & à vicino ire prohibeatur: Imperator Antoninus cum patre reſcripſit: iter ad ſepulchrum peti precario, & concedi ſolere. *l. 12. ff. de Relig.* Præſes etiam compellere debet, juſto pretio iter ei præſtari. Ita tamen ut judex etiam de opportunitate loci proſpiciat, ne vicinus magnum patiatur detrimentum. *d. l.*

[f] *It will be a voluntary Agreement that regulates the conditions of this Sale.* See the ſeventh Article of the ſecond Section of Covenants.

[g] *This is a neceſſary conſequence of theſe kinds of Sales.*

VII.

7. Effect of theſe kinds of Sales.

In the caſes where the Proprietor is diveſted of his Land or Tenement for ſome Publick Uſe, he cannot be obliged to any Warranty. For beſides that he is diveſted of it againſt his Will, the Land or Tenement being put out of Commerce by this Change, it is not any longer ſubject to Mortgages, nor to Evictions. But the Purchaſers, ſuch as Church-wardens, or the Corporation of a Town, remain bound to the Lord of the Mannor, for the Rights which he had upon the ſaid Lands; and they are to indemnify him as to the conſequences of this change, according to the quality of his Rights, and the Cuſtoms of the Places. And the Creditors of the perſon who is diveſted of his Land, or Tenement, have their Right upon the Price[h].

[h] *Theſe are likewiſe neceſſary conſequences of theſe kinds of Sales.*

VIII.

8. Fields lying near to the High Way.

If by any accident, ſuch as a Flood, a High Way is taken off, or rendred impracticable; the Proprietors of the adjacent Fields are bound to furniſh a High Way, but without having power to ſell what they loſe by that means[i]. For it is a caſualty which turns their Fields, or a part of them, into a High Way; and this ſituation of their Lands engaged them to ſuffer this event.

[i] Cùm via publica, vel fluminis impetu, vel ruina, amiſſa eſt, vicinus proximus viam præſtare debet. *l. 14. in f. ff. quemadm. ſerv. amitt.*

This Rule is to be underſtood of an ancient High Way. But if for the Publick Conveniency a way were changed, to make it ſhorter, or to make a way altogether new, it would be neceſſary to indemnify the particular perſons for the ſhare of their Grounds that goes to the making of this new Way.

Of Sales by Decree of a Court of Juſtice.

IX.

9. Diſtreſſes and Sales by Decree of a Court of Juſtice.

CReditors have a right to demand that the Goods of their Debtors be expoſed to Sale; and theſe ſorts of Sales are forced, and are made by a Decree of a Court of Juſtice[l].

[l] *See the ninth Article of the third Section of Mortgages.*

I do not enter here into a particular diſcuſſion of this matter, of Sales by Decree, which being a part of the Order of Judicial Proceedings, and being different in our Practice from what it was among the Romans, *it does not properly belong to this Collection.* V. l. ult. C. de jure dom.

Of Sale by Cant or Auction.

X.

10. Sale by Cant, or Auction.

WHen a thing, which cannot be divided without great difficulty, ſuch as a Houſe, or which cannot be divided at all, ſuch as a Judicial Office, belongs in common to ſeveral perſons, and that they either cannot, or will not agree among themſelves about it; they ſell it, in order to divide the Price of it among them; and they give it to the higheſt bidder, either among themſelves, or ſtrangers whom they admit to bid for it. And this way of Sale is called Cant or Auction[m].

[m] *V. l. 78. §. 4. ff. de jur. dot.* in verbo, *adjudicatuſque fundus ſocio fuerit*; & in verbo, *licitatione. l. 13. §. 17. ff. de act. empt. & vend. l. 7. §. 13. ff. comm. divid. l. 3. C. eod.*

Of Valuation.

XI.

11. Valuation.

It often happens that many things having been ſold by the Lump together, for one Sum, without diſtinguiſhing the Price of each, it becomes neceſſary afterwards to know the Price of each particular; and to regulate how much every one of the things may be worth upon the foot of the Price that was given for the whole. And this way of making an Eſtimate, is what is called Valuation. Thus, for Example, if one of ſeveral Lands that were ſold for one and the ſame Price, happens to be ſubject to a Fine of Alienation, it is by a Valuation that this Fine is regulated. And it would be the ſame thing, if it were neceſſary to make a particular Eſtimate of a portion of a Houſe, or other Eſtate[n].

[n] *V. l. 1. ff. de evict. l. 72. eod.*

TITLE III.

Of EXCHANGE.

Exchange being ancienter than Sale, why placed after it.

ALtho' the uſe of Exchange did naturally precede that of Sale[a], which had its beginning only with the Invention of Coin; yet order did require that we ſhould explain the Rules of the Contract of Sale, before we ſhould ſay any thing of Exchange, for the reaſons which have been remarked at the end of the Plan of the Matters treated of in this Book.

[a] Origo emendi vendendique à permutationibus cœpit. *l. 1. ff. de contr. empt.*

Exchange the firſt Commerce for acquiring the Property of Things.

Exchange has been the firſt Commerce which men made uſe of to acquire the Property of Things; the one party giving to the other what was either uſeleſs, or leſs neceſſary to himſelf, that he might get from the other a thing which he ſtood in need of[b].

[b] Unuſquiſque ſecundùm neceſſitatem temporum ac rerum utilibus inutilia permutabat. *l.* 1. *ff. de contr. empt.*

Particular Rules of the Roman *Law as to Exchange.*

Altho' the uſe of Exchange be wholly Natural, yet this Contract had in the *Roman* Law Rules which ſeem not to be very Natural in our Practice. For Exchange was conſidered in the *Roman* Law as a Contract without form, which was placed among thoſe Contracts which have no particular Name; the effect of which was, that when there was only a ſimple Contract of Exchange, without delivery on one ſide or t'other; it produced no right to demand the execution of the Contract[c]; and when delivery was made only by one party, he who had made it, had no right to demand that which the other party was bound to give him in counterchange, and he could only take back the thing which he had given[d]. But ſince it is Natural, and agreeable to our Practice, that all Covenants ſhould be performed[e]; we give to this Contract its intire perfection. And the parties who have bound themſelves in the Contract, are compelled mutually to execute it, in the ſame manner as in the Contract of Sale; and as they were likewiſe compelled in the *Roman* Law, when the Exchange was attended with a Stipulation[f].

[c] Ex placito permutationis, nulla re ſecuta, conſtat nemini actionem competere. *l.* 3. *C. de rer. perm.* Emptio ac venditio nuda conſentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi præbet. Alioquin ſi res nondum tradita ſit, nudo conſenſu conſtitui obligationem dicemus. Quod in his dumtaxat receptum eſt, quæ nomen ſuum habent, ut in emptione, venditione, conductione, mandato. *l.* 1. §. 2. *ff. de rer. perm.*

[d] Ex altera parte traditione facta, ſi alter rem nolit tradere, non in hoc agimus, ut intereſt noſtra illam rem accepiſſe, de qua convenit, ſed ut res contra nobis reddatur, condictioni locus eſt, quaſi re non ſecuta. *l.* 1. § *ult. ff. de rer. perm. l.* 5. *l.* 7. *C. eod.*

[e] Quid tam congruum fidei humanæ quam ea quæ inter eos placuerunt ſervare. *l.* 1. *ff. de pact.*

[f] Ex placito permutationis nulla re ſecuta, conſtat nemini actionem competere, niſi ſtipulatio ſubjecta ex verborum obligatione quæſierit partibus actionem. *l.* 3. *C. de rer. perm. l.* 33. *C. de tranſ.*

The Rules of Sales ſerve for Exchange.

All the matters relating to Exchange, being almoſt the ſame with thoſe belonging to the Contract of Sale, becauſe of the Affinity between theſe two Contracts, we ſhall repeat nothing here of what has been ſaid in the Contract of Sale; it being ſufficient to advertiſe the Reader, that we may apply to the Contract of Exchange, all the Rules of Sales, except thoſe which have no relation to it; ſuch as the Rules concerning the Price; becauſe in Exchange there is no Price. Thus, the Rules touching the Engagement of the Buyer to pay the Price, thoſe relating to the Power of Redemption, and others of the like nature, are not applicable[g] to Exchange. But the Rules touching Delivery, thoſe concerning Warranty, with the other Engagements of the Seller; thoſe relating to the changes of the thing ſold, the Nullities of Sales, Eviction, Redhibition, and others of the ſame kind, are Rules common to Sales and to Exchanges. So that it will ſuffice to ſet down here, as Rules peculiar to Exchange, thoſe which follow.

Exception.

[g] Quoniam permutatio vicina eſſet emptioni. *l. ult. de rer. perm.* Permutationem, utpote re ipſa bonæ fidei conſtitutam, ſicut commemoras, vicem emptionis obtinere non eſt juris incogniti. *l.* 2. *C. de rer. perm.*

The CONTENTS.

1. *Definition of Exchange.*
2. *In Exchange both the one and the other hold the place of Seller and Buyer.*
3. *Eviction in Exchange.*
4. *Rules of Exchange the ſame with thoſe of Sale.*

I.

1. Definition of Exchange.

EXchange is a Covenant, by which the Contracters give to one another one Thing for another[a], whatever it be, except Money; for in that caſe it would be a Sale[b].

[a] Si ego togam dedi ut tunicam acciperem, Sabinus & Caſſius eſſe emptionem & venditionem putant: Nerva & Proculus permutationem, non emptionem hoc eſſe——ſed verior eſt Nervæ & Proculi ſententia. *l.* 2. §. 1. *ff. de contr. empt.*

[b] Si quidem pecuniam dem, ut rem accipiam, emptio & venditio eſt. Sin autem rem do, ut rem accipiam, quia non placet permutationem rerum emptionem eſſe, &c. *l.* 5. §. 1. *ff. de præſc. verb.*

II.

2. In Exchange, both the one and the other hold the place of Seller and Buyer.

In the Contract of Exchange, the condition of the Contracters being equal, in ſo much as both the one and the other give one Thing for another; we cannot in it make a diſtinction of a Seller and a Buyer, no more than of a Price and a Merchandize[c]. But both one and the other hold the place at the ſame time, both of Seller of the thing which he gives, and of Buyer of that which he receives[d].

[c] In permutatione diſcerni non poteſt, uter emptor, uter venditor ſit. *l.* 1. §. 1. *in f. ff. de contr. empt. l.* 1. *ff. de rer. perm.*

Neque aliud merx, aliud pretium. *l.* 1. *in princ. de contr. empt.*

[d] Si quis permutaverit, dicendum eſt utrumque emptoris, & venditoris loco haberi. *l. 19. §. 5. ff. de ædil. ed.* Is qui rem permutatam accepit, emptori ſimilis eſt. *l. ult. ff. quib. ex cauſ. in poſſeſ. eatur.*

III.

3. Eviction in Exchange.

If he who has taken a thing in Exchange is evicted of it, he holds the place of Buyer; and has his Recourſe for Warranty. And the other is bound to indemnify him againſt the Eviction, in the ſame manner as a Seller is[e].

[e] Si ea res quam acceperim, vel dederim, poſteà evincatur, in factum dandam actionem reſpondetur. *l. 1. ff. de rer. perm.* Ad exemplum ex empto actionis. *l. 1. C. eod.*

IV.

4. Rules of Exchange the ſame with thoſe of Sale.

All the Rules of the Contract of Sale take place in Exchange, except thoſe which appear not to be of the nature of this Contract, ſuch as the Rules concerning the payment of the Price[f].

[f] Permutationem utpote reipſa bonæ fidei conſtitutam ſicut commemoras, vicem emptionis obtinere, non eſt juris incogniti. *l. 2. C. de rer. perm.* Quoniam permutatio vicina eſſet emptioni. *l. 2. eod.*

TITLE IV.

Of HIRING, *and* LETTING *to Hire, and of the ſeveral kinds of* LEASES.

The Matters of this Title.

THIS Title contains the Commerce uſed among Men, for communicating to one another the uſe of Things, or of their Induſtry, and Labour, for a certain Price. This Covenant is of a moſt neceſſary and moſt frequent uſe. For ſince it is not poſſible, that all Men ſhould have in their own property all the things which they ſtand in need of, nor that every one ſhould do that himſelf which cannot be had without Induſtry, and without Labour, and that it would not be juſt that the uſe of the Things of others, or of their Induſtry and Labour, ſhould be always gratuitous; it has therefore been found neceſſary to make a Traffick of all theſe things. Thus, he who has a Houſe which he does not inhabit himſelf, gives the uſe of it to another for a certain Rent. Thus, people hire Horſes, Coaches, Hangings, and other Moveables. Thus, Lands are farmed out to Tenants; or Labourers are hired to till them. Thus, people make a Traffick of their Induſtry, and their Labour, either by the great, or at the rate of ſo much a day, or by other bargains.

All theſe kinds of Covenants have this in common, that in every one of them, the one party enjoys the Thing belonging to another, or uſes his Labour for a certain Price: and it is for this reaſon, that in the *Roman* Law they are all of them compriſed under the Names of Letting and Hiring. Letting on the ſide of one of the Parties, who is called the *Leſſor*; and Hiring on the ſide of the other party, who is called the *Leſſee*. And here it is neceſſary to remark, that whereas in the Letting of Things, the Leſſor is he who gives the Thing, and the Leſſee is he who takes it; but in the Letting of Labour, the Leſſor is he who gives a Work to be done; and the perſon who undertakes the Work, and who gives his Labour and Induſtry, is called the Undertaker.

It is to theſe ſeveral ſorts of Covenants that we give the general name of Leaſe, ſuch as the Leaſe of a Houſe, the Leaſe of a Farm, a Leaſe of Work to be done, either at the rate of ſo much for every day's work, or by the great; becauſe in all theſe Covenants the one party gives to the other either a thing to be enjoyed, or a work to be done.

Altho' the Name of Letting and Hiring be common in the *Roman* Law to all theſe ſorts of Engagements, and that we have comprehended under one and the ſame Title, and without diſtinction, Leaſes of Houſes, and Moveables, and Farms, as alſo the Undertakings of a Building, or any other Work, with the other Covenants of this kind; yet we have thought it proper to diſtinguiſh between the Letting to Hire a Houſe, a Horſe, or any other thing, and the Leaſe of a Farm, and the Undertakings of any piece of Work at a price agreed on. For theſe matters are not only diſtinguiſhed by their Names, but they have likewiſe ſome differences in their Nature, and in their Rules. And becauſe they have all of them ſome Characters, and ſome Rules which are common to them all; we ſhall explain in the firſt Section, under the name of Letting and Hiring in general, thoſe characters which belong to them in common; and in the ſame Section, and the two following, we ſhall likewiſe gather together many of thoſe common Rules; and in the following Sections we ſhall explain what is particular in the Leaſes of Farms, and in the other kinds of Leaſes.

All theſe matters ſhall be contained in nine Sections, to which we have added a tenth, which treats of Emphyteutical Leaſes, or Leaſes for perpetuity, which are of a different Nature, and have different Rules from the uſual Leaſes of Farms, by which the Enjoyment of the Lands is granted only for a certain time.

SECT. I.

Of the Nature of LETTING *and* HIRING.

The CONTENTS.

1. *Definition of Letting and Hiring in general.*
2. *Who is the Leſſor, and who the Leſſee.*
3. *Letting and Hiring is accompliſhed by the bare conſent.*
4. *What things may be let.*
5. *The profits of Animals.*
6. *The letting of a thing which is not one's own.*
7. *The Rent, or Hire in Money, or a Portion of the Fruits.*
8. *The Loweſs of the Rent not conſidered in Leaſes.*
9. *Liberty to let to others what we our ſelves have a Leaſe of.*
10. *Leaſes go to Heirs, or Executors.*

I.

1. *Definition of Letting and Hiring in general.* Letting and Hiring in general, including therein all kinds of Leaſes and Undertakings of any Work, is a Contract by which one Party gives to the other the Enjoyment or Uſe of a Thing [a], or of his Labour [b], during a limited time, for a certain Rent, or Hire [c].

[b] *Tot. tit. ff. locat. cond.* Si rem aliquam utendam ſive fruendam tibi aliquis dederit. §. 2. *inſt. de locat. & cond.*

[b] Quoties faciendum aliquid datur, locatio eſt. *l.* 22. §. 1. *ff. locat.*

[c] Locatio & conductio ita contrahi intelligitur, ſi merces conſtituta ſit. *inſt. eod. l.* 2. *ff. eod.*

We do not comprehend under this Definition the Emphyteutical Leaſes, or Leaſes for perpetuity; becauſe they have their peculiar Nature, which ſhall be explained in the tenth Section.

II.

2. *Who is the Leſſor, and who the Leſſee.* He who gives a Thing to be enjoyed, is called the *Leſſor* [d], and the ſame name is given to him who gives out any Piece of Work to be done [e]. He who has the enjoyment of any Thing by hiring it, or taking a Leaſe of it, is called the *Leſſee* [f]; as alſo he who undertakes the doing of any Work [g], who is likewiſe called *Undertaker*. But in the Letting out of Labour and Induſtry, or in Undertaking of any Work by the great, or at the rate of ſo much a day, or ſo much a meaſure, the Workmen, or Undertakers, are likewiſe in ſome ſenſe to be accounted Leſſors; for they let out and give their Labour and Induſtry [h].

[d] Si quis fundum locaverit. *l.* 9. §. 2. *ff. locat. l.* 19. §. 2. *eod.*

[e] Quoties faciendum aliquid datur, locatio eſt. *l.* 22. §. 1. *ff. locat. l.* 36. *eod.*

[f] Licet certis annuis quantitatibus fundum conduxeris. *l.* 8. C. *de locato.*

[g] Adverſus eos à quibus extruenda ædificia conduxiſti, ex conducto actione contendes. *l.* 2. C. *de locato.*

[h] Locat artifex operam ſuam, id eſt, faciendi neceſſitatem. *l.* 22. §. 2. *ff. loc.*

III.

3. *Letting and Hiring is accompliſhed by the bare conſent.* This Contract is of the number of thoſe which are accompliſhed by the bare conſent, in the ſame manner as the Contract of Sale; and theſe two Contracts have a great affinity one to the other, and many Rules which are common to both [i].

[i] (Locatio) conſenſu contrahitur. *l.* 1. *ff. locat. cond.* Locatio & conductio proxima eſt emptioni & venditioni, iiſdemque juris regulis conſiſtit. Nam ut emptio & venditio ita contrahitur, ſi de pretio convenerit, ſic & locatio & conductio contrahi intelligitur, ſi de mercede convenerit. *inſt. l.* 2. *ff. eod. de loc. & cond.* Adeò autem familiaritatem aliquam habere videntur emptio & venditio, item locatio & conductio: ut in quibuſdam quæri ſoleat, utrum emptio & venditio ſit, an locatio, & conductio. *d. l.* 2. §. 1. §. 3. *Inſt. eod.*

The Contract of Hiring and Letting is, as the Contract of Sale, accompliſhed by the bare conſent, when the Parties are agreed as to the Thing that is to be given to be enjoyed, or the Work that is to be done, and as to the Rent or Hire. And it is in this reſpect that this Contract reſembles the Contract of Sale, both the one and the other having a Price, and a Merchandiſe; from whence it happens that in ſome Bargains, it is doubtful whether they be a Letting and Hiring, or a Sale. As, for inſtance, when one makes a Bargain with a Goldſmith, that he ſhall do ſome piece of Work, and ſhall furniſh the Silver, as well as the Faſhion: This Bargain ſeems to belong to the Contract of Letting and Hiring, altho' in effect it be a Sale. Item quæritur, ſi cum Aurifice Titius convenerit, ut is ex auro ſuo certi ponderis, certæque formæ annulos ei faceret, & acciperet verbi gratia decem aureos; utrum emptio, an locatio & conductio contrahi videatur? Caſſius ait, materiæ quidem emptionem & venditionem contrahi, operæ autem locationem & conductionem. Sed placuit tantùm emptionem & venditionem contrahi. §. 4. *Inſt. de locat. & cond. As to the Rules which belong in common to Sale, and to the Contract of Letting and Hiring, it is eaſie to judge of them by the bare reading of this and the foregoing Title.*

IV.

4. *What things may be let.* We may let to Hire all Things which the Hirer can reſtore back to the Letter, after he has enjoyed them [l]. From whence it follows, that we cannot let to Hire, no more than we can lend, ſo as to have

back the thing lent in ſpecie; ſuch Things as are conſumed by the uſe of them; ſuch as Corn, Wine, Oil, and other Proviſions[m].

[l] *This is a conſequence of the Definition of Letting and Hiring.*

[m] Non poteſt commodari id quod uſu conſumitur. *l. 3. §. ult ff. commod.*

See the ſixth Article of the firſt Section of the Loan of Things to be reſtored in ſpecie.

V.

5. The profits of Animals. Animals which produce any Revenue, or Profit, ſuch as Sheep, which yield Wool, Lambs, and Manure for Lands, and other Animals of the like kind, may be in a manner let to Hire to one who undertakes to keep them, and to feed them, for a certain Portion that is allotted him out of the Profits that ariſe from the ſaid Animals, provided the Agreement have nothing in it that is Uſurious, by reaſon of the exceſſive Profit reſerved to the Owner[n].

[n] Si paſcenda pecora partiaria (id eſt ut fœtus eorum portionibus quibus placuit inter dominum & paſtorem dividantur) Apollinarem ſuſcepiſſe probabitur, fidem pacto præſtare per judicem compellatur. *l. 8. C. de pact.*

VI.

6. The letting of a thing which is not one's own. We may let, as well as ſell, a Thing which belongs to another Perſon. Thus, he who poſſeſſes honeſtly a Thing of which he believes himſelf to be the true Owner, altho' he is not; and he who has a right to the Uſe and Profits of a Thing, without being Maſter of it, as the Uſufructuary, may let and farm out what they poſſeſs in this manner[o].

[o] Si tibi alienam inſulam locavero. *l. 7. ff. loc.* Si fructuarius locaverit fundum. *l. 9. §. 1. ff. eod.* See the twelfth Article of the fourth Section of the Contract of Sale.

VII.

7. The Rent, or Hire, in Money, or a Portion of the Fruits. The Rent, or Hire, of what is let out, may be regulated, either in Money, as it is in Sales, or in a certain Quantity of Proviſions, or in a Portion of the Fruits[p].

[p] Si olei certa ponderatione fructus anni locaſti. *l. 21. C. de locato.* Colonus qui ad pecuniam numeratam conduxit, & colonus partiarius. *l. 25. §. 6. ff. eod.*

VIII.

8. The Lowneſs of the Rent not conſidered in Leaſes. The Lowneſs of the Rent is not conſidered in Leaſes, as the Lowneſs of the Price is in Sales, in order to vacate them; unleſs it were attended with other circumſtances, ſuch as Fraud, or ſome Error. For Leaſes are not Alienations, as Sales are. And beſides, the uncertainty of the Value of the Profits for the time to come may juſtify the Agreement between the Proprietor and Farmer, in fixing a Rent certain, inſtead of that Value which is uncertain[q].

[q] Prætextu minoris penſionis, locatione facta, ſi nullus dolus adverſarii probari poſſit, reſcindi locatio non poteſt. *l. 53. ff. loc.*

Si decem tibi locem fundum, tu autem exiſtimes quinque te conducere, nihil agitur. *l. 52. ff. eod.* See the tenth Article of the fifth Section of Covenants, and the eleventh Article of the eighth Section of the Contract of Sale.

IX.

9. Liberty to let to others what we our ſelves have a Leaſe of. He who has a Leaſe of a Houſe, or Farm, may let it out to others, unleſs it has been otherwiſe agreed upon[r].

[r] Nemo prohibetur rem, quam conduxit, fruendam alii locare, ſi nihil aliud convenit. *l. 6. C. de loc. l. 60. ff. eod.*

X.

10. Leaſes go to Heirs, or Executors. The Engagements which are formed by the Contract of Letting and Hiring, paſs to the Heirs or Executors of the Leſſor, and to thoſe of the Leſſee[ſ].

[ſ] Ex conducto actionem etiam ad hæredem tranſire palam eſt. *l. 19. §. 8. ff. loc. l. 10. l. 29. l. 34. C. eod.*

[*In the Tranſlation of this Article, I have joined the word* Executors *to that of* Heirs; *becauſe the Law of* England *makes a diſtinction in Leaſes, ſome of which deſcend to the* Heir, *and ſome to the* Executor. *Leaſes for Life are of the nature of Freeholds, and therefore deſcend to the* Heir. *Leaſes for Years are Chattels, and go to the* Executor. Terms of Law, verb. Leaſe. Doctor and Student, lib. 1. ch. 7. & ch. 24.]

SECT. II.

Of the Engagements of the Leſſee.

The CONTENTS.

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I.

1. Engagements of the Leſſee.

THE Engagements of the perſon who takes any thing to Hire, are to put the thing to no other uſe than that for which it is hired; to uſe it well; to take care of it; to reſtore it at the time appointed; to pay the Rent or Hire; and in general he ought to obſerve whatever is preſcribed by the Covenant, by Law, and by Cuſtom [a].

II.

2. How the thing which is hired ought to be uſed.

He who takes a thing to Hire, cannot put it to any other uſe than that for which it is given him, nor uſe it in any other manner than what is agreed upon: and if he does otherwiſe, he ſhall be bound to make good the Damage that follows thereupon. Thus, he who hires a Horſe to ride on, cannot make uſe of him for a Pack-horſe. Thus, the Tenant of a Houſe, who is tied up by his Leaſe not to make a Fire, or not to put Hay in a certain place, cannot do any of theſe things; and if he does, and there happens a Fire, he ſhall be liable for Damages, altho' the Fire were occaſioned only by ſome accident; for it is the Tenant's fault that has given occaſion to this accident [b].

III.

3. Of him who miſuſes the Thing.

He who has taken a thing to Hire, is obliged to uſe it well and carefully, as a good Maſter would do, and neither to do, nor ſuffer any thing to be done, which may be of prejudice to the perſon who lets it out. Thus, the Tenant of a Houſe ought not to ſuffer the Uſurpation of a Service which is not due. Thus, he who has hired Beaſts of Burden, ought not to load them exceſſively; and if he does it, or miſuſes in any other manner of way the thing hired, he ſhall be anſwerable for it [c].

IV.

4. What care he is obliged to who has taken a Thing to Hire.

Seeing he who takes a thing to Hire, uſes it for his own behoof; he ought to take care to keep it, and to preſerve it: and he is accountable not only for the Damage which may happen thro' his Knavery, or thro' any groſs Fault of his which comes near to it; but likewiſe for the Damage which may be occaſioned by other Faults, which any careful and diligent Man would not readily fall into. But if without his Fault, the thing periſhes, or is damaged by ſome accident, he is not bound to make it good [d].

V.

5. He who takes a thing to Hire, is accountable for the deed of the perſons for whom he ought to anſwer.

He who takes the Thing to Hire, is bound not only for his own deed, but likewiſe for the deed of the perſons for whom he ought to be anſwerable. As if a Tenant of a Houſe has put in a Tenant under him; or if he has kept Servants in it, and they by their careleſneſs have ſet the Houſe on Fire [e].

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[a] *Theſe Engagements ſhall be explained in the Articles which follow.* See the firſt Article of the third Section of Covenants.

[b] Si hoc in locatione convenit ignem ne habeto, & habuit, tenebitur: etiam ſi fortuitus caſus admiſit incendium, quia non debuit ignem habere. *l.* 11. §. 1. *ff. loc.* Inter conductorem & locatorem convenerat, ne in villa urbana fœnum componeretur: compoſuit, deinde ſervus igne illato ſuccendit. Ait Labeo, teneri conductorem ex locato: quia ipſe cauſam præbuit, inferendo contra conductionem. *d. l.* 11. §. *ult. v. l.* 13. §. 2. *& l.* 18. *ff. commod.* See the tenth Article of the ſecond Section of the Loan of Things to be reſtored in ſpecie.

[c] Proſpicere debet conductor, ne aliquo vel jus rei, vel corpus deterius faciat, vel fieri patiatur. *l.* 11. §. 2. *ff. loc.* Qui mulas ad certum pondus oneris locaret, cùm majore onere conductor eas rupiſſet——vel ex lege aquilia, vel ex locato rectè eum agere. *l.* 30. §. 2. *ff. eod.*

[d] In judicio tam locati, quàm conducti dolum & cuſtodiam, non etiam caſum, cui reſiſti non poteſt, venire conſtat. *l.* 28. *C. de loc. l.* 9. §. 4. *ff. eod.* Dolum & culpam recipit locatum. *l.* 23. *ff. de reg. jur.* Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l.* 5. §. 2. *ff. commod. l.* 1. §. 10. *ff. depoſ.* See the twenty fourth Article of the ſecond Section of the Contract of Sale.

[e] Videamus, an & ſervorum culpam, & quoſcunque induxerit, præſtare conductor debeat; & quatenus præſtat. Utrum ut ſervos noxæ dedat, an verò ſuo nomine teneatur; & adverſus eos, quos induxerit, utrum præſtabit tantùm actiones, an quaſi ob propriam culpam tenebitur. Mihi ita placet, ut culpam etiam eorum quos induxit, præſtet ſuo nomine, etſi nihil convenit: ſi tamen culpam in inducendis admittit, quod tales habuerit vel ſuos, vel hoſpites. Et ita Pomponius, libro ſexageſimo tertio ad Edictum probat. *l.* 11. *ff. loc. v. l.* 27. §. 9. *ff. ad leg. aquil.* Periculum præſtat, ſi qua ipſius, eorumque, quorum operâ uteretur, culpa acciderit. *l.* 25. §. 7. *eod. l.* 60. §. 7. *eod.* See the fifth Article of the fourth Section of Damages occaſioned by Faults, and the fifth Article of the eighth Section of this Title.

It does not ſeem reaſonable that the Tenant ſhould be diſcharged of the Fauls of his Servants, or Under Tenants, altho' he were no way to blame for the choice of their perſons. For beſides that the Event ſhews that he has made a bad choice, he ought to anſwer for the deed of thoſe to whom he has given the uſe of the Houſe which was intruſted only to him; and the deed of thoſe perſons becomes his own, with reſpect to the perſon who has let the Houſe to him, and who treated only with him. To which caſe it may not be amiſs to apply the words of the laſt Law, ff. pro Socio. Directò cum illius perſona agi poſſe, cujus perſona in contrahenda ſocietate ſpectata ſit. *And beſides, either the Under-Tenant is able to pay the Damage occaſioned by the Fire, in which caſe the chief Tenant is at no loſs, ſince he may recover it of the Under-Tenant; or he is Inſolvent, and in this caſe the chief Tenant ought to be anſwerable for him; for he could not make the condition of the Proprietor worſe, who had choſe an able Tenant to be anſwerable for his Houſe.*

VI.

6. Of the damage done by an Enemy of the perſon who has hired the thing. If a Tenant, or Farmer, draw upon themſelves, by their own fault, any Damage from ſome of their Enemies; as if the ſaid Enemy, to be revenged of him for ſome bad treatment, ſets the Houſe on Fire where the Tenant lives, or cuts down the Trees of the Lands which the Farmer occupies, they ſhall be accountable for the Damages; for it is through their fault that theſe Miſchiefs do happen[f].

[f] Culpæ autem ipſius & illud adnumeratur, ſi propter inimicitias ejus vicinus arbores exciderit. *l. 25. §. 4. ff. loc.*

It is in the ſenſe explained in this Article, that we are to underſtand this Law. That is, that the Farmer, and Tenant, ought not to be anſwerable for the Damage done by an Enemy, unleſs they have given occaſion to it by their own fault. In relation to which we may take notice of the Example mentioned in the 66th Law, ff. ſolut. matr. *of the loſs of the Goods and Lands which* Licinnia, *Wife of* Gracchus, *brought him in Marriage; which were loſt by the Sedition of her Husband; which made it be decided, that that Loſs ſhould not fall upon the Wife, but upon the Eſtate of* Gracchus. In his rebus, quas præter numeratam pecuniam, doti vir habet, dolum malum, & culpam eum præſtare oportere, Servius ait. Ea ſententia Publii Mutii eſt. Nam is in Licinnia Gracchi uxore ſtatuit, quod res dotales in ea ſeditione, quâ Gracchus occiſus erat, periſſent, quia Gracchi culpâ ea ſeditio facta eſſet, Liciniæ præſtari oportere. *But if the Tenant, or Farmer, cannot be any ways blamed for any bad conduct in this matter, it would not be juſt to make them accountable for the conſequences of an Enmity, for which they had given no manner of occaſion; as for Inſtance, if the Enmity proceeded from one's bearing witneſs to the truth in a Court of Judicature.*

VII.

7. Of the Leſſee who quits Poſſeſſion for fear of ſome danger. If a Country Farmer, or a Tenant of a Houſe which ſtands in a lonely place, leave the Houſe, or Farm, for fear of ſome danger, without acquainting the Owner, in caſe they were able to do it, and if their quitting the Houſe, or Farm, has been attended with ſome Damage; it is to be judged by the circumſtances of the danger, and of their conduct, whether they ought to be accountable for the Rents, and Damages, or if they ought to be diſcharged of them[h].

[g] In judicio tam locati quam conducti, dolum & cuſtodiam non etiam caſum, cui reſiſti non poteſt, venire conſtat. *l. 28. C. de loc.*

Exercitu veniente migravit conductor: deinde hoſpitio milites feneſtras, & cætera ſuſtulerunt. Si domino non denuntiavit, & migravit, ex locato tenebitur. Labeo autem, ſi reſiſtere potuit, & non reſiſtit, teneri ait. Quæ ſententia vera eſt. Sed & ſi denuntiare non potuit, non puto eum teneri. *l. 13. §. 7. ff. loc.* Interrogatus, ſi quis timoris cauſa emigraſſet, deberet mercedem, nec ne? reſpondit, ſi cauſa fuiſſet cur periculum timeret, quamvis periculum verè non fuiſſet, tamen non debere mercedem: ſed ſi cauſa timoris juſta non fuiſſet, nihilominus debere. *l. 27. §. 1. ff. loc.*

Qui contra legem conductionis fundum ante tempus, ſine juſta ac probabili cauſa deſeruerit, ad ſolvendas totius temporis penſiones ex conducto conveniri poteſt, quatenus locatori, in id quod ejus intereſt, indemnitas ſervetur. *l. 55. in f. loc.* See the following Article.

VIII.

If a Tenant ceaſes, without cauſe, to inhabit the Houſe which he has hired, or a Farmer to cultivate the Grounds which he has taken to Farm, they may be ſued before the Term, both for the Rent, and likewiſe for the damages which the Owner ſuſtains thereby[h]. *8. If the Tenant leaves his Houſe, or the Farmer his Farm.*

[h] Si domus, vel fundus in quinquennium penſionibus locatus ſit, poteſt dominus, ſi deſeruerit habitationem vel fundi culturam colonus vel inquilinus, cum eis ſtatim agere. *l. 24. §. 2. ff. loc.* See the preceding Article.

IX.

If the Tenant or Farmer are obliged to any Repairs, whether by their Leaſe, or by the Cuſtoms of the Places; they will be compell'd to make them, and be liable in Damages to the Leſſor, if they have not made them[i]. *9. Repairs.*

[i] Sed de his quæ præſenti die præſtare debuerunt (velut opus aliquod efficerent, propagationes facerent) agere ſimiliter poteſt. *l. 24. §. 3. ff. loc.*

X.

If the Tenant of a Houſe diſappears without paying the Rent, the Owner may have recourſe to Juſtice, to get an Order for opening the Houſe, within the time that the Judge ſhall appoint; and for making an Inventory of the Moveables which ſhall be found in it, that out of them he may recover payment of his Rent, and that the Remainder may be ſecured for the Tenant, or for ſuch other perſons as ſhall be found to have an intereſt in them[l]. *10. If the Tenant abſconds.*

[l] Cùm domini horreorum, inſularumque deſiderant, diu non apparentibus, nec ejus temporis penſiones exſolventibus conductoribus, aperire, & ea quæ ibi ſunt deſcribere, à publicis perſonis, quorum intereſt, audiendi ſunt. *l. 56. ff. loc.*

XI.

11. *The Leaſe being out, he who hired the Thing, ought to give it back, and pay the Rent, or Hire.*

After that the time for which the Thing was let is expired, he who hired it, ought to reſtore it to the perſon who let it to him, and to pay the Rent or Hire, which was agreed upon, at the time appointed[m].

[m] Si quis conductionis titulo agrum, vel aliam quamcunque rem accepit, poſſeſſionem prius reſtituere debet. *l. 25. C. de locat.* Præſes Provinciæ ea quæ ex locatione debentur, exſolvi ſine mora curabit. *l. 17. C. eod.*

XII.

12. *The Moveables of the Leſſee that are mortgaged for the Rent.*

The Moveables which the Tenant brings into the Houſe which he has hired, are mortgaged for the payment of the Rent of the Houſe; and the Fruits of the Ground are mortgaged for the payment of the Rent of the Farm[n]. According to the Rules which ſhall be explained in the Title of Mortgages, and of the Privileges of Creditors.

[n] Eo jure utimur ut quæ in prædia urbana inducta, illata ſunt, pignori eſſe credantur, quaſi id tacitè convenerit. *l. 4. ff. in quib. cauſ. pign. vel hyp. t. contr. l. 5. C. de loc.* In prædiis ruſticis, fructus qui ibi naſcuntur, tacitè intelliguntur pignori eſſe domino fundi locati: etiamſi nominatim id non convenerit. *l. 7. ff. in quib. cauſ. pign. v. hyp. t. contr. l. 3. C. eod.*

See the twelfth, thirteenth, fourteenth and following Articles of the fifth Section of Mortgages, and of the Privileges of Creditors.

XIII.

13. *The Owner may turn out the Tenant, if he wants the Houſe himſelf.*

If the Owner of a Houſe which is let, happens to want it for his own uſe, he may oblige the Tenant to reſtore it to him, within the time that ſhall be determined by the Judge. For ſince the Owner does not let his Houſe, but only becauſe he has no occaſion for it himſelf; it is a tacit condition, that if he ſhall have occaſion for it, the Tenant ſhall be bound to deliver it up to him[o]. But the Owner may renounce this Right by the Leaſe[p].

[o] Æde quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet, niſi propriis uſibus dominus eam neceſſariam eſſe probaverit. *l. 3. C. h. t.*

[p] Omnes licentiam habent his quæ pro ſe introducta ſunt renuntiare. *l. 29. C. de pact. l. 41. ff. de min.* See the fourth Article of the fourth Section of Covenants.

XIV.

14. *If the Owner wants to repair his Houſe.*

The Tenant is likewiſe obliged to quit the Houſe, if the Owner has a mind to repair it[q]. And if the Repairs which he intends to make are neceſſary, as if it be to repair any part of the Houſe that is like to fall, the Owner will not be liable for any Damages to the Tenant; but only to diſcharge the Tenant of the Rent, or to reſtore it, if it has been already paid; for it is an accident[r]. But if the Repairs are not abſolutely neceſſary, the Owner will be bound to make good the Damages which the Tenant ſuffers by the interruption of his Leaſe. Thus, if the chief Tenant has let the Houſe to Under-Tenants for a greater Rent than what he is bound to pay by his Leaſe; the Owner is obliged to make this good to the Tenant, and to ſecure him againſt the demands of the Under-Tenants for the interruption of their Leaſes[s]. But if the Repairs may be made in a ſhort time, with little trouble to the Tenant, and without obliging him to remove, he ought to bear with this ſmall inconvenience[t].

[q] Aut corrigere domum maluerit. *d. l. 3. C. de loc.*

[r] Si averſione inſulam locatam dominus reficiendo, ne eà conductor frui poſſit, effecerit: animadvertatur, neceſſariò, nec ne id opus demolitus eſt. Quid enim intereſt utrum locator inſulæ propter vetuſtatem cogatur eam reficere an locator fundi cogatur ferre injuriam ejus quem prohibere non poſſit? *l. 35. ff. loc.* Similiter igitur & circa conductionem ſervandum puto, ut mercedem quam præſtiterim reſtituas, ejus ſcilicet temporis quo fruitus non fuerim. Nec ultrà actione ex conducto præſtare cogeris. *l. 33. ff. eod.*

[s] Qui inſulam triginta conduxerat, ſingula cœnacula ita conduxit, ut quadraginta ex omnibus colligerentur. Dominus inſulæ, quia ædificia vitium facere diceret, demolierat eam. Quæſitum eſt quanti lis æſtimari debeat, ſi is qui totam conduxerat, ex conducto ageret? Reſpondit, ſi vitiatum ædificium neceſſariò demolitus eſſet, pro portione, quanti dominus prædiorum locaſſet, quod ejus temporis habitatores habitare non potuiſſent, rationem duci: & tanti litem æſtimari. Sin autem non fuiſſet neceſſe demoliri, ſed quia melius ædificare vellet, id feciſſet, quanti conductoris intereſſet habitatores ne migrarent, tanti condemnari oportere. *l. 30. ff. loc.* Tantum ei præſtabis, quanti ejus interfuerit frui, in quo etiam lucrum ejus continebitur. *l. 33. ff. loc.*

[t] Ea conditione habitatorem eſſe; ut ſi quid tranſverſarium incidiſſet, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi ſuſtineret. *l. 27. ff. loc.*

XV.

15. *The Tenant may be turned out for Non-payment of his Rent.*

If the Tenant does not pay his Rent, the Proprietor may turn him out by the Authority of Juſtice, within the time that ſhall be preſcribed by the Judge to the Tenant, either to pay, or to remove[u].

[u] Æde quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet. *l. 3. C. de loc.* Colonum ejectum penſionum debitarum nomine. *l. 61. ff. loc. v. l. 54. §. 1. eod.*

XVI.

16. *The Tenant may be turned out,*

The Tenant may likewiſe be turned out by Authority of Juſtice, if he makes *if he make a bad uſe of the Houſe.* a bad uſe of the Houſe he has hired; as if he damages the Houſe; if he expoſes it to the hazard of being burnt, by making Fire in a place where he ought not; if he carries on any unlawful Commerce in the Houſe, or ſuffers others to do it; or if he makes a bad uſe of the Houſe any other manner of way.

XVII.

17. Intereſt of the Rent, or Hire. If the Tenant who owes his Rent, or he who gives out any Work to be done, does not pay the Rent, or Hire, at the time appointed, they will be liable for the Intereſt from the time of the Demand[y].

SECT. III.

Of the Engagements of the Leſſor.

The CONTENTS.

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I.

1. The Leſſor is obliged to procure a free Enjoyment to the Leſſee. THE Leſſor is bound to procure the free Uſe and Enjoyment of the Thing to the perſon to whom he lets it out; to deliver the thing to him in a condition to ſerve the Uſe for which it is hired, and to keep it in this good condition, making the neceſſary Repairs, which the Tenant is not bound to make neither by his Leaſe, nor by the Cuſtom of the place. And if the Leſſor does not deliver the Things in good condition, or ſuch as he promiſed them, the Leſſee will recover his Damages, and get the Leaſe to be annulled, if there is ground for it: And he will be ſtill more intitled to this Relief, if the Proprietor himſelf, or the perſons for whom he is anſwerable, hinder the Tenant from enjoying the Thing.[a]

II.

2. Eviction. If the Tenant is expelled by an Eviction, the Leſſor is liable in Damages for the interruption of the Leaſe. For altho' this be a kind of caſualty, yet the Leſſor is notwithſtanding bound to procure a free and undiſturbed Poſſeſſion of the Thing to the Tenant, and to put a ſtop to all Claims made by any other perſon to the Thing that is let, in the ſame manner as the Seller is obliged to do with reſpect to the thing he ſells[b].

III.

3. The Tenant diſſeiſed by a ſuperior Force. If the Tenant is turned out by the Act of the Prince, by a ſuperior Force, or by ſome other Accident; or if the Land or Tenement is deſtroyed by an Inundation, by an Earthquake, or other Event; the Leſſor who was bound to give the Land or Tenement, cannot demand any Rent for it, and will be obliged to reſtore ſo much of it as he has received; but without any other Damages: For no Man is to be accountable for Accidents[c].

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[x] Aut tu malè in re locata verſata es. *d. l.* 3. *C. de loc. v. l.* 11. §. 1. *ff. eod. Nov.* 14. *c.* 1.

[y] Præſes provinciæ ea quæ ex locatione debentur exolvi ſine mora curabit, non ignarus ex locato & conducto actionem cùm ſit bonæ fidei, poſt moram uſuras legitimas admittere. *l.* 17. *C. de loc. l.* 54. *ff. eod.*

[a] Si re quam conduxit, frui ei non liceat, fortè quia poſſeſſio ei aut totius agri, aut partis non præſtatur: aut villa non reficitur, vel ſtabulum, vel ubi greges ejus ſtare oporteat: vel ſi quid in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l.* 15. §. 1. *ff. loc.* Certè quin liceat colono, vel inquilino relinquere conductionem, nulla dubitatio eſt—— ſi oſtia, feneſtraſve nimium corruptas, locator non reſtituat. *l.* 25. §. 2. *ff. loc.* Planè ſi fortè dominus frui non patiatur—— quod intereſt præſtabitur. *l.* 15. §. 8. *ff. loc.* See the ſixth Article of the ſixth Section.

[b] Si quis domum bonâ fide emptam, vel fundum locaverit mihi, iſque ſit evictus, ſine dolo malo culpaque ejus; Pomponius ait, nihilominus eum teneri ex conducto ei qui conduxit: ut ei præſtetur frui, quod conduxit, licere. Planè ſi dominus non patitur, & locator paratus ſit aliam habitationem non minùs commodam præſtare, æquiſſimum eſſe ait abſolvi locatorem. *l.* 9. *ff. loc. v. l.* 7. *&* *l.* 8. *eod.*

We have not ſet down in the Article the exception made in this Law, of the caſe where the Leſſor, or Landlord, offers the Tenant another Lodging; becauſe ſuch an accommodation is hardly poſſible; unleſs it be by common conſent. And we muſt leave it to the diſcretion of the Judge, to conſider what regard ought to be had to ſuch Offers.

[c] In judicio tam locati quàm conducti, dolum & cuſtodiam, non etiam caſum cui reſiſti non poteſt, venire conſtat, *l.* 28. *C. de loc.* Non in quod ſua intereſt conductor conſequitur, ſed mercedis exonerationem.

rationem. *l.* 15. §. 7. *ff. loc.* Si ab eo interpellabitur, quem tu prohibere propter vim majorem, aut potentiam ejus non poteris, nihil amplius ei quam mercedem remittere: aut reddere debebis. *l.* 33. *in f. eod.* Incendia, aquarum magnitudines, impetus prædonum, à nullo præſtantur. *l.* 23. *ff. de reg. jur.*

IV.

4. Sale annuls the Leaſe. If the Leſſor ſells a Houſe, or any other Eſtate, which he had let out, the Leaſe is annulled by this change of the Proprietor; and the Purchaſer may uſe and diſpoſe of the thing as he pleaſes; unleſs the Seller has obliged him to continue the Leaſe. But if the Purchaſer turn the Tenant out, the Leſſor is bound for the Damages which this interruption of the Leaſe may have cauſed[d].

[d] Qui fundum fruendum, vel habitationem alicui locavit, ſi aliqua ex cauſa fundum vel ædes vendat, curare debet apud emptorem ut quoque eadem pactione & colono frui, & inquilino habitare liceat. Alioquin prohibitus is, aget cum eo ex conducto. *l.* 25. §. 1. *ff. loc.* Emptorem quidem fundi neceſſe non eſt ſtare colono, cui prior dominus locavit, niſi ea lege emit. *l.* 9. *C. eod.*

See the remark on the following Article.

V.

5. The Legatee may diſſolve the Leaſe. If the Leſſor deviſes the Houſe, or Lands which he has let out, and dies; the Legatee is not obliged to continue the Leaſe made by the Teſtator; for he is a new Proprietor, as is the Buyer. But if the Tenant is turned out by the Legatee, he will recover his Damages againſt the Heir, or Executor, who is bound to make good the deed of the deceaſed[e].

[e] Qui fundum colendum in plures annos locaverat, deceſſit, & eum fundum legavit. Caſſius negavit poſſe cogi colonum, ut eum fundum coleret, quia nihil hæredis intereſſet. Quòd ſi colonus vellet colere, & ab eo cui legatus eſſet fundus prohiberetur, cum hærede actionem colonum habere, & hoc detrimentum ad hæredem pertinere. *l.* 32. *ff. loc.*

It is neceſſary to remark on this and the foregoing Article, that the Tenant who is expelled by the Legatee, or Purchaſer, retains his Mortgage for his Leaſe on the Eſtate which is ſold, or deviſed; and that he may bring his Action for his Mortgage againſt the Poſſeſſors, to recover the Damages he ſuffers by the interruption of the Leaſe. And they will have their Warranty; viz. *the Buyer from his Seller, and the Legatee from the Executor.*

VI.

6. If an inconveniency happens unexpectedly. If a Houſe that is let becomes too inconvenient, altho' without the deed of the Leſſor; as if a Neighbour raiſing his Building, darkens the Lights; the Leſſor is bound to make good the Damages of the Tenant, who may, if he pleaſes, vacate the Leaſe. For altho' this be an accident, yet the Houſe being let for its uſe, in the condition it was in at the time of letting, whatever be the cauſe that makes it leſs uſeful, the damage ought to fall upon the Leſſor[f].

[f] Si vicino ædificante obſcurentur lumina cœnaculi, teneri locatorem inquilino. Certè quin liceat colono vel inquilino relinquere conductionem, nulla dubitatio eſt. De mercedibus quoque ſi cum eo agatur, reputationis ratio habenda eſt. *l.* 25. §. 2. *ff. loc.*

VII.

7. Of the Expences laid out by the Leſſee. If the Leſſee finds himſelf under a neceſſity of being at ſome charge in preſerving the Thing he has hired; as if the Tenant of a Houſe has prop'd up that which was in danger of falling, or if he has been at any other neceſſary Expence, which he was not bound to, neither by his Leaſe, nor by the Cuſtom of the place, the Leſſor is obliged to reimburſe him[g].

[g] In conducto fundo ſi conductor, ſua opera aliquid neceſſariò, vel utiler auxerit, vel ædificaverit, vel inſtituerit, cum id non conveniſſet: ad recipienda ea quæ impendit, ex conducto cum domino fundi experiri poteſt, *l.* 55. §. 1. *ff. loc.*

VIII.

8. Of the defects of the thing hired. If he who lets out a Thing for ſome uſe, gives it ſuch that by reaſon of ſome defect in it there happens ſome damage, he ſhall be anſwerable for it. Thus, for Inſtance, if he who lets out Veſſels for holding of Oil, Wine, or other Liquors, gives ſuch Veſſels as are not in a good condition, he ſhall be liable for the Loſs, or Damage that happens on that account. For he who lets a thing for any Uſe, ought to know if it is proper for it, and to warrant that uſe for which he takes the Hire. But if the defects of the Things that are let, are the bare effect of ſome caſualty, which he who lets them could neither know, nor preſume to be in them, he ſhall not be anſwerable for the event of this Accident; but only to give back the Hire or Rent. Thus, for Example, if in a Paſture-Ground which is farmed out, there happen to be Herbs which deſtroy the Farmer's Cattle, the Proprietor, who was ignorant of this defect, either becauſe theſe Herbs grew up of a ſudden, or having ſome other juſt cauſe of his Ignorance, will not be accountable for the Loſs of the ſaid Cattle, but he cannot demand any Rent for the Ground[h].

[h] Si quis dolia vitioſa ignarus locaverit: deinde vinum effluxerit, tenebitur in id quod intereſt. Nec ignorantia ejus erit excuſata: aliter atque ſi ſaltum paſcuum locaſti, in quo herba mala naſcebatur. Hic enim, ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt præſtabitur, ſi ſciſti. Si ignoraſti, penſionem non petes. *l.* 19. §. 1. *ff. loc.* *v. l.* 45. §. 1. *eod.*

See the third Article of the third Section of the Loan of Things to be reſtored in ſpecie.

IX.

9. A Leaſe from him who has the Uſe and Profits. If the Leſſor had only the Uſe and Profits of the Thing let, and the Leaſe is not limited to the time which the Uſufruct may laſt, his Heir or Executor will be liable for the Damages occaſioned by the interruption of the Leaſe, when the Uſufruct expires[i].

X.

10. If the Leſſor expreſſes himſelf obſcurely, his words will be interpreted againſt him. The Leſſor is obliged to make known to the Leſſee wherein conſiſts the Thing which he lets, to declare its defects, and to explain every thing that may give occaſion to any Error or Miſtake. And if he has expreſſed himſelf in dark or ambiguous terms, his words will be interpreted againſt him[l].

SECT. IV.

Of the nature of the Leaſes of Farms.

ALL that has been ſaid in the three firſt Sections, is common to Leaſes of Farms, and ought to be applied to them, except ſome Articles of which it is eaſy to judge, that they have no relation to them. Thus, what has been ſaid of the Landlord's right to turn the Tenant out of his Houſe, if he has occaſion for it himſelf, has no relation to a Leaſe of Lands. In the ſame manner it will be eaſy to judge of the other Rules which ought, or ought not to be applied to Leaſes of Farms. And it remains only to explain in this Section, and the two following, what is ſingular in the Nature of Leaſes of Farms, and in the Engagements of the Farmer, and thoſe of the Proprietor, that ſo we may paſs on to the other matters of this Title.

The CONTENTS.

1. *Definition of Leaſes of Farms, and of what Eſtates they are made.*
2. *What other Things may be farmed out.*
3. *The ſame.*
4. *Difference between Leaſes of Houſes, and Farms.*
5. *The effect of the uncertainty of Events.*
6. *Accidents of two kinds, Natural, and thoſe which are the Act of Man.*
7. *Renewing of the Leaſe.*
8. *Divers effects of a tacit Renewal of the Leaſe.*
9. *The tacit Renewal of the Leaſe, renews the ſame Conditions.*

I.

1. Definition of Leaſes of Farms, and of what Eſtates they are made. LEaſes of Farms are Contracts, by which Lands are let out, which naturally produce Fruits, whether by Culture, as Arable-Land, Vineyards; or without Culture, as a Coppice, a Fiſh-pond, Paſture-Ground. And this diſtinguiſhes the Leaſes of theſe kinds of Poſſeſſions from the Leaſes of Houſes, and other Buildings, which produce no manner of Fruit; and which are let only for the conveniency of dwelling in them, or for ſome other uſe[a].

II.

2. What other things may be farmed out. We may likewiſe let to Farm, the Grounds which produce other kinds of Revenues, as a Quarry to dig Stone out of, Places out of which they dig Gravel, Potters-Clay, Coal, Lime, and other Matters; and, in general, every thing which is the product of a Ground, or which may be digged out of it, may be farmed out[b].

III.

3. The ſame. We may likewiſe farm out a Right of Hunting, and Fiſhing, as alſo other Revenues which do not proceed from the Things themſelves, and yet are the product of the Grounds. Thus we farm out a Right to gather a Toll, the Paſſage of a Bridge, or of a Ferry-Boat, and other Duties of the like kind[c].

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[i] Si fructuarius locaverit fundum in quinquennium, & deceſſerit, hæredem ejus non teneri ut frui præſtet. *l.* 9. §. 1. *ff. loc.* Quid tamen, ſi non quaſi fructuarius ei locavit, ſed ſi quaſi fundi dominus, videlicet tenebitur. Decepit enim conductorem. *d.* §. *in f.*

[l] Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit, nocere, in quorum fuit poteſtate, legem apertius conſcribere. *l.* 39. *ff. de pact. v. l.* 21. *l.* 33. *ff. de contr. empt.*

See the thirteenth Article of the ſecond Section of Covenants, and the fourteenth Article of the eleventh Section of the Contract of Sale.

[a] Frugem pro reditu appellari, non ſolum quod frumentis, aut leguminibus, verùm & quod ex vino, ſylvis cæduis—— capitur. *l.* 77. *ff. de verb. ſign.* fundum fruendum, vel habitationem. *l.* 25. §. 1. *ff. loc.*

[b] Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *ff. de uſufr.* quod ex cretifodinis, lapidicinis capitur. *l.* 77. *ff. de verb. ſign.* Arundinem cæduam, & ſylvam in fructum eſſe. *l.* 40. §. 4. *ff. de contr. empt.*

[c] Aucupiorum quoque, & venationum reditum Caſſius ait, libro octavo juris civilis, ad fructuarium pertinere, ergo & piſcationum. *l.* 9. §. 5. *ff. de uſufr.* Vectigalium. *l.* 4. *C. de vectig. & comm.*

IV.

4. *Difference between Leaſes of Houſes, and Farms.*

The Leaſe of a Farm differs from the Leaſe of a Houſe, or other Building, in that the Tenant of a Houſe knows certainly what it is he is to enjoy, and what benefit he will reap from the Houſe, whether it be to dwell in it, or to put it to ſome other uſe for which he hires it; whereas the Farmer is ignorant what the Fruits of the Ground, and the other Revenues which he takes to Farm, will juſtly amount to, becauſe of the uncertainty of their being of greater or leſſer Quantity, and Value, and of the danger of a Barrenneſs, and other Accidents, which may diminiſh, or quite deſtroy the Revenue[d].

[d] *This is a conſequence of the nature of theſe two kinds of Revenues.*

V.

5. *The effect of the uncertainty of Events.*

This uncertainty of the Events which may diminiſh the Revenues which are farmed out, or quite deſtroy them, as likewiſe of thoſe which may augment them, makes the Parties in their Contracts about Farms, to treat with the view of this Hope, and of this Danger: And it is for this reaſon that they may covenant, that the Farmer ſhall not pretend any diminution of his Rent becauſe of Barrenneſs, Hail, or other Accidents[e].

[e] Si quis fundum locaverit, ut etiam ſi quid vi majore accidiſſet, hoc ei præſtaretur, pacto ſtandum eſſe. *l.* 9. §. 2. *ff. loc. l.* 8. *C. eod.* See the following Section.

VI.

6. *Accidents of two kinds, Natural, and thoſe which are the act of Man.*

The Covenant which obliges the Farmer to pay his Rent, notwithſtanding Accidents, does not extend to that which may happen by the Hand of Man, ſuch as an open Force, a War, a Fire, and other Accidents of the like kind, which no Man could foreſee[f]. But it is to be underſtood only of what falls out naturally, thro' the injury of the Weather, and which it is reaſonable to expect; ſuch as a Froſt, an Inundation, and other caſes of the like nature.

[f] De quo cogitatum non docetur. *l.* 9. *in f. ff. de tranſ.* See the twenty firſt Article of the ſecond Section of Covenants.

VII.

7. *Renewing of the Leaſe.*

If the term of the Leaſe of a Farm being expired, the Leſſor ſuffers the Farmer to remain in poſſeſſion, and the Farmer continues to manage the Farm; the Leaſe is renewed by this tacit conſent[g].

[g] Qui impleto tempore conductionis remanſit in conductione—— reconduxiſſe videbitur. *l.* 13. §. 11. *ff. loc.*

VIII.

8. *Divers effects of a tacit Renewal of the Leaſe.*

The tacit Renewal of the Leaſe continues it either only for the year which is begun anew, or even for two years, or for the ſame ſpace of time as the firſt Leaſe, or for a ſhorter time, according to the intention of the Contracters, and the circumſtances. Thus when the Leaſe is of ſuch a nature, that there is an inequality of the Produce, between one year and another, as if in a Leaſe of Arable Lands for ſeveral years, there were a greater number, or ſome of the beſt Fields to be ploughed up one year more than the other; the tacit Renewal of the Leaſe could not be for leſs than two years. Thus in Leaſes of Houſes, the Landlord and the Tenant may, when they pleaſe, interrupt the Leaſe that is thus tacitly renewed, they giving one another a certain time to provide themſelves in, according as it is regulated by Cuſtom, or by the Judge. But if it is a Place, the uſe of which demands in its own nature a longer prorogation of time, then the renewing of the Leaſe will take place for the time of that uſe. Thus, the tacit renewing of the Leaſe of a Barn reaches to the time of Harveſt, and that of a Wine-preſs, to the ſeaſon of the Vintage[h].

[h] Quod autem diximus taciturnitate utriuſque partis colonum reconduxiſſe videri, ita accipiendum eſt, ut in ipſo anno, quo tacuerunt, videantur eandem locationem renovaſſe; non etiam in ſequentibus annis: etſi luſtrum fortè ab initio fuerat conductioni præſtitutum. Sed & ſi ſecundo quoque anno, poſt finitum luſtrum, nihil fuerit contrarium actum, eamdem videri locationem illo anno permanſiſſe. Hoc enim ipſo, quo tacuerunt, conſenſiſſe videntur. Et hoc deinceps in uno quoque anno obſervandum eſt. *l.* 13. §. 11. *ff. loc.* Qui ad certum tempus conducit, finito quoque tempore, colonus eſt. Intelligitur enim dominus, cùm patitur colonum in fundo eſſe, ex integro locare: & hujuſmodi contractus neque verba, neque ſcripturam utique deſiderant, ſed nudo conſenſu convaleſcunt. *l.* 14. *ff. loc.* Tacito conſenſu eandem locationem ——renovare videtur. *l.* 16. *C. eod.* In urbanis autem prædiis alio jure utimur, ut prout quiſque habitaverit, ita & obligetur. *d. l.* 13. §. *ult.*

IX.

9. *The tacit Renewal of the Leaſe, renews the ſame Conditions.*

The tacit Renewal of the Leaſe, renews likewiſe all its Conditions. For it is only a continuance of the firſt Leaſe, with all its conſequences. But if in the firſt Leaſe there were Sureties, their Engagement ends with the Leaſe, and is not renewed by the tacit Renewal of the Leaſe, unleſs they have reiterated their conſent; becauſe their Obligation was limited to the time of the Leaſe in which they engaged themſelves[i].

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[i] Pignora videntur durare obligata, ſed hoc ita verum eſt, ſi non alius pro eo in priore conductione res obligaverat, hujus enim novus conſenſus erit neceſſarius. *l.* 13. §. 11. *ff. loc.* Tacito conſenſu eandem locationem una cum vinculo pignoris renovare videtur. *l.* 19. *C. eod.*

We have not ſet down in this Article, that the Renewal of the Leaſe renews the Mortgage. For that which is ſaid in the Laws quoted on this Article, that the Pledge remains, or is renewed by the Renewal of the Leaſe, ought to be underſtood only, according to our Cuſtom, of what is tacitly mortgaged to the Proprietor for the Rent of his Farm, and without Covenant, as the Fruits of the Ground. But the Mortgage which the Proprietor had expreſly by his Leaſe on the Goods of the Farmer, is extinguiſhed with the Leaſe, and the Renewal of the Leaſe does not renew this Mortgage, unleſs it were done in the preſence of Publick Notaries. And then this ſecond Mortgage would have its effect only from the time of its date. And it is the ſame thing with reſpect to the Mortgage which the Farmer has on the Eſtate of the Proprietor. See the third Article of the firſt Section, and the third Article of the ſeventh Section of Mortgages.

SECT. V.

Of the Engagements which the Farmer is under to the Proprietor.

The CONTENTS.

1. *The Farmer ought to uſe the Lands, as any careful Man would do, if they were his own.*
2. *The Fruits are mortgaged for the Rent.*
3. *The Farmer who ſhares the Fruits with the Owner, bears the loſs of all Accidents.*
4. *The effect of Accidents in a Leaſe which is only for one year.*
5. *A ſmall Loſs occaſioned by the nature of the Land, or Fruits, or ſome other cauſe.*
6. *A conſiderable Loſs by the ſame cauſes, or other accidents.*
7. *Compenſation of good and bad years.*
8. *The loſs of the Seed and Tillage falls on the Farmer.*
9. *The Farmer cannot quit his Farm.*

I.

1. The Farmer ought to uſe the Lands, as any careful Man would do, if they were his own.

THE Farmer ought to uſe the Lands he has in Farm, as any prudent, diſcreet Man would do, if they were his own, and to keep them, preſerve and cultivate them, in the manner as is agreed on by the Leaſe, or regulated by Cuſtom. And he cannot, to increaſe his Profits out of the Lands, make any Innovation which may be of prejudice to the Proprietor. Thus, if in a Farm there are Arable Lands, he cannot ſow them when they ought to lie fallow, nor ſow Wheat, when he ought only to ſow Barley or Oats, if theſe changes would make the Lands to be in a worſe condition at the end of the Leaſe, than they ought to be when they are reſtored to the Proprietor. And the Farmer ought likewiſe to cultivate the Grounds in their proper ſeaſons, and according to Cuſtom[a].

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[a] Conductor omnia ſecundùm legem conductionis facere debet, & ante omnia colonus curare debet, ut opera ruſtica ſuo quoque tempore faciat, ne intempeſtiva cultura deteriorem fundum faceret. *l.* 25. §. 3. *ff. loc.*

[*In* England, *Tenants of Lands for term of Life, or for Years, if they commit any Waſte, are liable to an Action of Waſte; by which they loſe the Thing which they have waſted, and muſt pay treble Damages.* Vid. Stat. 6. Ed. 1. cap. 5.]

II.

2. The Fruits are mortgaged for the Rent.

The Fruits and Profits of the Ground that is farmed out, are mortgaged for the Rent of the Farm, whether the Farmer continues in the poſſeſſion of the Farm himſelf, or ſubſtitutes another in his place, or lets it out to Under-Tenants[b].

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[b] Si colonus locaverit fundum——fructus in cauſa pignoris manent, quemadmodum eſſent, ſi primus colonus eos percepiſſet. *l.* 24. §. 1. *ff. loc. l.* 53. *eod.* See the twelfth Article of the fifth Section of Mortgages.

III.

3. The Farmer who ſhares the Fruits with the Owner, bears the loſs of all Accidents.

He who holds a Farm on condition to give to the Proprietor a certain Portion of the Fruits, and to keep the Remainder for himſelf for his manuring and ſowing the Grounds, can claim nothing from the Proprietor either for the Tillage, or the Seed, whatever loſs may happen by an accident, even altho' he ſhould have no Crop at all. For their Leaſe makes between them a kind of Partnerſhip, in which the Proprietor gives the Land, and the Farmer or Tenant the Seed, and the Tillage; each of them hazarding the Portion of the Fruits which this Partnerſhip entitles them to[c].

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[c] Vis major quam Græci Θεοῦ βίαν, id eſt, vim divinam appellant, non debet conductori damnoſa eſſe——apparet autem de eo nos colono dicere qui ad pecuniam numeratam conduxit. Alioquin partiarius colonus, quaſi ſocietatis jure, & damnum, & lucrum cum domino fundi partitur. *l.* 25. §. 6. *ff. loc.* As to the Farmer who pays a certain Rent, ſee the following Article.

IV.

4. The effect of Accidents in a Leaſe which is only for one year.

If a Farmer who has a Leaſe only for one year, and is obliged to pay his Rent in Money, reaps nothing becauſe of ſome Accident, ſuch as a Froſt, a Storm of Hail, an Inundation, and other caſes of the like nature; or even becauſe of ſome Act of Man, as if in a time of War the whole Crop is deſtroyed, or taken away by Force; he ſhall be diſcharged from paying his Rent, or ſhall recover it if he has already paid it[d]. For it is but reaſonable, that in the caſe of a Leaſe, where the Leſſor ſecures to himſelf a Rent, the Leſſee ſhould be ſecure of enjoying ſomething: and beſides, the Leaſe is of the Fruits which the Farmer ſhall reap, and which it is preſuppoſed that he will reap. But if it was agreed, that the Accidents ſhould fall upon the Farmer; he will then be obliged to pay his Rent, notwithſtanding theſe Loſſes.

[d] Servius omnem vim, cui reſiſti non poteſt, dominum colono præſtare debere, ait: ut puta fluminum, graculorum, ſturnorum, & ſi quid ſimile acciderit: aut ſi incurſus hoſtium fiat. *l.* 15. §. 2. *ff. loc.* Si labes facta ſit, omnemque fructum tulerit, damnum coloni non eſſe: ne ſupra damnum ſeminis amiſſi, mercedes agri præſtare cogatur. Sed & ſi uredo fructum oleæ, corruperit, aut ſolis fervore non aſſueto id acciderit, damnum domini futurum. *d.* §. 2. See the Text cited on the preceding Article. And the fifth and ſixth Articles of the fourth Section, and the ſeventh Article of this Section.

V.

5. A ſmall Loſs occaſioned by the nature of the Lands, or Fruits, or ſome other cauſe.

If without an extraordinary Accident, and only thro' the Nature of the Land it ſelf, and of the Fruits, or becauſe of ſome ordinary Event, there happens ſome loſs that is not very conſiderable; as if the Fruits are not of a good quality, or not in quantity enough; if Tares growing up with the Corn diminiſh the Crop; if Paſſengers have done any ſlight damage to the Fruits; in theſe caſes, and others of the like nature, the Farmer cannot pretend any diminution of his Rent for theſe kinds of ſmall Loſſes, altho' his Leaſe were only for one Year: For ſince he was to have the whole Profit, how great ſoever it ſhould be; it is but juſt that he ſhould bear theſe inconſiderable Loſſes[e].

[e] Si quæ vitia ex ipſa re oriantur, hæc damno coloni eſſe. Veluti ſi vinum coacuerit, ſi raucis aut herbis ſegetes corruptæ ſint. *l.* 15. §. 2. *ff. loc.* Cùm quidam de fructuum exiguitate quæreretur, non eſſe rationem ejus habendam, reſcripto divi Antonini continetur. Item alio reſcripto ita continetur: novam rem deſideras, ut propter vetuſtatem vinearum, remiſſio tibi detur. *d. l.* 15. §. 5. Si nihil extra conſuetudinem acciderit, damnum coloni eſſe. *d. l.* 15. §. 2. *v. l.* 78. *in f. ff. de contr. empt.* Idemque dicendum ſi exercitus præteriens, per laſciviam aliquid abſtulit. *d.* §. 2. modicum damnum— ferrè debet colonus, cui immodicum lucrum non aufertur. *l.* 25. §. 6. *ff. loc.* See the following Articles.

VI.

6. A conſiderable Loſs by the ſame cauſes, or other accidents.

If the damage which has happened to the Farmer who has a Leaſe only for one year, proves to be conſiderable; whether it has been occaſioned by the Events mentioned in the foregoing Article, or by a Storm of Hail, a Froſt, or other Accident; altho' the loſs be not of all the Fruits of the Farm, yet the Farmer ought to have an abatement of ſome part of his Rent, ſuch as the Judge in his Prudence ſhall think fit to decree[f].

[f] Vis major—— non debet conductori damnoſa eſſe, ſi plus quam tolerabile eſt, læſi fuerint fructus. *l.* 25. §. 6. *ff. loc.*

Omnem vim cui reſiſti non poteſt, dominum colono præſtare debere. *l.* 15. §. 2. *ff. loc.* See the following Article.

VII.

7. Compenſation of good and bad years.

If the Leaſe being for two or more years, there happens in ſome of them Accidents which occaſion Loſſes, whether it be of the whole Fruits, or a great part of them; and that theſe Loſſes are not compenſated by the Profits of the other years, the Farmer may demand an abatement of his Rent, according as the quality of the Loſs, and the other circumſtances may render his Demand juſt. But if there was any Covenant in the Leaſe, or any Cuſtom of the Place, which did regulate the caſe of Loſſes of this kind, it would be neceſſary to keep to that[g].

[g] Licet certis annuis quantitatibus fundum conduxeris, ſi tamen expreſſum non eſt in locatione (ut mos regionis poſtulabat) ut ſi qua lue tempeſtatis, vel alio cæli vitio damna accidiſſent, ad onus tuum pertinerent: & quæ evenerunt ſterilitates, ubertate aliorum annorum repenſatæ non probabuntur, rationem tui juxta bonam fidem haberi, rectè poſtulabis. Eamque formam qui ex appellatione cognoſcet, ſequetur. *l.* 8. *C. de loc. v. l.* 18. *eod.*

Si uno anno remiſſionem quis colono dederit ob ſterilitatem, deinde ſequentibus annis contigit ubertas, nihil obeſſe domino remiſſionem, ſed integram penſionem etiam ejus anni quo remiſit, exigendam. *l.* 15. §. 4. *ff. loc.* Circa locationes atque conductiones, maximè fides contractus ſervanda eſt, ſi nihil ſpecialiter exprimetur contra conſuetudinem regionis. *l.* 19. *C. eod.* See the preceding Articles.

If the loſs happened the firſt year of the Leaſe, and that it proved to be of the whole Crop, would it be neceſſary that, in expectation of the end of the Leaſe, to judge whether there would be ground for an abatement or not, the Farmer ſhould be compelled to pay the firſt year's Rent, the conſequences of which might perhaps diminiſh the Crops of the following years; as if a Shower of Hail had not only deſtroyed the Fruits of a Vineyard, or other Plantation, but likewiſe damaged or broken the Vines or Trees? And would it not be juſt, to defer the regulating of the Abatement till the end of the Leaſe, if there ſhould then appear to be ground for it, and to leave it *to the prudence of the Judge to grant in the mean while ſome delay for the payment of the firſt year's Rent, or a part of it, according to the circumſtances of the quality of the Loſs, and the condition of the Proprietor, if he is able to tarry, as alſo the condition of the Farmer, if he is not able to pay?*

VIII.

8. *The Loſs of the Seed and Tillage falls on the Farmer.*

In all the Accidents which cauſe any loſs to the Farmer, for which he may claim an Abatement, either of the whole Rent, or a part of it, he cannot demand any Damages, neither for the Profits which he might have reaped, nor even for the Seed, or Tillage[h]. For he was obliged to be at theſe charges, that he might have a right to the Fruits.

[h] Ubicumque tamen remiſſionis ratio habetur ex cauſis ſuprà relatis, non id quod ſua intereſt conductor conſequitur, ſed mercedis exonerationem, pro rata. Suprà denique, damnum ſeminis ad colonum pertinere declaratur. *l.* 15. §. 7. *ff. loc. d. l.* §. 2. See the third Article of this Section.

IX.

9. *The Farmer cannot quit his Farm.*

The Farmer cannot quit his Farm, nor ceaſe to manure it; and if he fails either to till the Ground, or to perform any other Engagement, as if he was obliged to any Repairs; the Proprietor may bring his Action againſt him, both to compel him to perform his Engagements, and to make good the Damages which he has ſuffered by the interruption of the Leaſe[i].

[i] Si domus vel fundus in quinquennium penſionibus locatus ſit, poteſt dominus, ſi deſeruerit habitationem vel fundi culturam colonus vel inquilinus, cum eo ſtatim agere. Sed & de his quæ præſenti die præſtare debuerunt, velut opus aliquod efficerent, propagationes facerent, agere ſimiliter poteſt. *l.* 24. §. 2. & 3. *ff. loc.*

SECT. VI.

Of the Engagements which the Proprietor is under to the Farmer.

The CONTENTS.

1. *What the Proprietor is bound to furniſh to the Farmer.*
2. *Moveables and Tools given to the Farmer.*
3. *Repairs made by the Farmer.*
4. *The Expences which the Farmer has been at, the Leaſe being interrupted.*
5. *Improvements made by the Farmer.*
6. *If the Farmer is moleſted by the Proprietor.*
7. *Of the Trouble which the Proprietor could not prevent.*

I.

1. *What the Proprietor is bound to furniſh to the Farmer.*

BEſides the Engagements which the perſon is under who lets any thing to Hire, which are explained in the third Section, he who lets out a Country Farm, ought to furniſh that which the Leaſe obliges him to, for manuring the Grounds, and gathering in the Fruits, ſuch as Barns, Tubs and Preſſes for making Wine, and other things, according as it is agreed between the Parties, or regulated by Cuſtom[a].

[a] Illud nobis videndum eſt, ſi quis fundum locaverit, quæ ſoleat, inſtrumenti nomine, conductori præſtare: quæque ſi non præſtet, ex locato tenetur, &c. *l.* 19. §. 2. *ff. loc.* Si quid in lege conductionis convenit, ſi hoc non præſtatur; ex conducto agetur. *l.* 15. §. 1. *eod.* Utiliter ex conducto agit is, cui ſecundùm conventionem non præſtantur, quæ convenerant. *l.* 24. §. 4. *verſic. item eod.*

II.

2. *Moveables and Tools given to the Farmer.*

If the Proprietor furniſhes the Farmer with any Moveables and Inſtruments for cultivating the Farm, the Farmer is obliged to take care of them purſuant to the Rules explained in the third and following Articles of the ſecond Section. But if theſe things are eſtimated in the Leaſe at a certain Price, it will be a Sale, and they will be the Farmer's own[b].

[b] Cùm fundus locetur, & æſtimatum inſtrumentum colonus accipiat, Proculus ait, id agi, ut inſtrumentum emptum habeat colonus: ſicuti fieret, cum quid æſtimatum in dotem daretur. *l.* 3. *ff. loc.*

III.

3. *Repairs made by the Farmer.*

If the Farmer has made any Repairs, or been at other neceſſary charges, which he was not bound to by his Leaſe, nor by the Cuſtom of the place; the Proprietor will be obliged to reimburſe him of what he has laid out, or to diſcount it on the Rent[c].

[c] In conducto fundo, ſi conductor ſua opera aliquid neceſſario, vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cùm id non conveniſſet: ad recipienda ea quæ impendit, ex conducto cùm domino fundi, experiri poteſt. *l.* 55. §. 1. *ff. loc.*

IV.

4. *The Expences which the Farmer has been at, the Leaſe being interrupted.*

If a Farmer whoſe Leaſe might be interrupted by ſome Event which he ought to have foreſeen, has nevertheleſs been at ſome charges, in hopes that he ſhould enjoy the Farm for a certain time, as if he has laid up any great ſtore of Proviſions, bought Cattel, or been at other Expences of this kind; he cannot pretend to recover any of them, if his Leaſe is interrupted by the Event which he had reaſon to expect.

As if it was a Leaſe granted by one who had only the Uſe and Profits of the Eſtate, which came to ceaſe by the death of the Uſufructuary, who had let out only what Right he himſelf had: or a Leaſe that was to be diſſolved by the event of ſome Condition. For the Farmer knowing that theſe Expences might become altogether uſeleſs, he was willing to run the hazard of the Loſſes which he might ſuffer thereby[d].

[d] Si fructuarius locaverit fundum in quinquennium, & deceſſerit —— idem (Marcellus) quærit: ſi ſumptus (conductor) fecit in fundum, quaſi quinquennio fruiturus, an recipiat: & ait, non recepturum: quia hoc evenire poſſe, proſpicere debuit. *l.* 9. §. 1. *ff. loc.*

V.

5. Improvements made by the Farmer. If a Farmer has made Improvements which he was not bound to make, as if he has planted a Vineyard, or an Orchard, or made other Improvements of this kind, which have increaſed the Revenue of the Farm; he will recover the Expence he has been at on this account, purſuant to the Rule explained in the ſeventeenth Article of the tenth Section of the Contract of Sale[e].

[e] In conducto fundo, ſi conductor ſua opera aliquid neceſſario, vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cùm id non conveniſſet: ad recipienda ea quæ impedit; ex conducto cum domino fundi experiri poteſt. *l.* 55. §. 1. *ff. loc.* Colonus, cum lege locationis non eſſet comprehenſum ut vineas poneret, nihilominus in fundum vineas inſtituit, & propter earum fructum, denis amplius aureis annuis ager locari cœperat. Quæſitum eſt ſi dominus iſtum colonum fundi ejectum, penſionum debitarum nomine, conveniat, an ſumptus utiliter factos in vineis inſtituendis reputare poſſit, oppoſita doli mali exceptione? Reſpondit, vel expenſas conſecuturum, vel nihil amplius præſtaturum. *l.* 61. *ff. loc.* Impenſas quas ad meliorandam rem vos erogaſſe conſtiterit, habita fructuum ratione reſtitui vobis jubebit. *l.* 16. *C. de evict.*

VI.

6. If the Farmer is moleſted by the Proprietor. If the Farmer is moleſted either by the Proprietor himſelf, or by perſons whom the Proprietor might hinder from giving him any diſturbance, he ſhall be liable to make good the Damages which the Farmer ſuſtains, and all the Profit which he might have made of his Farm during the time which his Leaſe had yet to run; unleſs the trouble that was given him was only of a few days, and that matters being ſtill entire, he were re-eſtabliſhed in the peaceable Poſſeſſion of his Farm[f].

[f] Colonus, ſi ei frui non liceat, totius quinquennii nomine ſtatim rectè aget. *l.* 24. §. 4. *ff. loc.* Et quantùm per ſingulos annos compendii facturus erat, conſequetur. *d. l.* Quod ſi paucis diebus prohibuit, deinde pœnitentiam agit, omniaque colono in integro ſint, nihil ex obligatione paucorum dierum mora minuet. *d. l.* 24. §. 4. Si colonus tuus fundo frui à te, aut ab eo prohibetur, quem tu prohibere, ne id faciat poſſis: tantum ei præſtabis, quanti ejus interfuit frui: in quo etiam lucrum ejus continebitur. *l.* 33. *in f. ff. loc.*

VII.

7. Of the Trouble which the Proprietor could not prevent. If the diſturbance given to the Farmer is an open Violence, or a fact which the Proprietor is not able to hinder, and for which he is not accountable; he ſhall be obliged only to abate of the Rent in proportion to the Farmer's loſs by this diſturbance; or to give back ſo much of it as he had already received. But he will not be bound to make up the profit which the Farmer might have made, if he had enjoyed his Farm peaceably[g].

[g] Sin verò ab eo interpellabitur, quem tu prohibere, propter vim majorem, aut potentiam ejus non poteris: nihil amplius ei quàm mercedem remittere, aut reddere debebis. *l.* 33. *in f. ff. loc.*

SECT. VII.

Of the Nature of Undertakings of Work by the great, and of other ways of Letting out Man's Labour, and Induſtry.

The CONTENTS.

1. *Definition.*
2. *Difference of Undertakers, according as they furniſh any of the Materials, or not.*
3. *Of him who furniſhes the Materials, and undertakes the Work.*
4. *Of the Architect who furniſhes every thing.*
5. *Conditions of Undertakings.*
6. *What things are to be regulated by the judgment of ſkilful men.*

I.

1. Definition. IN Undertakings of Work by the great, and the other ways of Letting out the Labour of Workmen, the Leſſor is he who gives out the Work, or Buſineſs to be done; and the Leſſee, or Undertaker, is he who undertakes the Buſineſs, or Work[a].

[a] Qui ædem faciendam locaverat. *l.* 30. §. 3. *ff. loc.* See the ſecond Article of the firſt Section.

II.

2. Difference of Undertakers, according as they furniſh any of The Undertaker is ſometimes only charged with the bare Work, as an Engraver to whom a Seal is given to be engraven; or with a bare Labour, as a Carrier; or ſometimes he is bound to *the Materials, or not.* furniſh the Materials for the Work, together with his own Labour, as an Architect who furniſhes the Materials for the Building, together with his Direction and Overſight of the Work[b].

[b] Si gemma includenda vel inſculpenda data ſit. *l.* 13. §. 5. *ff. loc.* Si navicularius onus Minturnas vehendum conduxerit. *d. l.* 13. §. 1. Qui ædem faciendam locaverat, in lege dixerat, quoad in opus lapidis opus erit, pro lapide, & manu pretio dominus redemptori in pedes ſingulos ſeptem dabit. *l.* 30. §. 3. *eod.*

III.

3. Of him who furniſhes the Materials, and undertakes the Work. If the Workman furniſhes all the Materials, and his Work ſuch as has been agreed on, for a certain Price; as if a Goldſmith undertakes to make a Piece of Silver Plate, of ſuch a Faſhion, and for ſuch a Price, and furniſhes the Silver; it will be a Sale, and not a Letting to Hire. But if the Silver is given to the Goldſmith, and he is only to furniſh the Workmanſhip, it will be a Letting to Hire, or an Undertaking by the great[c].

[c] Si cum aurifice convenerit, ut is ex auro ſuo annulos mihi faceret, certi ponderis certæque formæ, & acceperit, verbi gratia, trecenta: utrum emptio & venditio ſit, an locatio & conductio, ſed placet, unum eſſe negotium, & magis emptionem & venditionem eſſe. Quod ſi ego aurum dedero, mercede pro opera conſtituta, dubium non eſt quin locatio & conductio ſit. *l.* 2. §. 1. *ff. loc.* §. 4. *inſt. eod.*

It is to be remarked touching the caſe ſpoken of in this Article, and others of the like nature, that all Bargains of this kind, implying the condition that the Work ſhall be well done, it may be ſaid, that at the time of the Contract, it is as it were a Letting to Hire, and an Undertaking by the great; and that in the Execution of the Contract it is as it were a Sale. And this is it that has given occaſion to the doubt mentioned in the texts quoted on this Article, whether it were a Sale, or a Letting to Hire. See the following Article.

IV.

4. Of the Architect who furniſhes every thing. If an Architect who undertakes a Building, engages to furniſh the Materials, it will be a Letting to Hire, and not a Sale, altho' it ſeems as if he ſold the Materials. For beſides that his principal Obligation is, to give his Direction and Overſight for the Building[d]; he does not ſell the Ground, to which the Building is only an Acceſſory.

[d] Cum inſulam ædificandam loco, ut ſua impenſa conductor omnia faciat: proprietatem quidem eorum ad me transfert, & tamen locatio eſt. Locat enim artifex operam ſuam, id eſt, faciendi neceſſitatem. *l.* 22. §. 2. *ff. loc.*

See the ſecond Article of the firſt Section, and the ninth Article of the following Section.

V.

5. Conditions of Undertakings. In undertakings of Work by the great, and other Covenants which reſpect the Labour of Perſons, the Parties may regulate what ſhall be furniſhed by him who gives out the Work to be done, the quality of the Work, the time within which it ſhall be finiſhed, and other conditions of this kind; and whatever ſhall be regulated by the Contract, ought to be performed[e].

[e] Si quis in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l.* 15. §. 1. *ff. loc.* See the ſeventh Article of the ſecond Section of Covenants.

VI.

If all that is to be done, or furniſhed by the Undertaker, is not plainly enough regulated by the Contract, as if the quality of the Materials which he is to furniſh, or the quality of the Work is not expreſs'd, or the time not fixed; all theſe things, and others of the like kind, ſhall be regulated either according to Cuſtom, if there is any concerning this matter, or by the judgment of ſkilful perſons[f]. *6. What things are to be regulated by the judgment of ſkilful men.*

[f] *See the ſixteenth Article of the ſecond Section of Covenants, and the ſixth Article of the following Section.*

SECT. VIII.

Of the Engagements of the perſon who undertakes any Work, or Labour.

The CONTENTS.

1. *Undertakers anſwerable for their Ignorance.*
2. *Defects of the Materials which the Workman is to furniſh.*
3. *What care Workmen and Undertakers are bound to take.*
4. *Of the Defect of the Thing.*
5. *The care of Carriers and Watermen.*
6. *Work to be done to the Owner's Content, or the arbitration of another perſon.*
7. *Work made according to the Maſter's direction.*
8. *If the Work periſhes before it is approved of.*
9. *If the Edifice periſhes while it is a building.*
10. *If the Workman is to furniſh every thing, and the whole periſhes.*
11. *Acceſſories to the Engagement of the Undertaker.*

I.

Beſides the Engagements which are common to all perſons who hire a Thing, and which have been explained in *1. Undertakers anſwerable for* *their Ignorance.* in the ſecond and fifth Sections, thoſe who undertake any Buſineſs, or Work, ought moreover to be anſwerable for all the defects occaſioned by their Ignorance; for they ought to know how to do that which they undertake, and it is their fault if they are ignorant of what they profeſs[a].

[a] Imperitia culpæ adnumeratur. *l.* 132. *ff. de reg. jur.*

Celſus etiam imperitiam culpæ adnumerandam, libro octavo Digeſtorum, ſcripſit. Si quis vitulos paſcendos, vel ſarciendum quid poliendumve conduxit, culpam eum præſtare debere. Et quod imperitia peccavit, culpam eſſe; quippe ut artifex, inquit, conduxit. *l.* 9. §. 5. *ff. loc. l.* 13. *eod. l.* 25. §. 7. *eod.* Poterit ex locato cum eo agi, qui vitioſum opus fecerit. *l.* 51. §. 1. *ff. loc.* See the fixth Article of this Section..

II.

2. Defects of the Materials which the Workman is to furniſh. If the Undertaker is obliged to furniſh any Materials for the Work, as an Architect who has undertaken to furniſh the Materials for a Building, he ought to give them good and well conditioned; and likewiſe to anſwer for the defects which he is ignorant of; for he is bound to give that good in its kind which he ought to give; as he who lets a thing to Hire, is obliged to give it ſuch as it ought to be for the Uſe for which it is deſigned[b].

[b] Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod intereſt, nec ignorantia ejus erit excuſata. *l.* 19. §. 1. *ff. loc.* Quod imperitia peccavit, culpam eſſe. Quippe ut artifex conduxit. *l.* 9. §. 5. *ff. locati.*

See the ſeventh Article of the eleventh Section of the Contract of Sale.

III.

3. What care Workmen and Undertakers are bound to take. The Workman, or Artificer, who takes a thing into his cuſtody to work on it, and he who undertakes barely to keep a thing for a certain price, as he who undertakes to keep Cattel, ought to preſerve that which is intruſted to them, with all the care that is poſſible to be taken by perſons that are the moſt watchful and diligent. And if, for want of ſuch a care, the thing periſhes, altho' even by an accident, they will be made accountable for it; as if the Thing is ſtole, or burnt, or damaged, for want of having been laid up in a ſecure place, or for not being carefully lookt after. And it would be the ſame thing if a Workman, having in his cuſtody things belonging to ſeveral perſons, had given to one that which belonged to another, altho' by miſtake[c].

[c] Si fullo veſtimenta polienda acceperit: eaque mures roſerint, ex locato tenebitur quia debuit ab hac re cavere. Et ſi pallium fullo permutaverit, & alii alterius dederit, ex locato actione tenebitur. Etiamſi ignarus fecerit. *l.* 13. §. 6. *ff. loc.*

Poterat ea res in locum tutiorem transferre. *l.* 34. *in f. ff. de dam. inf.* Qui mercedem accipit pro cuſtodia alicujus rei, is hujus periculum cuſtodiæ præſtat. *l.* 40. *ff. loc.* Quæcumque de furto diximus, eadem & de damno debent intelligi. Non enim dubitari oportet, quin is qui ſalvum fore recipit, non ſolùm à furto, ſed etiam à damno recedere videatur. *l.* 5. §. 1. *ff. naut. caup. l.* 60. §. 2. *ff. loc.* See the ſecond Article of the ſecond Section of the Loan of Things to be reſtored in Specie; the fourth Article of the third Section of a Depoſitum; and the fifth Article of the firſt Section of Perſons who drive any Publick Trade.

IV.

4. Of the defect of the Thing. If that which is given to a Workman to be wrought, periſhes in his hands, without his Fault, and merely thro' a defect in the Thing it ſelf; as if an Amethiſt which is given to be engraven, happens to break in the hands of the Engraver, thro' ſome defect of the matter, and not thro' his unſkilfulneſs, he ſhall not be accountable for it, unleſs he has undertaken the Work at his own peril[d].

[d] Si gemma includenda, aut inſculpenda data ſit, eaque fracta ſit: ſi quidem vitio materiæ factum ſit, non erit ex locato actio: ſi imperitia facientis, erit. Huic ſententiæ addendum eſt, niſi periculum quoque in ſe artifex receperat. Tunc enim, etſi vitio materiæ id evenit, erit ex locato actio. *l.* 13. §. 5. *ff. loc.*

V.

5. The care of Carriers and Watermen. Carriers and Watermen, and all thoſe who undertake to carry Merchant Goods, or other things, are anſwerable for the cuſtody, carriage, and tranſportation of the things which they take under their charge, and to uſe all the application, and take all the care of them that is poſſible. And if any thing periſhes, or is damaged thro' their fault, or the fault of the perſons whom they imploy, they ought to anſwer for it[e].

[e] Si magiſter navis, ſine gubernatore in fluvem navem immiſerit, & tempeſtate orta temperare non potuerit, & navem perdiderit: vectores habebunt adverſus eum ex locato actionem. *l.* 13. §. 2. *ff. loc.* Qui columnam tranſportandam conduxit, ſi ea dum tollitur, aut portatur, aut reponitur, fracta ſit, ita id periculum præſtat, ſi qua ipſius eorumque quorum opera uteretur, culpa acciderit. Culpa autem abeſt, ſi omnia facta ſunt, quæ diligentiſſimus quiſque obſervaturus fuiſſet. *l.* 25. §. 7. *ff. eod.* See the fourth Article of the ſecond Section of thoſe who drive any Publick Trade.

VI.

6. Work to be done to the Owner's content, or the arbitration of another perſon. If it is agreed that a Work ſhall be done to the Owner's ſatisfaction, or according to the arbitration of a perſon who is named, the Workman ſhall be bound only to deliver the Work good, ſuch as will be approved of by ſkilful Men[f]. For theſe kinds of Covenants imply the Condition, that what ſhall be regulated ſhall be reaſonable[g].

[f] Si in lege locationis comprehenſum ſit, ut arbitratu domini opus approbetur, perinde habetur ac ſi viri boni arbitrium comprehenſum fuiſſet. Idemque ſervatur, ſi alterius cujuſlibet arbitrium comprehenſum ſit. Nam fides bona exigit, ut arbitrium tale præſtetur, quale viro bono convenit. *l. 24. ff. loc.*

[g] *See the eleventh Article of the third Section of Covenants.*

The Emperors Gratian, Valentinian, *and* Theodoſius *ordained, that the Undertakers of Publick Works, and their Heirs, ſhould be anſwerable for the ſpace of fifteen years, for the defects of the Work.* l. 8. C. de oper. publ.

VII.

7. *Work made according to the Maſter's direction.*

Altho' the Workman ought to anſwer for the defects of the Work; yet if the Owner himſelf has ordered and directed the Work, he cannot complain of it[h].

[h] Poterit itaque ex locato cum eo agi, qui vitioſum opus fecerit. Niſi ſi ideo in operas ſingulas merces conſtituta erit. *Ut arbitrio domini opus efficeretur.* Tunc enim nihil conductor præſtare domino de bonitate operis videtur. *l. 51. in f. ff. loc.*

VIII.

8. *If the Work periſhes before it is approved of.*

If one has given Materials to a Workman, to make a Work at a certain rate for the whole; the Undertaker will not have performed his Engagement, nor be diſcharged from it, until the whole Work has been examined, and it appears to be ſuch as it ought to be. And if it is a Work which conſiſts of ſeveral Pieces, or is to be meaſured, and a certain Price to be paid for each Piece, or each Meaſure; the Undertaker ſhall be diſcharged in proportion to what ſhall be counted or meaſured and approved of. And on the contrary, the Undertaker ſhall bear the loſs of his Work, and make good the Damages of the Maſter, if he ſuffers any, for ſo much of the Work as is found not to be of the quality which it ought to have. But if in the caſe of either of theſe two Bargains, the Thing periſhes by an accident, before the Work is proved; the Maſter ſhall bear the loſs, and be accountable for the Price of the Work, eſpecially if it was his fault that the Work was not proved; unleſs it did appear that the Work was not ſuch as ought to be received[i].

[i] Opus quod averſione locatum eſt, donec adprobetur, conductoris periculum eſt. Quod verò ita conductum ſit, ut in pedes, menſuraſve præſtetur eatenus conductoris periculo eſt, quatenus admenſum non ſit. Et in utraque cauſa nociturum locatori, ſi per eum ſteterit, quominus opus adprobetur, vel admetiatur. Si tamen vi majore opus prius interciderit quàm adprobaretur, locatoris periculo eſt. Niſi aliud actum ſit. Non enim ampliùs præſtari locatori oporteat, quàm quod ſua cura atque opera conſequutus eſſet. *l. 36. ff. loc.* Si priuſquam locatori opus probaretur, vi aliqua conſumptum eſt, detrimentum ad locatorem ita pertinet, ſi tale opus fuit, ut probari deberet. *l. 37. ff. eod.* See the firſt Article of this Section, and the following Article.

IX.

9. *If the Edifice periſhes while it is building.*

If an Architect having undertaken to build a Houſe, or other Edifice, and having finiſhed it, or only a part of it, it happens to be deſtroyed by an Inundation, an Earthquake, or other Accident; the whole Loſs will fall upon the Owner: and he will notwithſtanding the loſs, be accountable both for the Materials which the Undertaker has furniſhed, and for what is due on account of the Workmanſhip. For whatever was built upon his Ground, was delivered to him. But if the Building periſhed thro' the defect of the Work, the Architect ſhall loſe his Labour, together with all the Materials that are deſtroyed; and he will likewiſe be liable for the Damage which the Maſter ſuffers on this account[l].

[l] Marcius domum faciendam à Flacco conduxerat: deinde operis parte effecta, terræ motu concuſſum erat ædificium. Maſſurius Sabinus, ſi vi naturali, veluti terræ motu, hoc acciderit, Flacci eſſe periculum. *l. 59. ff. loc.* Si rivum quem faciendum conduxeras, & feceras antequam eum probares, labes corrumpit: tuum periculum eſt. Paulus: imò ſi ſoli vitio id accidit, locatoris erit periculum: ſi operis vitio accidit, tuum erit detrimentum. *l. ult. eod.* Redemptores, qui ſuis cœmentis ædificant, ſtatim cœmenta faciunt eorum in quorum ſolo ædificant. *l. 39. ff. de rei vind.* See the firſt Article of this Section.

X.

10. *If the Workman is to furniſh every thing, and the whole periſhes.*

If the Workman was to furniſh all the Work, as in the caſe of the third Article of the ſeventh Section, and the Thing periſhes by an accident, before the Work has been delivered; the whole loſs both of the Stuff, and Faſhion, will fall upon the Workman. For this is a Sale, which is not accompliſhed, till the Workman has delivered his Work[m].

[m] *This is a conſequence of the third Article of the ſeventh Section.*

XI.

11. *Acceſſories to the Engagement of the Undertaker.*

He who has undertaken a Work, a Labour, the Carriage of ſomething, or any other thing of this kind, is not only bound to perform what is expreſly contained in the Bargain; but likewiſe to do every thing that is acceſſory to the Work, or Thing which he has undertaken. Thus, Maſters of Stage Coaches, Waggoners, and Carriers pay the Tolls, and Ferry Boats which are on the Road;

for theſe are Charges which reſpect the Carriage[a]. But they do not pay the Cuſtoms, and other Duties which are laid upon the Goods which they carry. For theſe Duties have nothing to do with the Carriage of the Goods, but are exacted of the Owners.

SECT. IX.

Of the Engagements of the perſon who gives out any Work, or Buſineſs to be done.

The CONTENTS.

1. *Engagements of the perſon who gives any Work to be done.*
2. *He owes the Price, with the Intereſt, if he is in delay.*
3. *Diſcharge from advancing the Price in caſe of danger.*
4. *If the Thing periſhes thro' ſome defect in it ſelf, or by the deed of him who gives it out.*
5. *If the Work is not done againſt the time appointed.*
6. *Of the Labourer, whoſe fault it was not that he did not work.*
7. *If the Maſter delays to receive the Work.*
8. *If the Undertaker is at any charge.*

I.

1. Engagements of the perſon who gives any Work to be done. HE who gives out a Work to be done, is obliged to furniſh to the Undertaker that which he is bound to by the Bargain; whether it be to furniſh any Stuff, to give the Workman his Diet, or that he is obliged to any other thing.

II.

2. He owes the Price, with the Intereſt, if he is in delay. He ought likewiſe to pay the Price, whether it be after the whole Work is finiſhed and delivered, or in proportion to the quantity of the Work that is done, or even beforehand, according as it has been regulated by the Agreement; and if he fails to pay at the term, he ſhall be obliged to pay the Intereſt of the Price from the time of the Demand[b].

III.

3. Diſcharge from advancing the Price in caſe of danger. If it was agreed that the Price of the Work, or a part of it, ſhould be paid beforehand, and afterwards there appeared to be danger in advancing the Money, he that gave out the Work cannot be compelled to advance the Money, unleſs the Undertaker gives Security[c].

IV.

4. If the Thing periſhes thro' ſome defect in it ſelf, or by the deed of him who gives it out. If a Thing that is given out to a Workman to have ſomething done to it, happens to periſh becauſe of ſome defect in the Thing it ſelf, or by ſome deed which he who gave it out ought to anſwer for; he will be liable to pay the Workman what he had done and furniſhed for the Work: as in the Caſe of the fourth Article of the eighth Section[d].

V.

5. If the Work is not done againſt the time appointed. If it has not been the fault of the Workman, or Artificer, that the Work has not been finiſhed within the time agreed on, and that ſkilful Men be of opinion that the time allowed for finiſhing the Work was not ſufficient, he who gave it out ought to allow the time that is neceſſary, and cannot pretend any Damages for the delay, even altho' they had been ſtipulated in caſe the Work were not done within the time; for no Covenant obliges people to that which is impoſſible[e]. But if the Work was promiſed againſt a certain day, and for a Uſe which could not admit of delay, as if it was to be ſold at ſuch a Fair, or to be ready for ſuch an Imbarkation; the Undertaker would be liable to make good the damages of the Delay, and ought to blame himſelf for having undertaken what he was not able to perform.

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[a] Vehiculum conduxiſti, ut onus tuum portaret, & ſecum iter faceret, id cùm pontem tranſiret, redemptor ejus pontis portorium ab eo exigebat. Quærebatur, an etiam pro ipſa ſola rheda portorium daturus fuerit? Puto, ſi mulio non ignoravit ea ſe tranſiturum, cùm vehiculum locaret, mulionem præſtare debere. *l. 60. §. 8. ff. loc.*

[a] Si quid in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l. 15. §. 1. ff. loc.* See the firſt Article of the ſixth Section.

[b] *See the ſeventeenth Article of the ſecond Section.*

[c] Quidam in municipio balineum præſtandum, annuis viginti nummis conduxerat: & ad refectionem fornacis, fiſtularum, ſimiliumque rerum, centum nummi ut præſtarentur ei, convenerat: conductor centum nummos petebat, ita ei deberi dico, ſi in earum refectionem —— impendi ſatiſdaret. *l. 58. §. 2. ff loc.* See the twenty ſecond Article of the tenth Section of the Contract of Sale.

[d] *This is a conſequence of the fourth Article of the eighth Section.*

[e] In operis locatione erat dictum, ante quam diem effici deberet. Deinde ſi ita factum non eſſet, quanti locatoris interfuiſſet, tantam pecuniam conductor promiſerat, Eatenus eam obligationem contrahi puto quatenus vir bonus de ſpatio temporis

æſtimaſſet, quia id actum apparet eſſe, ut eos ſpatio abſolveretur, ſine quo fieri non poſſit. *l.* 58. §. 1. *ff. loc. v. l.* 13. §. 10. *eod.* See the ſixth Article of the fifth Section of Covenants, the twelfth Article of the twelfth Section, and the nineteenth Article of the ſecond Section of the Contract of Sale.

VI.

6. Of the Labourer, whoſe fault it was not, that he did not work. If it has not been the fault of the Labourer, that he did not do the Work, or perform the Service which he had promiſed within a certain time; and that during that time he has not been imployed any other way; he who engaged him in his Service, is bound to pay the Salary for the time which he has made the Labourer loſe[f].

[f] Qui operas ſuas locavit, totius temporis mercedem accipere debet, ſi per eum non ſtetit quominus operas præſtet. *l.* 38. *ff. loc.* Cùm per te non ſtetiſſe proponas, quominus locatas operas Antonio Aquilæ ſolveres, ſi eodem anno mercedes ab alio non accepiſti, fidem contractus impleri æquum eſt, *l.* 19. §. 9. *eod.* Diem functo legato Cæſaris, ſalarium comitibus reſidui temporis præſtandum, modò ſi non poſtea comites cum aliis eodem tempore fuerunt. *d. l.* 19. §. *ult. v. l.* 61. §. 1. *ff. loc.*

VII.

7. If the Maſter delays to receive the Work. If he who gave out the Work to be done, delays to receive it after it is finiſhed, or refuſes it without a good reaſon, and the thing periſhes after his delay, he ſhall nevertheleſs be bound to pay the price of the Work[g].

[g] Nociturum locatori ſi per eum ſteterit quominus opus approbetur. *l.* 36. *ff. loc.*

VIII.

8. If the Undertaker is at any charge. If beſides the Workmanſhip, the Workman, or Undertaker, has been at any expence in preſerving the thing, the perſon who gave the Work out, ſhall be bound to reimburſe him[h].

[h] *See the ſeventh Article of the third Section.*

SECT. X.

Of Leaſes for Perpetuity, or for a long Term of Years.

The ſubject matter of this Section. Emphyteutical Leaſes, or Leaſes for Perpetuity, or a long Term of Years, have been a conſequence of the Leaſes of Farms. For ſince the Owners of barren Lands, could not eaſily find Tenants for them, a way was invented, to give in Perpetuity ſuch kind of Lands, on condition that the Grantee ſhould cultivate, plant, and otherwiſe improve them, as the word *Emphyteuſis* ſignifies. By this Agreement, the Proprietor finds on his part his account, by aſſuring to himſelf a certain and perpetual Rent: And the perpetual Tenant finds likewiſe his advantage, in laying out his Labour, and Induſtry, to change the face of the Ground, and to make it fruitful.

Seeing the matter of Emphyteutical or Perpetual Leaſes, takes in Quit-Rents, and other kinds of Ground-Rents, and that the conditions of perpetual Tenants are different, according to the diverſity of their Grants, and according to the Cuſtom and Uſage of Places, we are not to enter here into the detail of this matter. Thus, we ſhall not inſert here the Rules of Law concerning Fines of Alienation, nor thoſe which relate to the Right which the Lord of a Mannor has on Lands that are part of his Mannor, which are different in different Countries, but ſhall confine our ſelves to ſuch Rules as are of the *Roman* Law. And we ſhall lay down only the general Principles, which are both agreeable to the *Roman* Law, and to our Uſage, ſuch as are obſerved in all the Cuſtoms, and are the fundamental Maxims of the Law touching this matter.

The CONTENTS.

1. *Definition of Perpetual Leaſes.*
2. *All Lands may be let out upon Leaſes for Perpetuity.*
3. *Difference between perpetual and other kinds of Leaſes.*
4. *Perpetuity of the Emphyteutical Leaſe.*
5. *The perpetual Leaſe ſhares the Rights of Property.*
6. *Property direct and uſeful.*
7. *Mutual Engagements which reſult from the Perpetual Leaſe.*
8. *Who bears the Loſſes occaſioned by accidents.*
9. *The perpetual Tenant cannot commit Waſte.*
10. *The perpetual Leaſe vacated for Non-Payment of the Rent.*
11. *The Expences are not refunded.*

I.

A Perpetual, or Emphyteutical Leaſe, is a Contract by which the Owner of an Eſtate in Land gives it to a Tenant to cultivate and improve it[a]; and to enjoy it and diſpoſe of it for ever[b], on condition that the Tenant pay him a certain Rent in Money, Corn, or other kind[c], and that he bear the other Charges which they agree on. *1. Definition of perpetual Leaſes.*

[a] *This is what is meant by Jus* Emphyteuticum, *which is the word uſed in the Title of this matter, which denotes that the Lands are given to the Tenant,*

II.

2. All Lands may be let out upon Leases for Perpetuity. Altho' the *Emphyteuſis* ſeems to be reſtrained by its primitive Inſtitution, to barren Lands, yet Leaſes for Perpetuity are given of Lands which are fruitful, and in a good condition. And ſuch Leaſes are likewiſe granted of Poſſeſſions which of their own nature produce no manner of Fruit, but which yield other Revenues; ſuch as Houſes, and other Buildings[d].

III.

3. Difference between perpetual and other kinds of Leaſes. Perpetual Leaſes are diſtinguiſhed from the common Leaſes of Farms[e], by two eſſential characters, which are the foundation of the Rules that are peculiar to Perpetual Leaſes. The firſt is the Perpetuity of the Leaſe[f]; and the ſecond is the tranſlation of a kind of Property[g].

IV.

4. Perpetuity of the Emphyteutical Leaſe. The perpetuity of the Emphyteutical Leaſe makes it to paſs, not only to the Heirs of the perpetual Tenant, but likewiſe to all thoſe who ſucceed to his Right, whether by Donation, Sale, or any other kind of Alienation. And they can never be diſpoſſeſſed by the Owner of the Lands, and his Succeſſors[h], unleſs in the caſes which ſhall be explained in this Section.

V.

5. The Perpetual Leaſe ſhares the Rights of Property. The tranſlation of Property which is made by a Perpetual Leaſe, is proportioned to the nature of this Contract, where the Owner gives the Lands and reſerves the Rent. And by this Covenant, there is made as it were a Partition of the Rights of Property between the Owner of the Lands, and the perpetual Tenant. For the Owner who grants the perpetual Leaſe, remains Maſter in ſo far as to enjoy the Rent which he has reſerved, as the Fruit of his own proper Lands, by which he retains the chief right of Property, which is that of enjoying the Thing as Owner of it, together with the other Rights which he has reſerved to himſelf. And the perpetual Tenant, on his part, acquires the Right of tranſmitting the Eſtate to his Sceſſors for ever, of ſelling it, giving it away, alienating it, with the Burden of the Rights which the Leſſor of the Lands has reſerved to himſelf; as alſo a right to plant, to build, and to make what other changes he ſhall think proper, for improving the Eſtate, which are ſo many Rights of Property[i].

VI.

6. Property direct and useful. The Rights of Property which the Maſter retains, and thoſe which are conveyed to the perpetual Tenant, are commonly diſtinguiſhed by the names of *Direct Property*, which is given to the Right of the Maſter; and *Uſeful Property*, which is given to the Right of the Tenant. The meaning of which is, that the firſt Maſter of the Eſtate retains his Original Right of Property, except in ſo far as he tranſmits a ſhare of it to the perpetual Tenant; and that the

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that he may cultivate, plant, and improve them. Meliorationes ἐμπονήματα, *l.* 3. *C. de jur. emphyt.*

[b] Ut ecce de prædiis, quæ perpetuò quibuſdam fruenda traduntur. Id eſt, ut quamdiu penſio, ſive reditus pro his domino præſtetur, neque ipſi conductori, neque hæredi ejus, cuive conductor, hæresve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocumque modo alienaverit, auferre liceat. §. 3. *inſt. de locat. & cond. l.* 1. *ff. ſi ager vect. id eſt, emphyt. pet. l.* 1. *C. de adm. rer. publ.*

[c] Domini prædiorum id quod terra præſtat accipiant, pecuniam non requirant, quam ruſtici optare non audent; niſi conſuetudo prædii hoc exigat. *l.* 5. *C. de agric. & cenſ.* Penſio, ſive reditus pro his domino præſtetur. §. 3. *inſt. de locat. & cond.* Reditus in auro, & ſpeciebus. *l.* 2. §. 2. *C. de agric. & cenſ.*

[d] Loca omnia fundive reipublicæ—— perpetuariis conductoribus locentur. *l.* 3. *C. de locat. præd. civil.* Vectigales ædes. *l.* 15. §. 26. *ff.* de damno infecto. Suburbanum, aut domum. *Nov.* 7. *C.* 3. §. 2.

[e] Sed talis contractus quia inter veteres dubitabatur, & à quibuſdam locatio, à quibuſdam venditio exiſtimabatur: lex Zenoniana lata eſt, quæ Emphyteuſeos contractus propriam ſtatuit naturam, neque ad locationem, neque ad venditionem inclinantem: ſed ſuis pactionibus fulciendam. §. 3. *inſt. de locat. & cond.* Jus Emphyteuticarium neque conductionis, neque alienationis eſſe titulis adjiciendum. Sed hoc jus tertium eſſe conſtituimus ab utriuſque memoratorum contractuum ſocietate, ſeu ſimilitudine ſeparatum, conceptionem, definitionemque habere propriam. *l.* 1. *C. de jur. Emphyt.*

[f] Perpetuò quibuſdam fruenda. §. 3. *inſt. de locat. & cond.* Perpetuarii, hoc eſt, Emphyteuticarii juris. *l.* 1. *C. de off. com. ſacr. pal. l.* 1. *&* 5. *C. de locat. præd. civil. l.* 10. *Cod. de loc. & cond.*

[g] Emphyteuticarii fundorum domini, *l.* 12. *C. de fund. patr.* See the following Articles.

There are ſome Emphyteutical Leaſes which are not perpetual, but only for a long Term of Years, ſuch as a Hundred, or Ninety Nine years.

[h] Neque hæredi ejus, cuive conductor, hæresve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocumque modo alienaverit, auferre liceat. §. 3. *inſt. de locat. & cond.*

[i] Jus Emphyteuticarium neque conductionis, neque alienationis eſſe titulis adjiciendum: ſed hoc jus tertium eſſe conſtituimus. *l.* 1. *C. de jur. emphyt.* Penſio ſive reditus domino præſtetur. §. 3. *inſt. de loc. & cond.* Emphyteuticarii fundorum domini. *l.* 12. *C. de fund. patrim.* Cui conductor, hæresve ejus id prædium vendiderit, donaverit, aliove quocumque modo alienaverit. §. 3. *inſt. de loc. & cond.*

the perpetual Tenant acquires the Right of enjoying and diſpoſing of the Eſtate, with the burden of the Rights that are reſerved to the Maſter of the Lands. And it is for this Reaſon, that in the *Roman* Law, the perpetual Tenant is conſidered in a double capacity, either as being, or not being the Maſter of the Eſtate, according to the different views, and the different effects of theſe two kinds of Property[l].

[l] Emphyteuticarii, fundorum domini. *l.* 12. *C. de fund. patrim.* quamvis non efficiantur domini. *l.* 1. §. 1. *ff. ſi ager vectig. id eſt emphyt. petat.*

VII.

7. Mutual Engagements which reſult from the Perpetual Leaſe.

The perpetual Tenant, on his part, is obliged to pay the perpetual Rent, and to perform the other conditions regulated by his Leaſe, and by Cuſtom; ſuch as the duty of Fines of Alienation which thoſe perſons are bound to pay, who come into the Eſtate of the perpetual Tenant, either upon all kinds of changes of a Tenant, or upon ſome, or only upon Sales, according as it is regulated by the Leaſe, or by Cuſtom; the Right of Pre-emption, when the perpetual Tenant has a mind to ſell the Eſtate, and others of the like nature. And he who grants the perpetual Leaſe, is obliged, on his part, to warrant the Eſtate, and to take it back, and diſcharge the perpetual Tenant of the Rent, if he finding it too hard is willing to give it up[m].

[m] Lex Zenoniana lata eſt, quæ emphyteuſeos contractûs propriam ſtatuit naturam—— ſuis pactionibus fulciendam. Et ſi quidem aliquid pactum fuerit, hoc ita obtinere. §. 3. *inſt. de loc. & cond.* Jus Emphyteuticarium—— ſeparatam conceptionem, definitionemque habere propriam, & juſtum eſſe validumque contractum, in quo cuncta, quæ inter utraſque contrahentium partes, ſuper omnibus pactionibus ſcriptura interveniente habitis placuerint, firma illibataque perpetua ſtabilitate, modis omnibus debeant cuſtodiri. *l.* 1. *C. de jur. Emphyt. l.* 2. *eod.*

See the Origine of the Right of Fines of Alienation, of the Right of Redemption and Pre-emption in the third Law of the ſame Title.

The perpetual Tenant has a right to give up the Eſtate to the direct Lord of the Lands, if he finds himſelf overcharged by the Rent. There is nothing ſaid here of the Rules concerning this matter, which are eſtabliſhed by Cuſtom. It is ſufficient to remark, that this Right is founded on the Loſſes, or Diminutions which may happen to the Eſtate, and on the Injuſtice that it would be to force the Tenant to pay a perpetual, and exceſſive Rent, if the Eſtate were not able to afford it; ſince in Leaſes for a few Years, eaſes and abatements of the Rent are granted to Farmers, becauſe of the diminution of the Fruits of the Ground. See the following Article.

VIII.

8. Who bears the loſſes occaſioned by Accidents.

It follows from the Nature of theſe Perpetual Leaſes, that all the Accidents which deſtroy only the Revenues, or the Improvements made by planting, building, and others of what kind ſoever they be, that are made by the perpetual Tenant, are to his loſs. For he was obliged to make Improvements, and it was for his behoof that the Eſtate was improved. And the Accidents which deſtroy the Lands, fall both upon the Maſter, who ſuffers the loſs of his Eſtate, and likewiſe on the perpetual Tenant, who loſes the Improvements which he had made upon it[n].

[n] Si interdum ea quæ fortuitis caſibus eveniunt, pactorum non fuerint conventione concepta, ſi quidem tanta emerſerit clades, quæ prorſus etiam ipſius rei quæ per Emphyteuſim data eſt faciat interitum, hoc non Emphyteuticario, cui nihil reliquum permanſit, ſed rei domino, qui, quod fatalitate ingruebat, etiam, nullo intercedente contractu habiturus fuerat, imputetur. Sin verò particulare, vel aliud leve contigerit damnum, ex quo non ipſa rei penitus lædatur ſubſtantia, hoc Emphyteuticarius ſuis partibus non dubitet adſcribendum. *l.* 1. *C. de jur. Emphyt.* §. 3. *inſt. de loc. & cond.*

We have not ſet down in this Article the caſe of the Loſs of a part of the Lands, as if an Inundation has carried off the half, or more, or leſs of the Eſtate. For altho' what remains is liable for the whole Rent, yet the liberty which the perpetual Tenant has of yielding up the Eſtate to the Maſter, puts it in his power to free himſelf of the Rent by abandoning the Eſtate, or that which remains of it, in the condition in which he ought to reſtore it, purſuant to the Rules eſtabliſhed for caſes of this kind.

IX.

9. The perpetual Tenant cannot commit Waſte.

It is likewiſe a conſequence of the Nature of Perpetual Leaſes, that the perpetual Tenant cannot commit waſte, or damage the Eſtate, nor even take away the Improvements which he had made upon it. And if he commits Waſte, the Maſter of the Lands may get the perpetual Leaſe to be vacated, may enter again to the poſſeſſion of his Eſtate, and oblige the Tenant to repair what has been waſted. But the perpetual Tenant may make what changes are uſeful, and ſuch as any careful and diligent Maſter would do; ſuch as the cutting down of old Trees, in order to plant new ones, the demoliſhing that which is falling to decay, in order to rebuild it; and others of the like nature.

[o] Si quidem deterius fecerit prædium, aut ſuburbanum aut domum qui emphyteuſim percepit, cogi eum de ſuo diligentiam, ac reſtitutionem priſci ſtatus facere. *Nov.* 7. *cap.* 3. §. 2. Si verò quis aut locator aut emphyteuta—— deteriorem faciat rem—— damus licentiam venerabili domui—— antiquum ſtatum locatæ, ſive emphyteuticæ rei exigere, & ejicere de emphyteuſi. *Nov.* 120. *c.* 8. Si quid inædificaverit, poſtea eum neque tollere hoc, neque refigere poſſe. *l.* 15. *ff. de uſufr.*

Altho' this Law relates to the Uſufructuary, yet it may with much greater reaſon be extended to the perpetual Tenant, who poſſeſſes only on condition that he do improve the Lands.

X.

10. The perpetual Leaſe vacated for Non-Payment of the Rent.

This is alſo another conſequence of the Nature of Perpetual Leaſes, that in caſe of Non-Payment of the Rent, the perpetual Tenant may be ejected, even altho' there were no Clauſe for vacating the Leaſe in this caſe[p], unleſs he makes payment within the time limited by the Judge[q].

[p] Sancimus ſi quidem aliquæ pactiones in emphyteuticis inſtrumentis fuerint conſcriptæ, eaſdem & in omnibus aliis capitulis, obſervari: & de rejectione ejus qui emphyteuſim ſuſcepit, ſi ſolitam penſionem vel publicarum functionum apochas non præſtiterit. Sin autem nihil ſuper hoc capitulo fuerit pactum, ſed per totum triennium neque pecunias ſolverit, neque apochas domino tributorum reddiderit, volenti ei licere eum à prædiis emphyteuticariis repellere. *l.* 2. *C. de jure emphyt. Nov.* 7. *c.* 3. §. 2. *Nov.* 120. *cap.* 8.

[q] *See the eighth Article of the third Section of the Contract of Sale, and the twelfth and thirteenth Articles of the twelfth Section of the ſame Title.*

XI.

11. The Expences are not refunded.

If the perpetual Tenant has made Improvements on the Eſtate, and is ejected for default of payment of the Arrears of his Rent; he cannot pretend to be reimburſed his Expences[r]. For the Eſtate was given him on condition that he ſhould improve it. But it will be prudent for the Judge, to grant, according to the quality of the Improvements, and the other circumſtances, a reaſonable Delay, that the perpetual Tenant may be thereby in a condition, either to pay what he is in Arrear, and to retain the Eſtate, or be able to ſell it[ſ].

[r] Nulla ei in poſterum allegatione nomine meliorationis, vel eorum quæ emponemata dicuntur, vel pœna opponenda. *l.* 2. *C. de jur. emph.*

[ſ] Licentia emphyteutæ detur, ubi voluerit, & ſine conſenſu domini, meliorationes ſuas vendere. *l.* 3. *eod.*

Altho' the words of this Law do not concern the preſent caſe; yet they may be applied to it; becauſe it is always true that the perpetual Tenant may ſell the Eſtate, and the Improvements made on it. And it is but juſt to grant him a delay for uſing this Right, in the caſe where he would loſe his Improvements for not paying the Rent.

TITLE V.

Of the Loan of THINGS to be reſtored in Specie, and of a Precarious Loan.

OUR Language having no proper word whereby to expreſs this Contract which the *Romans* call *Commodatum*, where one lends a thing to another gratuitouſly, that he may uſe it, and reſtore it after he has done with it; we have expreſs'd this Contract by a Circumlocution, calling it the Loan of things that are to be reſtored in Specie, that it may be diſtinguiſhed from the Loan of Money, and other things which may be repaid in kind, to which Contract the *Romans* gave the name of *Mutuum*, and of which we ſhall treat in the following Title. For theſe are two different Covenants, which are not to be blended together; the Covenant which is explained under this Title, obliging the Borrower to reſtore the ſame Individual Thing which he borrowed, as when one borrows a Horſe; and the other Covenant obliging the Borrower to reſtore a thing of the ſame kind, as when one borrows Money, and other things which we ceaſe to have in our poſſeſſion, when we make uſe of them.

The Loan of things that are to be reſtored in Specie, is a Contract which reſults naturally from the Union which Society eſtabliſhes among Mankind. For ſince men have not always the means of buying, or hiring all the things which they ſtand in need of, and which they want only for a little time; Humanity obliges them to aſſiſt one another with the Loan of ſuch things as they ſtand in need of.

A Precarious Loan is the ſame kind of Contract with the Loan of things that are to be reſtored in Specie, and differs from it only in this, according to the *Roman* Law, that whereas the Loan of things to be reſtored in Specie is for a time proportioned to the neceſſity of the Borrower, or even for a certain time regulated by the Contract; the Precarious Loan is undetermined, and laſts no longer than it pleaſes the Lender.

This diſtinction between the Loan of things to be reſtored in Specie, and the precarious Loan, is not much in uſe with us; and we make but little uſe of this word *precarious*, except in Immoveables, as in a Sale, or other Alienation, when he who alienates an Eſtate, acknowledges that if he remain in poſſeſſion of it, it ſhall only be precariouſly. Which is expreſſed in this manner, to denote that he ſhall not hereafter poſſeſs his Eſtate, but by permiſſion from the purchaſer, and in the ſame manner as he poſſeſſes a thing who has borrowed it. See the ſeventh Article of the ſecond Section of the Contract of Sale.

SECT. I.

Of the Nature of the Loan of Things to be reſtored in Specie, and of a Precarious Loan.

The CONTENTS.

1. *Definition of this Loan.*
2. *A Precarious Loan.*
3. *The Loan does not oblige, but by the delivery of the thing.*
4. *The Lender remains Proprietor of the thing.*
5. *Moveables and Immoveables may be lent in this way.*
6. *Of Things which are conſumed by their uſe.*
7. *The Loan of that which is another's.*
8. *The Lender is to regulate the manner and time of the uſe.*
9. *The Loan is preſumed to be for the natural uſe of the thing.*
10. *The continuance of the Loan is proportioned to the uſe for which the thing is lent.*
11. *Reſtitution of the Thing, at the time and place agreed on.*
12. *A Loan may be either for the conveniency of the Borrower, or Lender, or both.*
13. *The Precarious Loan ends by the death of the Lender.*
14. *Who may borrow and lend.*
15. *The Engagements of the Loan paſs to the Heirs, or Executors.*

I.

1. Definition of this Loan. THE Loan of Things that are to be reſtored in ſpecie, is a Covenant by which one gives a thing to another, that he may put it to a certain uſe, and keep it as long as his occaſions require, without paying any price for the uſe of it. For if there were a Price, it would be a Letting to Hire[a].

[a] Utendum datum. *l.* 1. §. 1. *ff. commod.* Res aliqua utenda datur. §. 2. *inſt. quib. mod. re contr. obl.*

Commodata res tunc propriè intelligitur, ſi nulla mercede accepta, vel conſtituta, res utenda data eſt. Alioqui mercede interveniente, locatus tibi uſus rei videtur. Gratuitum enim debet eſſe commodatum. *d.* §. 2. *inſt. quib. mod. re contr. obl.*

II.

2. A Precarious Loan. A Precarious Loan, is when a thing is lent at the deſire of the perſon who borrows it, to be uſed during the time that the Lender is willing to let him have it; and on condition that he ſhall reſtore it whenever the Owner is pleaſed to call for it[b].

[b] Precarium eſt, quod precibus petenti utendum conceditur tamdiù, quamdiù is qui conceſſit, patitur. *l.* 1. *ff. de prec. l.* 2. §. *ult. eod.* Qui precario concedit, ſic dat, quaſi tunc recepturus, cùm ſibi libuerit precarium ſolvere. *d. l.* 1. §. 2.

III.

3. The Loan does not oblige, but by the delivery of the thing. The Loan of things that are to be reſtored in Specie, is one of thoſe kinds of Covenants, whereby one obliges himſelf to reſtore a thing, and conſequently where the Obligation is not contracted, but by the delivery of the Thing borrowed[c].

[c] Is cui res aliqua utenda datur, id eſt commodatur, re obligatur. §. 2. *inſt. quib. mod. re contr. obl.*

See the ninth Article of the firſt Section of Covenants.

IV.

4. The Lender remains Proprietor of the thing. It is the nature of this Contract, that the Lender remains Proprietor of the Thing which he lends, and conſequently that the Borrower is obliged to reſtore the ſame individual Thing which he has borrowed, and not another of the ſame kind. For otherwiſe it would not be a Loan of things to be reſtored in ſpecie, but another kind of Loan, as where one borrows Proviſions, or Money, to conſume them, and to reſtore as much of the ſame kind[d].

[d] Rei commodatæ & poſſeſſionem, & proprietatem retinemus. *l.* 8. *ff. commod.* Nemo enim commodando, rem facit ejus cui commodat. *l.* 9. *eod.* Mutuum damus recepturi, non eandem ſpeciem, quam dedimus: alioqui commodatum erit, aut depoſitum. *l.* 2. *ff. de reb. cred.*

V.

5. Moveables and Immoveables may be lent in this way. We may lend in this way, not only Moveable Things, but likewiſe Immoveables, ſuch as a Houſe to dwell in[e].

[e] Rem mobilem. *l.* 1. §. 1. *ff. commod.* Commodata res dicitur & quæ ſoli eſt. *d. l.* 1. §. 1. Etiam habitationem commodari poſſe. *d.* §. 1. *in fine. l.* 17. *ff. de præſc. verb.*

VI.

6. Of Things which are conſumed by their uſe. We cannot lend in this way, Things which are conſumed, or which ceaſe to be by being uſed, ſuch as Money and Proviſions; for to lend them in order to conſumption, would be a Contract of another nature; that is, a Loan where the things lent are not to be reſtored in Specie, but in Kind. But we may lend theſe kinds of Things, ſo as to have them reſtored in Specie, if we lend them for any other uſe than that of Conſumption: As if we lend Money to make a Tender, or to depoſite, on condition that the Borrower take it up again, and reſtore the ſame in Specie[f].

[f] Non poteſt commodari id quod uſu conſumitur, niſi fortè ad pompam, vel oſtentationem quis accipiat. *l.* 3. §. *ult. ff. commod.* Sæpe etiam ad hoc commodantur pecuniæ, ut dicis gratia, numerationis loco intercedant. *l.* 4. *eod.*

See the fourth Article of the firſt Section of Letting and Hiring.

VII.

7. The Loan of that which is another's.

We may lend that which is not our own. Thus, he who poſſeſſes a thing honeſtly, may lend what he poſſeſſes, and what he believes to be his own. And it is alſo a Loan of this kind, when one lends that which he poſſeſſes knaviſhly, knowing it to belong to another[g].

[g] Commodare poſſumus etiam alienam rem quam poſſidemus, tametſi ſcientes alienam poſſidemus. *l.* 15. *ff. commod.* Ita ut, & ſi fur, vel prædo commodaverit, habeat commodati actionem. *l.* 16. *eod. l.* 64. *ff. de Judic.*

VIII.

8. The Lender is to regulate the manner and time of the uſe.

It belongs to him that lends the Thing to regulate in what manner, and for what time, the Borrower is to have the uſe of it[h].

[h] Modum commodati finemque præſcribere, ejus eſt, qui beneficium tribuit. *l.* 17. §. 2. *ff. commod.* See the eleventh Article of the ſecond Section.

IX.

9. The Loan is preſumed to be for the natural uſe of the thing.

If the uſe to which the thing borrowed is to be imployed, be not regulated by the Contract, it is limited to the natural and ordinary ſervice that may be had from it. Thus, he who lends a Horſe, is preſumed to lend him for a Journey, and not for the War[i].

[i] Qui alias re commodata utitur; non ſolùm commodati, verùm furti quoque tenetur. *l.* 5. §. 8. *ff. commod.* Si tibi equum commodavero, ut ad villam adduceres, tu ad bellum duxeris, commodati teneberis. *d. l.* 5. §. 7.

X.

10. The continuance of the Loan is proportioned to the uſe for which the thing is lent.

If the time of the Loan is not regulated by the Contract, it is limited to the continuance of the uſe for which the thing is lent. Thus, a Horſe being lent for a Journey, he who borrows him has the uſe of him during the time that is neceſſary for performing the ſaid Journey[l].

[l] Intempeſtivè uſum commodatæ rei auferre, non officium tantùm impedit, ſed & ſuſcepta obligatio inter dandum accipiendumque. *l.* 17. §. 3. *ff. commod.* Non rectè facies importunè repetendo. *d.* §. Temporalis miniſterii cauſa. *l.* 2. *C. eod.* See the firſt Article of the third Section.

XI.

11. Reſtitution of the thing at the time and place agreed on.

If it has been agreed, that the Thing lent ſhall be reſtored within ſuch a time, and at ſuch a place, and the Borrower fails to perform what he promiſed, he ſhall be liable for the Damages which he has been the cauſe of according to the circumſtances[m].

[m] Si ut certo loco vel tempore reddatur commodatum, convenit, officio judicis ineſt, ut rationem loci, vel temporis habeat. *l.* 5. *ff. commod.*

XII.

12. A Loan may be either for the conveniency of the Borrower, or Lender, or both.

A Thing may be lent, either for the bare intereſt of the Borrower; and this way of lending is the moſt uſual; as if I lend my Horſe to a Friend, to make a journey for his own buſineſs: or it may be lent for the mere behoof of the Lender; as if I lend my Horſe to one whom I employ to go into the Country about my affairs: or the Loan may be for the common advantage both of Borrower and Lender; as if a Partner lends his Horſe to his Co-Partner, to go and look after the common concerns of the Company[n].

[n] Commodatum plerumque ſolam utilitatem continet ejus cui commodatur. *l.* 5. §. 2. *in f. ff. commod.*

Si ſua dumtaxat cauſa commodavit: ſponſæ fortè ſuæ, vel uxori quo honeſtius culta ad ſe deduceretur: vel ſi quis ludos edens Prætor, ſcenicis commodavit. *d. l.* 5. §. 10. *l.* 10. §. 1. *eod.*

Si utriuſque gratia (commodata ſit) res, veluti ſi communem amicum ad cœnam invitaverimus, tuque ejus rei curam ſuſcepiſſes, & ego tibi argentum commodaverim. *l.* 18. *eod.* See the ſecond and following Articles of the ſecond Section.

XIII.

13. The Precarious Loan ends by the death of the Lender.

A Precarious Loan is at an end by the death of the Lender, but it is not ſo with the ordinary Loan of Things. For the Precarious Loan laſts no longer than the Lender is willing it ſhould: and his will ceaſes by his death. But in the ordinary Loan, the Lender agreed to leave the thing with the Borrower, all the time that ſhould be neceſſary for that uſe to which he lent it[o].

[o] Precarii rogatio ita facta, quoad is qui dediſſet vellet, morte ejus tollitur. *l.* 4. *ff. locati.* See the third Section of this Title, Art. 1. *l.* 17. §. 3. *ff. commod.*

XIV.

14. Who may borrow and lend.

All perſons who are capable of contracting, may lend and borrow; and beſides the natural Engagements to which this kind of Loan obliges the Parties, they may add what other Covenants they pleaſe; and we muſt apply to this

Contract the other general Rules of Covenants[p].

[p] *See the third Article of the ſecond Section, the firſt Article of the third Section, and the firſt Article of the fourth Section of Covenants. V. l.* 1. §. 2. *& l.* 2. *ff. commod.*

XV.

15. The Engagements of the Loan paſs to the Heirs, or Executors.

The Engagements which are formed by the Loan, paſs to the Heirs, or Executors of the Lender, and of the Borrower[q].

[q] Hæres ejus qui commodatum accepit pro ea parte qua hæres eſt, convenitur. *l.* 3. §. 3. *ff. commod. l.* 17. §. 2. *eod.* See touching the engagement of the Heir or Executor, the twelfth Article of the third Section of a *Depoſitum*.

SECT. II.

Of the Engagements of the Borrower.

The CONTENTS.

1. *Engagements of the Borrower.*
2. *What care the Borrower is obliged to take.*
3. *What care he is obliged to, who borrows the thing for the Maſter's behoof.*
4. *What care he is obliged to, who borrows for the Lender's intereſt, as well as his own.*
5. *If the Contract regulates the care that is to be taken.*
6. *Accidents.*
7. *The regard which the Borrower ought to have to the thing borrowed, more than to his own.*
8. *The Borrower may take upon himſelf all Accidents.*
9. *Of the Thing lent and eſtimated.*
10. *If the Borrower puts the thing to another uſe than that for which it was lent, he is accountable for accidents.*
11. *Penalty for miſuſing the Thing.*
12. *If the thing is damaged, either by the uſe it is put to, or by the fault of the Borrower.*
13. *The Thing borrowed is not kept by way of Compenſation for a Debt.*
14. *Expence laid out for the uſe of the thing.*

I.

1. Engagements of the Borrower.

THE Engagements which he is under, who borrows a thing, are to take care of it[a], to uſe it according to the intention of the Lender[b], and to reſtore it[c] at the time appointed[d], and in good caſe[e]. Theſe ſeveral Engagements ſhall be explained by the Rules which follow.

[a] In rebus commodatis diligentia præſtanda eſt. *l.* 18. *ff. commod.*

[b] Modum commodati, finemque præſcribere, ejus eſt, qui beneficium tribuit. *l.* 17. §. 3. *ff. commod.*

[c] De ea re ipſa reſtituenda tenetur. §. 2. *inſt. quib. mod. re contr. obl. l.* 1. §. 3. *ff. de obl. & act.*

[d] Ad modum finemque. *l.* 17. §. 3. *ff. commod.*

[e] Si reddita quidem ſit res commodata, ſed deterior reddita, non videbitur reddita. *l.* 3. §. 1. *ff. commod.*

II.

2. What care the Borrower is obliged to take.

He who has borrowed a thing for his own uſe, is obliged to take care of it, not only as he takes care of what is his own, if he is not careful enough in his own concerns, but with all the exactneſs that is uſually obſerved by the moſt diligent perſons; and he is to anſwer for all the Loſs and Damage that may happen for want of ſuch a due care[f]. For ſeeing he has the free and gratuitous uſe of that which is lent him, he ought to preſerve it with all the circumſpection that is poſſible to be uſed by the moſt careful perſons.

[f] In rebus commodatis talis diligentia præſtanda eſt, qualem quiſque diligentiſſimus pater familias ſuis rebus adhibet. *l.* 18. *ff. commod.* Exactiſſimam diligentiam cuſtodiendæ rei præſtare compellitur. Nec ſufficit ei, eandem diligentiam adhibere, quam ſuis rebus adhibet, ſi alius diligentior cuſtodire potuerit. *l.* 1. §. 4. *ff. de obl. & act.* §. 2. *inſt. quibus mod. re contr. obl.* Cuſtodiam commodatæ rei, etiam diligentem debet præſtare. *l.* 5. §. 5. *ff. commod.* See the fourth Article of the third Section of a *Depoſitum*, and the third Article of the eighth Section of Letting and Hiring.

There is this difference in the Roman *Law, between the ordinary Loan of Things to be reſtored in Specie, and a Precarious Loan, as to the care that is to be taken by the Borrower, that in the Precarious Loan, he who poſſeſſes precariouſly the thing belonging to another, is accountable only for what he does fraudulently, and for the faults which come near to Fraud, and not for ſlender faults.* Dolum ſolum præſtat is qui precario rogavit, cùm totum hoc ex liberalitate deſcendat ejus qui precariò conceſſit: & ſatis ſit ſi dolus tantùm præſtetur. Culpam tamen dolo proximam contineri quis meritò dixerit. *l.* 8. §. 3. *ff. de precar. But the liberality of the Lender, ought it to diminiſh the care of the Borrower? And whoever lends, whether it be for a certain time, or precariouſly, does he lend for any other end than to do a favour to the Borrower? Or if we muſt needs diſtinguiſh their condition, as to the care of the thing lent, is it not becauſe he to whom the thing is lent for a certain time, ought to be more careful in preſerving the thing, than he to whom it is lent indefinitely, who knows not how long the Lender will be pleaſed to let him have the uſe of it?*

III.

3. What care he is obliged to, who borrows the thing for

If the thing has been lent only for the intereſt of the Lender, he who has borrowed it on this account, will not be bound to take the ſame care of it as if he had borrowed it for his own proper *the Maſter's behoof.*

per uſe. But he ſhall be bound only for what may happen thro' his Knavery [g], or thro' any groſs fault that is next door to Fraud [h]. For it would not be reaſonable, that to do ſervice to another, he ſhould be obliged to ſuch a ſtrict care, as to be anſwerable for the leaſt Neglect, or the ſmalleſt Fault.

[g] Interdum planè dolum ſolum in re commodata, qui rogavit, præſtabit: ut putà ſi quis ita convenit, vel ſi ſua dumtaxat cauſâ commodavit. *l.* 5. §. 10. *l.* 10. §. 1. *ff. commod.*

[h] Lata culpa planè dolo comparabitur. *l.* 1. §. 1. *ff. ſi mens. falſ. mod. dix.* diſſoluta negligentia prope dolum eſt. *l.* 29. *ff. mand.*

IV.

4. What care he is obliged to, who borrows for the Lender's intereſt, as well as his own.

If the thing has been lent for the common intereſt both of Lender and Borrower; as if one Partner borrows the Horſe of his Co-Partner, to go and look after any affair in which the Company is concerned, he ſhall anſwer for what falls out, not only thro' his Knavery, but thro' his Neglect, and his want of Care [i]. For he borrows partly for his own Intereſt, and he receives a favour in a matter that concerns him.

[i] At ſi utriuſque (gratia commodata ſit res) ſcriptum quidem apud quoſdam invenio, quaſi dolum tantum præſtare debeas. Sed videndum eſt ne & culpa præſtanda ſit: ut ita culpæ fiat æſtimatio, ſicut in rebus pignori datis, & dotalibus æſtimari ſolet. *l.* 18. *verſic.* at ſi *ff. commod.* Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l.* 5. §. 2. *ff. commod.* Placuit (in pignore) ſufficere, ſi ad eam rem cuſtodiendam exactam diligentiam adhibeat. §. *ult. inſt. quib. mod. re contr. oblig.*

V.

5. If the Contract regulates the care that is to be taken.

If it has been agreed what care the Borrower ſhall be obliged to take of the thing lent, the Agreement ſhall ſerve as a Rule [l].

[l] Sed hæc ita, niſi ſi quid nominatim convenit, vel plus, vel minus in ſingulis contractibus: nam hoc ſervabitur quod initio convenit, legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* Interdum planè dolum ſolum in re commodata, qui rogavit præſtabit: ut puta ſi quis ita convenit. *l.* 5. §. 10. *ff. commod.*

VI.

6. Accidents.

If the Borrower has uſed the thing which he borrowed, only during the time, and for the purpoſe for which it was lent him, and the thing periſhes, or is damaged, without his fault, by the bare effect of ſome accident, or becauſe of the nature of the Thing itſelf; he is not anſwerable for it. For no blame can be laid at his door. And no Covenant obliges naturally to anſwer for theſe ſorts of Events, which are a bare effect of Providence, and which affect thoſe who are the Owners of the things to which the loſs happens [m].

[m] Quod verò ſenectute contingit, vel morbo, vel vi latronum ereptum eſt, aut quid ſimile accidit: dicendum eſt nihil eorum eſſe imputandum ei, qui commodatum accepit, niſi aliqua culpa interveniat. *l.* 5. §. 4. *ff. commod. l.* 1. *C. eod. l.* 23. *in f. ff. de reg. jur.* Si commodavero tibi equum quo utereris uſque ad certum locum, ſi nulla culpa tua interveniente in ipſo itinere deterior equus factus ſit, non teneris commodati: nam ego in culpa ero, qui in tam longum iter commodavi qui eum laborem ſuſtinere non potuit. *l. ult. ff. commod.* Tantùm eos caſus non præſtet, quibus reſiſti non poſſit quæ ſine dolo & culpa ejus accidunt. *l.* 18. *ff. commod. v. l.* 20. *eod.* Fortuitos caſus nullum humanum conſilium providere poteſt. *l.* 2. §. 7. *ff. de adm. rer. ad. civit. pert.* Ad eos qui ſervandum aliquid conducunt, aut utendum accipiunt, damnum injuria ab alio datum non pertinere, proculdubio eſt. Qua enim cura, aut diligentia conſequi poſſumus, ne aliquis damnum nobis injuria det? *l.* 19. *ff. commod.* See the ſixth Article of the ſecond Section of Proxies, and the twelfth Article of the fourth Section of Partnerſhip.

We may take notice upon this Article, of the diſtinction which is made by the Divine Law, between the caſe where the thing borrowed periſhes in the abſence of the Owner, and where it periſhes in his preſence. In this laſt caſe, the loſs falls upon the Owner, and in the firſt, on the Borrower. If a Man borrow ought of his Neighbour, and it be hurt, or die, the owner thereof being not with it, he ſhall ſurely make it good. But if the owner thereof be with it, he ſhall not make it good. *Exod.* xxii. 14, 15. *This diſtinction, is it grounded on this, that the Maſter being preſent, ſees that the Borrower is not any ways to blame for the loſs of the thing; and that if the Borrower were to be acquitted of the loſs which happens in the Owner's abſence, it would give occaſion to Borrowers to miſuſe, or neglect the things which they borrow, and even to pretend a loſs which had not happened?*

VII.

7. The regard which the Borrower ought to have to the thing borrowed, more than to his own.

If the thing borrowed periſhes by an accident, againſt which the Borrower might have guarded, by imploying his own thing, he ſhall be obliged to make it good. For he ought not to have uſed it, except for want of his own. And it would be the ſame thing, if in a Fire he had let the thing he borrowed periſh, that he might ſave his own [n].

[n] Proinde, & ſi incendio, vel ruina aliquid contingit, vel aliquid damnum fatale, non tenebitur, niſi fortè cùm poſſit res commodatas ſalvas facere, ſuas prætulit. *l.* 5. §. 4. *ff. commod.*

VIII.

8. The Borrower may take upon himſelf all Accidents.

If in view of ſome danger that was to be feared, it was agreed that the Borrower ſhould be accountable for all Accidents, he ſhall be bound to make good the Damage that happens thereby [o]. For it was in his power not to tie himſelf up to this condition, and it is he himſelf who has put the thing in danger.

[o] Cùm is qui à te commodari ſibi bovem poſtulabat, hoſtilis incurſionis contemplatione, periculum

amiſſionis, ac fortunam futuri damni in ſe ſuſcepiſſe proponatur: præſes provinciæ —— placitum conventionis implere eum compellet. *l.* 1. *C. de commod.* Si quis pactus ſit ut ex cauſa depoſiti omne periculum præſtet, Pomponius ait pactionem valere: nec, quaſi contra juris formam, non eſſe ſervandum. *l.* 7. §. 15. *ff. de pact. l.* 5. §. 2. *ff. commod. v. l.* 21. §. 1. *eod.* See the ſeventh Article of the third Section of a *Depoſitum*.

IX.

9. *Of the Thing lent and eſtimated.*

If the thing lent is eſtimated between the Lender and Borrower, in order to adjuſt what the Borrower ſhall reſtore; in caſe he do not reſtore the Thing it ſelf, he ſhall be accountable for this value, altho' the thing ſhould periſh by an accident[p]. For he who lends in this manner, does it that he may ſecure to himſelf in all events, the recovery either of the Thing which he lends, or of the Value, if the Thing periſhes.

[p] Si fortè res æſtimata data ſit, omne periculum præſtandum ab eo qui æſtimationem ſe præſtaturum recepit. *l.* 5. §. 3. *ff. commod.* Æſtimatio periculum facit ejus qui ſuſcepit. Aut igitur ipſam rem debebit incorruptam reddere, aut æſtimationem de qua convenit. *l.* 1. §. 1. *ff. de æſtimat. act.*

X.

10. *If the Borrower puts the Thing to another uſe than that for which it was lent, he is accountable for accidents.*

If the thing lent periſhes by an accident, becauſe the Borrower put it to another uſe than that for which it was lent him, he ſhall be bound to make it good[q].

[q] Si cui ideò argentum commodaverim, quod is amicos ad cœnam invitaturum ſe diceret, & id peregrè ſecum portaverit, ſine ulla dubitatione etiam piratarum, & latronum, & naufragii caſum præſtare debet. *l.* 18. *ff. commod.*

XI.

11. *Penalty for miſuſing the Thing.*

If the Lender declares for what uſe he lends the Thing, and for what time, his intention ſhall ſerve as a Rule. And if nothing of this is mentioned, the Borrower cannot imploy the Thing, but in the natural and ordinary uſe for which it is proper, and during the time that is neceſſary for the occaſion for which it was lent. And if he puts it to any other uſe, contrary to the intention of the Lender, or againſt his Order, he commits a kind of Theft: and he ſhall be bound to make good the Loſſes, and Damages that happen thereupon[r].

[r] Si tibi equum commodavero ut ad villam adduceres, tu ad bellum duxeris, commodati teneberis. *l.* 5. §. 7. *ff. commod.*

Qui alias re commodata utitur, non ſolum commodati, verum furti quoque tenetur. *d. l.* §. 8. §. 9. *inſt. de oblig. quæ ex del. naſc.* Qui jumenta ſibi commodata longius duxerit, alienave re, invito domino uſus ſit, furtum facit. *l.* 40. *ff. de furt.* Habet ſummam æquitatem, ut eatenus quiſque noſtro utatur, quatenus ei tribuere velimus. *l.* 15. *ff. de precar.* See the eighth and following Article of the firſt Section.

XII.

12. *If the Thing is damaged either by the uſe it is put to, or by the fault of the Borrower.*

If the Thing is damaged without any fault of the Borrower, and by the bare effect of the uſe which he had a right to put it to, he is not bound to make good the Damage; but if he is any way to blame for it, he ought to make it good[ſ].

[ſ] Eum qui rem commodatam accepit, ſi in eam rem uſus eſt in quam accepit, nihil præſtare, ſi eam in nulla parte, culpa ſua deteriorem fecit, verum eſt. Nam ſi culpa ejus fecit deteriorem, tenebitur. *l.* 10. *ff. commod.*

Sive commodata res ſive depoſita deterior ab eo qui acceperit, facta ſit, non ſolum iſtæ ſunt actiones, de quibus loquimur, verum etiam legis Aquiliæ. *l.* 18. §. 1. *eod.* Non videbitur reddita, quæ deterior facta redditur, niſi quod intereſt præſtetur. *l.* 3. §. 1. *eod.*

XIII.

13. *The Thing borrowed is not kept by way of Compenſation for a Debt.*

He who has borrowed a Thing, cannot keep it by way of Compenſation for what the Lender may be indebted to him[t].

[t] Prætextu debiti, reſtitutio commodati non probabiliter recuſatur. *l. ult. C. de commod.*

XIV.

14. *Expence laid out for the uſe of the Thing.*

If to make uſe of the Thing borrowed, it is neceſſary to be at ſome Expence, this falls to the ſhare of the Borrower[u].

[u] *See the fourth Article of the following Section.*

SECT. III.

Of the Engagements of the Lender.

The CONTENTS.

1. *He who has lent a thing cannot take it back till after the uſe.*
2. *How the thing may be taken back which is lent precariouſly.*
3. *Of the defects of the thing lent.*
4. *Expences laid out on the thing borrowed.*

I.

1. *He who has lent a Thing, cannot take it back till after the uſe.*

HE who has lent a Thing cannot take it back till it has ſerved the uſe for which it was lent. For it was free for him not to have lent it; but having lent it, he is obliged, not only in common Civility, but likewiſe by the effect of the Contract, to ſuffer the thing to be employed to that uſe; for otherwiſe the Loan, which ought to be a kindneſs, would prove an occaſion of cheating, and doing miſchief[a].

[a] Sicut voluntatis, & officii magis quam neceſſitatis eſt, commodare; ita modum commodati, finemque præſcribere, ejus eſt, qui beneficium tribuit. Cùm autem id fecit (id eſt poſtquam commodavit) tunc finem præſcribere, & retroagere, atque intempeſtive uſum commodatæ rei auferre, non officium tantùm impedit: ſed & ſuſcepta obligatio, inter dandum accipiendumque. Geritur enim negotium invicem, & ideo invicem propoſitæ ſunt actiones ut appareat quod principio beneficii, ac nudæ voluntatis fuerat, converti in mutuas præſtationes, actioneſque civiles. *l.* 17. §. 3. *ff. commod.* Adjuvari quippe nos, non decipi beneficio oportet. *d.* §. *in f.*

II.

2. How the Thing may be taken back, which is lent precariouſly.

In the Precarious Loan, the Lender may take back the Thing before the uſe for which it was lent is ſerved; for he did not lend it for a certain time; but on the contrary, on condition that he might take it back when he pleaſed[b]. However, this is not to be extended to an indiſcreet liberty of taking back the thing without any delay, and at an unſeaſonable time, which might occaſion damage to him who was uſing it; but ſuch a time ought to be allowed for reſtoring the thing, as appears to be reaſonable by the circumſtances[c].

[b] Qui precario concedit, ſic dat, quaſi tunc recepturus, cùm ſibi libuerit precarium ſolvere. *l.* 1. §. 2. *ff. de prec.* Utendum conceditur tamdiu, quamdiu is qui conceſſit patitur. *d. l.* 1.

[c] Ut moderatæ rationis temperamenta deſiderant. *l.* 10. §. 3. *ff. de quæſt.* In omnibus æquitas ſpectanda. *l.* 90. *ff. de reg. jur. l.* 183. *eod.*

III.

3. Of the defects of the Thing lent.

If the Thing lent has any defect which may be of prejudice to the Borrower, and if this defect was known to the Lender, he ſhall be accountable for any damage that ſhall happen thereby to the Borrower. As if to hold Wine, or Oil, he has lent Veſſels which he knew to be ſpoiled; if to prop up a Building, he has lent Timber which he knew to be rotten. For we lend to do ſervice, and not to do miſchief[d].

[d] Qui ſciens vaſa vitioſa commodavit, ſi ibi infuſum vinum, vel oleum corruptum effuſumve eſt, condemnandus eo nomine eſt. *l.* 18. §. 3. *ff. commod.*

Idemque eſt ſi ad fulciendam inſulam, tigna commodaſti——ſciens vitioſa——adjuvari quippe nos, non decipi beneficio oportet. *l.* 17. §. 3. *in fine eod.*

See the eighth Article of the third Section of Letting and Hiring.

IV.

4. Expences laid out on the Thing borrowed.

The Expences which are neceſſary in order to make uſe of the thing borrowed, ſuch as the feeding and ſhoeing a Horſe that is lent, are due by the Borrower. But if there happen any other charges, ſuch as for curing a Horſe of ſome hurt which he received without any fault of the Borrower, the Lender ſhall be bound to pay ſuch Expences as theſe, unleſs they are ſo very inconſiderable, that the benefit which the Borrower reaps from the uſe of the thing lent ſhould oblige him to defray them[e].

[e] Poſſunt juſtæ cauſæ intervenire ex quibus cum eo, qui commodaſſet, agi deberet. Veluti de impenſis in valetudinem ſervi factis, quæve poſt fugam requirendi, reducendique ejus cauſa factæ eſſent. Nam cibariorum impenſæ, naturali ſcilicet ratione ad eum pertinent qui utendum accepiſſet. Sed & id, quod de impenſis valetudinis, aut fugæ diximus, ad majores impenſas pertinere debet. Modica enim impendia verius eſt, ut ſicuti cibariorum, ad eundem pertineant. *l.* 18. §. 2. *ff. commod. l.* 8. *ff. de pign. act.*

TITLE VI.

Of the Loan of MONEY, *and other Things to be reſtored in Kind; and of* USURY.

The Origin of the Loan of Things which may be reſtored in kind.

WE have ſeen in the foregoing Title, the manner in which Men lend to others *gratis* thoſe Things whoſe Nature is ſuch, that after they have been uſed, they are capable of being reſtored, as we return a Horſe to the perſon of whom we borrowed him.

But there is another ſort of Things, whoſe Nature is ſuch, that after we have made uſe of them, it is not poſſible to reſtore them. For we cannot uſe them without conſuming them, or putting them out of our poſſeſſion. Of this kind is Money, Grain, Liquors, and other things of the like nature. So that to lend them, another kind of Covenant is neceſſary; and this is the Loan which we ſhall diſcourſe of under this Title.

Two characters of Things which are lent.

To underſtand aright the nature of this Loan, it is neceſſary to conſider in this kind of Things two Characters, which diſtinguiſh them from all others; and which are the Foundation of ſome diſtinctions that are neceſſary to be obſerved between this Loan, and the other Contracts of which we have ſpoke.

The firſt of theſe Characters is, that we cannot uſe Money, Corn, Liquors, and other things of the like nature, but by ceaſing to have them: And this is a natural effect of the Providence of God, who deſigning Man for Labour, has made theſe kinds of Things ſo neceſſary to him, and has made them of ſuch a nature,

nature, that they cannot be had but by Labour, and that we ceaſe to have them as ſoon as we uſe them; to the end that this Want, which always returns, may oblige Man to a Labour which laſts as long as his Life.

The ſecond Character which diſtinguiſhes theſe Things from all others, is that whereas in other Things it is very hard to find many of the ſame kind which are perfectly like to one another, and which have the ſame Value, and the ſame Qualities, we may eaſily in Things of this kind find many that are exactly the ſame both in Value, and in Quality. Thus, all Piſtoles, all Crowns, and all other Pieces of Money have the ſame Allay, the ſame Weight, the ſame Stamp, the ſame Value: and every one of them ſerves inſtead of all others of the ſame kind: and we may likewiſe make up the ſame Sum, in other Species of Coin. Thus we have Grain for Grain, Liquors for Liquors, of the ſame Quality, and of the ſame Meaſure, or of the ſame Weight.

The nature of this kind of Loan, and the Characters which diſtinguiſh it from the Loan of Things to be reſtored in Specie, and from other Contracts.

Theſe two Characters of the Things of this kind, are the Foundations of the Commerce which is made of them by this ſort of Loan. For ſince we cannot have the uſe of them, and reſtore the ſame things, as we might have of a Suit of Hangings, a Horſe, or a Book; we borrow them on condition to reſtore as much of the ſame kind: which is eaſy to be performed, ſince it depends wholly on counting, weighing, or meaſuring: and this is the Covenant which we diſtinguiſh by the name of a Loan of Things to be reſtored in kind.

Thus we ſee that in our Language the word Loan is common to the Loan of Money, and to the Loan of a Horſe: and that altho' they are two ſorts of Covenants, whoſe Natures are different, and which have alſo in the *Latin* Tongue different Names, yet we give indifferently to the one and the other the Name only of Loan; becauſe both ſorts have this in common, that the one lends to the other on condition to have the ſame Thing reſtored to him, if it be ſuch as that the uſe of it does not conſume it, or to receive another Thing exactly like to what was lent, and which may ſerve inſtead of it, if the Thing lent was ſuch that it could not be uſed, without being conſumed, or given away. But ſince, as has been remarked in the foregoing Title, we muſt not confound theſe two kinds of Covenants together, we have therefore thought proper to diſtinguiſh them by different Names.

It appears from this uſe of the Loan, which ſhall be the ſubject matter of this Title, what the Nature of it is, and that it is a Contract in which the Lender gives a Thing, on condition that the Borrower ſhall reſtore to him, not the ſame Thing in ſubſtance, but as much of the ſame kind. So that it is eſſential to this Contract, that the Thing lent ſhould paſs in ſuch a manner to the Borrower, as that he may become Maſter of it, in order to have a right to conſume it. And it is from this uſe of this kind of Loan, that we may diſcern what it has in common with Sale, with Exchange, with the Loan of Things to be reſtored in Specie, and with Letting and Hiring; and what it is that diſtinguiſhes it from theſe other kinds of Covenants.

It is common to Sale, and to the Loan of Things to be reſtored in kind, that the thing is alienated; but in a Sale, it is alienated for a Price; and in a Loan, it is given on condition to receive exactly ſuch another.

It is common to Exchange, and to this kind of Loan, that one Thing is given for another; but in Exchange, it is in the difference of the Things that the Contracters find their conveniency, giving ſome different thing to one another reciprocally, and at the ſame time: whereas in a Loan, one gives on condition to have ſomething again, not immediately, but ſometime after, and not a different Thing, but a Thing exactly like to that which was lent.

It is common to the Loan of Things to be reſtored in Specie, and to the Loan of Things to be reſtored in Kind, that a Thing is lent *gratis*[a]; but in the Loan of Things to be reſtored in Specie, the Borrower is only to uſe the Thing, and to reſtore it after he has done with it; and in the Loan of Things to be reſtored in Kind, the Borrower is allowed to conſume the Thing, and to give to the Lender another of the ſame kind and value.

It is common to the Contract of Letting and Hiring, and to Loan, that a Thing is given to be uſed. But in Letting and Hiring, the uſe of the thing is granted for a Hire, and on condition that the ſame Thing be reſtored: whereas in this kind of Loan, the uſe of the Thing is granted without any other Charge than that of reſtoring as much of the ſame kind.

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[a] *It is the nature of a Loan to be free and gratuitous: and this Truth which is here preſuppoſed, ſhall be proved hereafter.*

It is common to theſe five ſorts of Covenants, that the Parties covenanting do there treat of the Things, only with a view to the Uſe which may be made of them; but they treat about this Uſe of the Things in a very different manner. One way, which is proper to the Loan of Things to be reſtored in Specie, and to Letting and Hiring, is where the Contracters treat only of the bare Uſe, and not of the Property of the Things; for in theſe Contracts there is no Alienation of the Thing: The other way which is peculiar to Sale, to Exchange, and to the Loan of Things to be reſtored in Kind, is where the Parties treat only of the bare Property of the Things, and where they are alienated without any regard to the Uſe which ſhall be made of them, and in ſuch a manner, that altho' the Thing ſhould periſh as ſoon as the Contract is accompliſhed, and before it were poſſible for him who receives the Thing to make any uſe of it; yet the Contract would remain entire: Whereas the Loan of Things that are to be reſtored in Specie, and the Contract of Letting and Hiring do not ſubſiſt, if the Thing periſhes before he who receives it has been able to uſe it: and the Contract vaniſhes, if the Thing periſh. From whence it follows, that he who has taken a Thing by Sale, by Exchange, or by a Loan, which obliges him to reſtore it in Kind, is become Proprietor of the Thing; and that when he uſes it, it is his own Thing that he uſes. But in the Loan of Things to be reſtored in Specie, and in Letting and Hiring, it is another Man's thing that is uſed by the Borrower, and by the Hirer.

Uſe of the Remarks which have been made.

We have made here all theſe Remarks on the different Natures of the Things which are lent, either by a Loan which obliges to make Reſtitution in Specie, or by a Loan which obliges to a Reſtitution in Kind; upon the Characters that are common to Loan, and to other kinds of Covenants; and upon thoſe which diſtinguiſh them, in order to lay the Foundations of the Rules of Loan, which ſhall be explained in this Title.

And theſe Remarks will likewiſe ſerve, together with others that ſhall be made hereafter, to diſcover what are the cauſes which render it unlawful to take Intereſt for Money lent, and why this Intereſt, which is otherwiſe called Uſury, and which was ſuffered by the *Roman* Law, is ſo little countenanced with us, that our Laws puniſh Uſury as a very great Crime. We give the name of Uſury, to every thing that the Creditor who has lent either Money, or Proviſions, or other Things which are conſumed by Uſe, may receive over and above the value of the Money, or other Thing which he lent.

Of Uſury, and the cauſes which render it naturally unlawful.

Although this matter of Uſury being otherwiſe regulated by our Laws, than by the *Roman* Law, be without the bounds of the deſign of this Work; yet ſeeing it is an eſſential part of this kind of Loan we are now treating of, and that the knowledge of it is of moſt frequent and neceſſary uſe, and that it hath its Principles in the Law of Nature, we thought it not proper to omit it in this Title of Loan. But to keep to the method which we propoſed, not to inſert in the detail of the Rules any others than ſuch as are both agreeable to the *Roman* Law, and to our Uſage, we ſhall blend what relates to Uſury, with the particular Rules of Loan; and we ſhall mention here at the head of this Title, all that we ſhall think fit to ſay on this ſubject.

To eſtabliſh the Principles upon which we are to judge, whether the Intereſt of Money lent be lawful, or not, we need only have recourſe to the Authority of the Divine Law, which has condemned it, and forbid it in ſuch ſtrong and expreſs terms. For whoever has common ſenſe, cannot but agree that that is to be accounted unjuſt and unlawful which God condemns and prohibits[b]. But although it be his Will alone which is the Rule of Juſtice, or rather which is Juſtice it ſelf, and which renders juſt and holy whatever he commands[c]; yet he ſuffers, and even requires that Man ſhould conſider and examine what that Juſtice is, and that he ſhould open his eyes to the Light of it, in order to know it[d]. If therefore we would diſcover what is the character of the Iniquity, which renders Uſury ſo criminal before God, and which ought to make it ſo to us both in our hearts and minds; we have only to conſider what the Nature of this Contract of Loan is, in order to judge whether it be juſt to take Intereſt for it or not. And we ſhall eaſily perceive by the Natural Principles of the Uſe which God has given to this Contract in the Society of Men, that Uſury is a Crime which violates theſe Principles, and undermines the very Foundations of the Order of Society.

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[b] A Man of Underſtanding truſteth in the Law. *Ecclus.* xxxiii. 3.

[c] The Judgments of the Lord are true, and righteous altogether. *Pſal.* xix. 9.

[d] Learn Juſtice, and the Judgments of God. *Ecclus.* xvii. 24.

The two ways of Lending, whether it be that of the Loan of Things to be reſtored in Specie, which has been treated of under the foregoing Title, or the Loan of Things to be reſtored in Kind, which is the ſubject of this Title, derive their Origin, as all the other Covenants, from the Order of Society; and they are natural and eſſential to it. For it is eſſential to this Order, where Men are linked together by mutual Love, and where every one has for a Rule of the Love which he owes to his Neighbour, that which he has for himſelf, that there ſhould be ways whereby Men may aſſiſt one another gratuitouſly, both with Things, and with their Perſons. And as there are Covenants eſtabliſhed for ſuch Commerces between them as are not gratuitous, ſo there ought alſo to be for ſuch as are. Thus, ſeeing Men may traffick with one another about the Property and Uſe of Things; there are therefore Covenants eſtabliſhed for the ſaid Traffick; ſuch as Sale, Exchange, and Letting and Hiring: Which makes it to be of the Nature of theſe Covenants, not to be free and gratuitous. Thus, ſeeing Men may communicate to one another freely, and without any reward, both the Property and Uſe of Things, there are therefore Covenants, by which they may acquire Things in this manner, the nature of which is for this reaſon, that they ſhould be gratuitous, ſuch as Donation, and the Loan of Things to be reſtored in Specie[e].

It is therefore certain, that there are two ways by which people may communicate to one another the Uſe of Things. One is gratuitous, and the other for a recompence, in ſuch things where this Commerce may be lawful. Thus, the Owner of a Horſe may either let him out for a Hire, or the price of the Service which the ſaid Horſe may render; or he may lend the uſe of him gratuitouſly, and without any reward. And theſe two ſorts of Covenants have their Nature and Characters different, which ought not to be confounded together.

It remains therefore, in order to know whether we may take Intereſt for the Loan of Money, or not, that we examine, whether as there are two ways of giving the uſe of a Horſe, of a Houſe, a Suit of Hangings, and other things of the like nature, one by the Loan of Things to be reſtored in Specie, and without any recompence, and the other by Letting it to Hire for a certain price, and both the one and the other honeſt and lawful; there be likewiſe two ways of giving Money, Corn, Liquors, and the other things of the like kind; one by a free gratuitous Loan, and the other by Letting them out for Hire, or a gainful Loan. So that as it is indifferently juſt and natural, that he who gives his Horſe, ſhould have his choice of ſaying that he either lends it, or that he lets it out, it may be likewiſe equally natural and juſt for him who gives his Money, his Corn, his Oil, his Wine, to have it in his choice to ſay, that he lends it out upon Intereſt, or without Intereſt.

This is without doubt the point in queſtion, which depends on the knowledge of the Cauſes which juſtify the will of him, who inſtead of lending his Horſe, will only let him out for a certain profit; and on the enquiry whether there be alſo cauſes which juſtify the will of him who will not lend his Money, or his Proviſions, but on condition that he ſhall have Intereſt for them. And in order to judge of this Parallel, we muſt conſider what it is that paſſes in the Contract of Letting and Hiring, and likewiſe ſee what paſſes in the Loan of Money, or Proviſions.

In the hiring of a Horſe, a Houſe, and other things, he who lets it out may juſtly ſtipulate the price of the ſervice and uſe which he who hires the thing may reap from it, whilſt he who is the Owner of it ceaſes to enjoy it, and to make uſe of it: and he likewiſe has for a Title to juſtify him in ſo doing, that ſort of diminution, which, although it be inſenſible, does nevertheleſs happen to the thing that is hired.

In the Leaſe of a Farm, the Leſſor juſtly ſtipulates the price of the Fruits and other Revenues which may ariſe from the Lands that are farmed out.

In Undertakings of Work to be done, and in the Hire of Labourers, it is but juſt that thoſe who give their time and their pains, ſhould ſecure to themſelves a Salary for the Labour out of which Men are to get their livelihood.

We ſee then, in all theſe ſorts of Commerce, that that which renders lawful the Profit, or the Revenue, that may be made by them, is, that he who lets out to another, either his Labour, or his Induſtry, or a Horſe, a Houſe, a Farm, or other Thing, ſtipulates juſtly a Price for the Right which he gives another to enjoy either the Produce of his Labour, or the Service of his Horſe, to dwell in his Houſe, to reap the Fruits of his Lands, or to have the benefit of the other uſes that may be made of the Thing that is let out to Hire. But altho' this Agreement ſeems to be a juſt Title for taking a Salary, a Hire, or other Revenue; yet it would not be ſufficient to juſtify the profit that is made by letting to Hire, if it were not attended with the other Characters that are eſſential to this Contract, and which are ſuch, that if they were wanting, the Covenant, for the profit to be made thereby, would be unjuſt. So that altho' it were true, that one might make ſuch a Stipulation for the Intereſt of Money, or Proviſions, in conſideration of the advantage which the Borrower might make of them, which cannot be, as ſhall be ſhewn hereafter; yet the want of theſe other Characters which are neceſſary to juſtify the profit that is made by Letting and Hiring, would render the Intereſt of Money unlawful. And in order to judge of it, we are only to conſider what thoſe Characters are, which are to be found in Letting and Hiring, and not in a Loan, and without which even the profit that is made by Letting to Hire, would be unlawful.

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[e] Gratuitum debet eſſe commodatum. §. 2. *inſt. quibus mod. re contr. obl.*

In Letting and Hiring, it is neceſſary that he who hires the Thing, ſhould be at liberty to make uſe of it, and enjoy it according to the quality of the Agreement, and if he were hindred from doing ſo by an Accident, he would be diſcharged from the Rent, or Hire. But in a Loan, the Borrower remains bound, whether he uſes the thing that he has borrowed, or that he is hindred by ſome accident from uſing it.

In Letting and Hiring, the perſon who hires the Thing is obliged only to reſtore the ſame thing which he has hired, and if it periſhes in his Hands, by any Accident, he is not anſwerable for it, and is not obliged to reſtore any thing.

But in a Loan of this kind, the Borrower is obliged to reſtore the ſame Sum, or the ſame Quantity, which he had borrowed, altho' he ſhould at the ſame time loſe it by an Accident.

In Letting and Hiring, the diminution, be it ſenſible or inſenſible, which happens to the Thing that is let, by the uſe which is made of it by the perſon who has hired it, falls upon the Owner, who had let it out.

But in a Loan of this kind, the Lender ſuffers no diminution, nor bears any loſs.

In Letting and Hiring, the Leſſee uſes that which belongs to another, for he who lets a Thing remains Maſter of it: and if he were not, he would have no right to take a Rent, or Hire, for the uſe of it.

But in this kind of Loan, the Borrower becomes Maſter of the thing that is lent him; and if he were not, he could not uſe it. So that when he makes uſe of it, it is his own thing that he uſes; and the Lender has no longer any right to it.

We ſee by this parallel of the Characters which diſtinguiſh the Contract of Letting and Hiring from that of Loan, what are in the Contract of Letting and Hiring the natural Cauſes which juſtify the profit which he makes who lets out his Labour, his Lands, or any other thing; and that to render the Rent, or Hire thereof lawful, it is neceſſary, that he who lets out a thing, ſhould retain the Property of it, and that he remaining Maſter of the thing, ſhould bear the loſs or diminution of it, if it periſhes, or is diminiſhed. And he muſt moreover warrant the Enjoyment and Uſe of the Thing to him who hires it, and if this Enjoyment ſhould be interrupted, and ceaſe, even altho' it were by an Accident, he could not demand the Rent, or Hire. Which makes the condition of the Leſſee ſuch, that he is ſure of enjoying the Thing of another perſon, without being in danger of paying any thing for it if he does not enjoy it, and without the hazard of loſing the Thing, if it periſhes.

Theſe are the natural Foundations which render theſe ſorts of Commerce lawful, where one puts a Thing into the hands of another perſon, for ſome gain or profit that accrues to both. And we ſee on the contrary, that he who lends Money, or Proviſions, upon Intereſt, does not aſcertain any profit to the Borrower; and yet nevertheleſs ſecures to himſelf a certain gain. That he does not ſo much as warrant the uſe of the Thing which he gives, and that on the contrary, although the Thing which he lends ſhould happen to periſh, the Borrower ſhall nevertheleſs be bound to reſtore to him as much, and likewiſe the Intereſt. So that he takes a ſure profit, where the Borrower can have only loſs: That he takes profit of a thing that is not his own; and even of a thing which in its own nature yields no profit; but which can only be put to uſe by the induſtry of the Borrower, and with the hazard both of the whole Profit and Capital, without the Lender's contributing any ſhare, either of the ſaid Induſtry, or of the Loſs.

We ſhall not enlarge any farther on the conſequences which follow from all theſe Principles: and what has been ſaid, is ſufficient to convince us, that Uſury is not only unjuſt becauſe of its being prohibited by the Law of God, and becauſe of its being contrary to Charity, but that it is moreover naturally unlawful, as being a violation of the moſt juſt and moſt certain Principles of the Nature of Covenants, and which are the Foundation of the Juſtice of the Profits that are made by all theſe ſorts of Commerce. So that it is not ſtrange that Uſury ſhould be looked on as ſo odious and ſo criminal a practice, and that it ſhould be ſo rigorouſly condemned, both by divine and humane Laws, and ſo ſeverely repreſſed, both by our Religion, and Civil Policy.

It would not be neceſſary, after theſe proofs of the iniquity of Uſury, to anſwer the Objections that are brought by Uſurers, ſeeing it cannot be doubted that an unlawful Commerce cannot be tolerated on any pretext whatſoever. And beſides, the Law allows of none, and condemns all Uſury without diſtinction, and without having any regard to all the motives that are made uſe of to juſtify it, and to excuſe it. But becauſe the pretexts for Uſury, however unjuſt they may be, have this effect, that thoſe who make uſe of them, pretend that the general Rule prohibiting Uſury admits of the Exceptions which they would make to it, it is neceſſary to ſhew, by the Anſwers to theſe Objections, and to theſe pretexts, that this Rule admits of no Exception whatſoever.

Firſt pretext of Uſurers, that they do a kindneſs.

All the pretexts of Uſurers center in this, To ſay that they do a kindneſs; that they deprive themſelves of the gain which they might make of their Money, or other things which they may lend; and even that the Loan occaſions them loſs. And in fine, that the Borrower makes profit by it, or reaps ſome other advantage from it.

Anſwer.

It is true, that to lend, is to do a kindneſs, and this is the natural and eſſential character of the Contract of Loan. But it is for this very reaſon, that we can lend only gratuitouſly, in the ſame manner as we can only make a Gift, or beſtow Alms, without any recompence. And it would be very ſtrange, that by means of a Contract, the eſſential uſe of which is to do a kindneſs, we ſhould make Merchandize of that very kindneſs. As therefore it would be againſt all Order, for him who makes a free Gift, or beſtows Alms, to ſell that Favour which he does by giving; and that it would not be any longer either a Gift, or an Alms; it is likewiſe contrary to Order, that he who lends ſhould ſell his kindneſs. For in a word, it is ſo eſſential to all manner of Kindneſs that it ſhould be gratuitous, that even in the Covenants where one may lawfully receive a profit for doing a Kindneſs, it cannot be the Kindneſs it ſelf which is turned into Commerce. But every Profit has ſome other cauſe. Thus, he who lets his Houſe to one who cannot find another, does him a kindneſs: but he ſhall not for this reaſon be at liberty to take from this Tenant, whom he is willing to oblige, a greater Rent than he would take from one whom he did no ways intend to oblige by letting it: Otherwiſe it might be ſaid, that we may ſell dearer to a Friend than to a Stranger, ſeeing we ſhould ſell to him with the circumſtance of having a mind to oblige him, which we ſhould not have in our thoughts, if we ſold to a Stranger.

We cannot therefore make uſe of the pretext of doing a pleaſure to excuſe Uſury, but as a blind, and with intention to overthrow the Order of the firſt Laws, which enjoin us to do good, only becauſe they require us to love; and which do not ſuffer us to ſell that Love which they command every one to have in his heart towards his Neighbour.

This Truth, that a Kindneſs cannot be bought and ſold, is ſo natural, that by the *Roman* Law, which allowed of Uſury, as ſhall be ſhewn hereafter, a Debtor could not even compenſate with the Intereſt which he owed, a good Office done to his Creditor. And we have a remarkable Inſtance of it in one of the Laws of the *Pandects*[f], where it is ſaid, That if one who is indebted in a Sum of Money, which of its own nature produces no Intereſt, undertakes the management of the Affairs of his Creditor, in his abſence, and without his knowledge, he is obliged to pay the Intereſt of that Sum, after the term of payment is expired, without any demand. And the good Office which

which he renders is ſo far from being reckoned a Compenſation for that Intereſt, that it is laid down as a Rule in that Law, That every good Office which the Debtor renders to his Creditor, in taking care of his Affairs, obliges him to demand that Intereſt of himſelf, and to pay it, without retaining it as a Compenſation for the kindneſs he does him[f]; becauſe, as is mentioned in the ſame Law, in relation to another kind of duty, thoſe who do any Office, or Service, which in its nature ought to be free and gratuitous, ought to do it intirely, and without intereſt, and can take nothing for it[g]. And we ſee likewiſe in the *Roman* Authors, who were no more enlightned with the Spirit of the Divine Law, than thoſe Authors were from which the Laws of the *Pandects* have been taken, that they were of Opinion, that it was eſſential to the nature of an Act of Kindneſs, not to put it out to Uſury[h].

Second and third Pretext, Loſs, or Want of Gain.

All the conſequence then which the Creditor, who lends his Money with this view, can draw from this good intention of his to do a kindneſs, is, that he ought to lend it *gratis*; and if the Loan is not agreeable to him with this condition, which is inſeparable from it, he has nothing to do but to keep his Money, or put it to ſome other uſe. And he will not have reaſon to complain, neither that the Loan deprives him of a Gain, nor that it occaſions him any Loſs. *Anſwer.* And this may ſerve as an anſwer to the objection, made by thoſe who ſay, that by lending they ceaſe to gain, or that they even loſe, ſeeing they are at liberty not to lend; ſeeing the Contract of Loan was not invented for the benefit of thoſe who lend, but for the conveniency of thoſe who borrow; and in fine, that people may lay out their Money in purchaſing Annuities, or employ it ſome other way, beſides that of lending it on Intereſt; which can never become innocent under any pretext whatſoever, ſeeing there is none but what God has foreſeen, and which his expreſs prohibition of Uſury ſhews to be unwarrantable. Thus, we ſee that both the Church, and the State, have prohibited Uſury by ſo many Laws, not as a bare Injuſtice, but as a great Crime. For the Councils, and the Canons, do ſo ſeverely repreſs Uſury, that they condemn even as Hereticks, thoſe who ſtand up in defence of it[i], becauſe that in effect it is an error againſt the Spirit and firſt Principles of the Law of God. And the Ordinances puniſh it ſo rigorouſly, that the Puniſhment of Uſury in *France*, for the firſt time, is a publick acknowledgment of the Offence, in an ignominious manner; which in *France* is called, *L'Amande Honorable*, and Baniſhment moreover. And the ſecond Offence is Death[l]. And by that Law the Uſurer is to be hanged, altho' he ſhould alledge in his defence, that by lending his Money he ceaſed to gain, or that even he ſuſtained ſome loſs or damage thereby.

Fourth Pretext, The Profit of the Borrower.

The pretext of the profit which the Borrower may make of the Money which he borrows, is of no greater conſideration in the eye of the Law, than the other pretexts before mentioned; and it likewiſe is nothing elſe but an illuſion. *Anſwer.* Seeing this Profit, if any were to be made by the Borrower, could not be a ſufficient Title to juſtify the Lender's taking Intereſt. For it is the Rule touching future Profits, that to be intitled to a ſhare of them, one ought to run a hazard of the Loſſes which may happen, inſtead of the Profits which were hoped for. And the condition of being intitled to a ſhare of a future Gain, implies that of not profiting, unleſs there be Gain made, and even of loſing, in caſe any Loſs does happen[m]. One cannot therefore, without breach of Humanity, nor even without a Crime, diſcharge himſelf from the Loſs, and aſcertain to himſelf a Gain. To which we muſt add what has been ſaid touching the cauſes which juſtify the taking of Profit.

Iniquity of Uſury.

There remains then no other Title for the juſtification of Uſury, beſides the Covetouſneſs of the Lender, and the Neceſſity of the Borrower. And it is likewiſe the combination of theſe two different kinds of Evils, which has been the occaſion, and the ſource of the Commerce of Uſurers. So that whereas the Divine Providence forms the conjuncture which brings the perſon who is in want, near to him who is able to relieve him, that the ſight of the Neceſſity of the one, may diſpoſe the other to exerciſe his Charity, or Humanity[n]; the Uſurer makes of this Conjuncture a Snare, according to the Scripture Phraſe, he lies in wait, to make a prey of thoſe who fall into it[o].

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[f] *L.* 38. *ff. de neg. geſt.*

[g] Cum gratuitam, certè integram, & abſtinentem omni lucro, præſtare fidem deberent. *d. l.*38. *ff. de neg. geſt.*

[h] Benefici, liberàleſque ſumus non ut exigamus gratiam: neque enim beneficium fœneramur. *Cic. de amicitia.* Fœneratum iſthuc hoc beneficium tibi, pulchrè dices. *Terent. in Phormione.*

[i] *Can.* 1, 4, 5. *D.* 47. *toto tit. de uſur. Clem. de uſur.*

[l] *Ordinance of* Blois, *Art*. 202.

[m] Secundum naturam eſt commoda cujuſque rei eum ſequi, quem ſequuntur incommoda. *l.* 10. *ff. de reg. jur.* See the inſtance given in *l. ult.* §. 3. *Cod. de furt.* and of *l.* 13. §. 1. *ff. commod.*

Bad conſequences of Uſury.

We ſhall not dwell upon the other characters of the Iniquity that is to be found in Uſury, ſuch as Idleneſs[p], which it leads the Uſurer into, by reaſon of the facility of making Profit, without Induſtry, without Hazard, and without Trouble; the liberty which the Lender has to take his Intereſt immediately, and to demand his Principal whenever he pleaſes; and the ſlavery[q] into which Uſury brings the Debtor, under the burden of paying always to no purpoſe; and of ſeeing himſelf expoſed every moment to repay the whole at an unſeaſonable time, which may prove his ruine. Neither ſhall we enlarge any farther on the detail of the Inconveniencies of Uſury in Trade, and the Troubles and other Evils which it occaſions to the Publick. They are ſufficiently known by experience; and it is eaſie to imagine, that a crime which extinguiſhes the Spirit of the firſt Laws, and which by that means deſtroys the very Foundations of Society, raiſes Troubles and Diſorders in it; and Troubles of ſuch dangerous conſequence, that we know that at *Rome* Uſury was the occaſion of many Seditions[r]; and it is upon this account that our Laws have extended the puniſhment of Uſurers even to death.

Prohibitions of Uſury in the Law, and the Prophets.

Uſury forbidden at Rome.

These ſeveral Evils which are occaſioned by Uſury, and the characters of Iniquity which are diſcovered in it by the Principles of the Law of Nature, are juſt cauſes of the Prohibition of it by the Law of God[s]. And we cannot doubt of Uſury's being a great Crime, when the Prophets call it an Abomination, and place it in the rank with Idolatry, Adultery, and other great Crimes[t]. Which plainly ſhews, that Uſury is contrary to the Spirit of the Law of Nature. For if there were no greater difference between lending one's Money without Intereſt, or upon Intereſt, than there is between lending a Horſe, and letting him to hire, it would be impious and abſurd to imagine, that the Law of God, which does not forbid the taking Hire for a thing that is let out, ſhould have forbid the taking Intereſt for Money lent, and ſhould have placed it in the number of the moſt enormous crimes. So that it muſt neceſſarily be, that the Law of Nature, which is not tranſgreſſed by Letting and Hiring, be ſo by Uſury: and it is ſo in reality all the ſeveral ways that have been mentioned, and which render Uſury ſo contrary to Humanity, and give it a character of Iniquity ſo naturally ſenſible, that it has made it odious even to thoſe Nations which were ignorant of the firſt Laws[u]. For it was prohibited at *Rome* in the firſt Ages of the Commonwealth, and long before the Goſpel was known there; and it was even more rigorouſly prohibited than Theft. Since whereas the Puniſhment of Theft was only the double of the thing ſtollen, that of Uſury was the quadruple[x]. Thus Uſury was looked upon among the *Romans* as a very pernicious crime; and thus we likewiſe ſee that an eminent *Roman*, being one day aſked what he thought of Uſury, made no other anſwer to the perſon who aſked him the queſtion, than by aſking him again what he thought of Murder[y]. And the Author who has taken notice of this anſwer, has ſaid in another place, that Uſury kills[z]. We know likewiſe that another Author of greater antiquity, in raillery, makes one who wanted Money to ſay, that if he could not get any to borrow, he would take ſome upon Intereſt; to ſhew that it is contrary to the nature of Loan to take Intereſt for it[a].

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[n] The rich and poor meet together: the Lord is the maker of them all. *Prov.* xxii. 2.
The poor and the deceitful man meet together: the Lord lighteneth both their eyes. *Prov.* xxix. 13. And he gave every man commandment concerning his neighbour. *Ecclus.* xvii. 14.

[o] His eyes are privily ſet againſt the poor. He lieth in wait ſecretly, as a Lion in his den; he lieth in wait to catch the poor: he doth catch the poor when he draweth him into his net. *Pſal.* x. 8, 9.

[p] Vivant omnes Judæi de laboribus manuum ſuarum, vel negotiationibus ſine terminis, vel uſuris. *St. Lewis*, 1254. In omnibus ferè locis, ita crimen uſurarum invaluit, ut *(aliis negotiis prætermiſſis)* quaſi licitè uſuras exerceant. *Cod. l.* 3. *de uſur.*

[q] The borrower is ſervant to the lender. *Prov.* xxii. 7.

[r] Sanè vetus urbi fœnebre malum: & ſeditionum, diſcordiarumque creberrima cauſa. *Tacit.* 6. *annal. Anno Urbis* 786.

[s] And if thy brother be waxen poor, and fallen in decay with thee; then thou ſhalt relieve him: yea, though he be a ſtranger, or a ſojourner, that he may live with thee. Take thou no uſury of him, or increaſe; but fear thy God, that thy brother may live with thee. Thou ſhalt not give him thy money upon uſury, nor lend him thy victuals for increaſe. *Lev.* xxv. 35, 36, 37. Thou ſhalt not lend

Objection from the liberty granted to the Jews, *to lend upon Uſury to other nations.*

It may be objected by ſome, as to the prohibitions of Uſury by the Law of God, that they were made only for the *Jews* among themſelves, but that they were at liberty to lend upon Uſury to Strangers[b]. And that Uſury is not expreſly prohibited by the Goſpel, in order to infer from thence that it is not unlawful by the Law of Nature: And it may be likewiſe imagined, with reſpect to that ancient Law among the *Romans*, that it was afterwards aboliſhed, and that Uſury was afterwards permitted at *Rome*, as appears both from the *Digeſt*, and the *Code*. And it will not be amiſs to give an anſwer to theſe laſt difficulties, for the ſatisfaction of thoſe who may not ſo readily perceive the anſwers to them, altho' they be eaſie to be underſtood.

Anſwer.

It is true, that the Law of God, which forbad Uſury to the *Jews*, allowed them to lend upon Uſury to Strangers. But we muſt not divide the Law againſt it ſelf: and this liberty cannot change the idea which God gives us of Uſury both in the Law it ſelf, and likewiſe by the Prophets. For ſeeing they tell us that Uſury is an Abomination; it is neceſſary that this Truth ſhould remain inviolable; and that this liberty granted to the *Jews* ſhould not be contrary to it. And in fact it is not contrary to it, as will appear from the remark we ſhall make on two Truths which we learn from the ſame Law, and from the Goſpel, and which plainly ſhew that this liberty which was given to the *Jews* to lend upon Uſury to Strangers, is no ways inconſiſtent with the Divine Prohibition of Uſury; and that this Prohibition is ſtill in greater force under the new Law.

The firſt of theſe Truths is, that the Law was given to a people choſen from among all other Nations[c]. And who, at the time that this Law was given them, did live in the midſt of other Nations, whom they were commanded to look upon as enemies whom they were to deſtroy without mercy[d], for fear leſt thoſe who compoſed the Elect People, ſhould ceaſe to look upon thoſe Strangers as enemies to God and them, and ſhould enter into ſuch ties and engagements with them, ſo as to be drawn over to their Idolatry, and their other Crimes[e].

The bare reflexion on this firſt Truth, is ſufficient to warrant our drawing this inference from it, that the liberty under the old Law of lending upon Uſury to Strangers, joined with the prohibition of Uſury among the *Jews* themſelves, proves nothing elſe but a Divine Diſpenſation to take Uſury from thoſe Nations whom they were to conſider as Enemies, and to exterminate from off the earth: and that this liberty was of the ſame

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lend upon uſury to thy brother; uſury of money, uſury of victuals, uſury of any thing that is lent upon uſury. Unto a ſtranger thou mayeſt lend upon uſury, but unto thy brother thou ſhalt not lend upon uſury, *Deut.* xxiii. 19, 20. I rebuked the Nobles, and Governors. and ſaid unto them, do ye all of you take uſury from your brethren. 2 *Eſdr.* v. 7.

[t] Lord, who ſhall dwell in thy tabernacle, or who ſhall reſt upon thy holy hill? —— He that hath not given his money upon uſury. *Pſal.* xv. 1, 6. He that hath not given forth upon uſury, neither hath taken any increaſe.——He is juſt, he ſhall ſurely live, ſaith the Lord God. *Ezek.* xviii. 8, 9. Hath eaten upon the mountains, and defiled his neighbour's wife; Hath oppreſſed the poor and needy, hath ſpoiled by violence, hath not reſtored the pledge, and hath lift up his eyes to the idols, hath committed abomination. *Hath given forth upon uſury, and hath taken increaſe*; ſhall he then live? he ſhall not live; he hath done all theſe abominations, he ſhall ſurely die, his blood ſhall be upon him. *Ezeck.* xviii. 11, 12, 13. That hath not received uſury nor increaſe. *Ibid.* v. 17. Thou haſt taken uſury and increaſe. *Ibid.* xxii. 12.

[u] Primum improbantur hi quæſtus, qui in odia hominum incurrunt, ut fœneratorum. *Cic. lib.* 1. *de offic.*.

[x] Majores noſtri ſic habuerunt, & ita legibus poſuerunt. Furem dupli condemnari, fœneratorem quadrupli. *Marc. Cato de re ruſt.* Sanè vetus urbi fœnebre malum, & ſeditionum diſcordiarumque creberrima cauſa; eoque cohibebatur antiquis quoque, & minùs corruptis moribus. Nam primo duodecim tabulis ſanctum, ne quis unxiariò fœnore amplius exerceret, cùm antea, ex libidine locupletum agitaretur. Dein rogatione tribunitia ad ſemuncias redacta: poſtremò vetita uſura. Multiſque plebiſcitis obviam itum fraudibus, quæ toties repreſſæ, miras per artes rurſum oriebantur. *Tacitus* 6. *annalium, anno urbis* 786.

[y] Cùm ille qui quæſierat, dixiſſet, quid fœnerari? tum Cato: quid hominem, inquit, occidere? *Cic. lib.* 2. *de off. in fine.*

[z] Ne fœnore trucidetur. *Cic. pro Cælio.*

[a] Si mutuò non potero, certum eſt ſumam fœnore. *Plaut. in aſinaria.*

[b] Thou ſhalt not lend upon uſury to thy brother; uſury of money, uſury of victuals, uſury of any thing that is lent upon uſury. Unto a ſtranger thou mayeſt lend upon uſury. *Deut.* xxiii. 19, 20.

[c] The Lord thy God hath choſen thee to be a ſpecial people unto himſelf, above all people that are upon the face of the earth. *Deut.* vii. 6.

[d] Thou ſhalt ſmite them, and utterly deſtroy them, thou ſhalt make no covenant with them, nor ſhew mercy unto them. *Deut.* vii. 2.

[e] Leſt they make thee ſin againſt me, if thou ſerve their Gods. *Exod.* xxiii. 33. Thou ſhalt not bow down to their Gods, nor ſerve them, nor do after their works, but thou ſhalt utterly overthrow them, and quite break down their images. *Exod.* xxiii. 24. *Deut.* vii. 4. For ſurely they will turn away your hearts after their Gods. 1 *Kings* xi. 2. *Exod.* xxxiv. 13.

ſame nature and character with the command that was given to the ſame people when they went out of *Egypt*, to borrow and carry away with them the moſt precious moveables of the *Egyptians*[f]. And as this commandment does not prove that it is lawful to ſteal, and does not hinder Theft from being a crime contrary to the Law of Nature; ſo the liberty of taking Uſury in the like circumſtances, does not prove that Uſury is not ſuch as God deſcribes it, both in his written Law, and by the Law which he has engraven on the mind of Man, and which the Heathens themſelves were not ignorant of.

The other Truth which is to be obſerved, is, that the Divine Law was given to a ſtiff-necked and ignorant people[g], and who, becauſe of their ſtubbornneſs, were indulged by the ſame Law in ſome things which were prohibited enough by the Law of Nature. Thus, for example, that Written Law tolerated Divorce, and permitted it[h], although contrary to the Law of Nature, and to that ſtrict Union which God himſelf has formed between the Huſband and Wife, and of which it is ſaid, that it is not lawful for Man to put them aſunder[i]. And as the permiſſion of Divorce under the ancient Law would be a very falſe principle to juſtify it now adays; ſo likewiſe that which was given to the *Jews* to lend upon Uſury to Strangers, cannot be looked upon by us as a Rule ſince the publication of the Goſpel. For in the ſame manner as no body doubts now that Divorce is unlawful, and that it is a Truth and a Rule both of the Law of Nature, and the revealed Law of God, that Marriage is indiſſolvable; ſo likewiſe we can no more doubt, but that Uſury is a crime againſt the Law of Nature, and againſt the Law of God; and that the toleration of Uſury with regard to Strangers, is aboliſhed by the Goſpel, as well as the permiſſion of Divorce; ſeeing it is certain under the new Law, by which Truth is unveiled, and diveſted of the Types and Figures of the old Law[l], that there are now no people rejected or diſtinguiſhed in the ſight of God[m]; That the *Samaritan* is become neighbour to the *Jew*[n]; and that now there is no diſtinction of *Jew* and *Greek*, nor of other Stranger, ſeeing they are all of them called to the new Law, and are united to it under the obedience of their common Lord[o]. So that the liberty to lend upon Uſury to Strangers, cannot ſubſiſt for thoſe to whom no body is any more a Stranger, and who are commanded to look upon all Men, of what Nation ſoever without diſtinction, as their Brethren. And we may likewiſe add to theſe truths, that even before the Goſpel, the Prophets who prepared the minds of the people to receive the new Law, condemned Uſury, without diſtinguiſhing between Brothers and Strangers, as appears from the paſſages that have been quoted.

Another objection, that the Goſpel has not forbidden Uſury.

As to the Goſpel, it is ſaid, that Uſury is not there prohibited, becauſe in one place where our Saviour Jeſus Chriſt hath ſpoken of Loan, he has not there in expreſs terms forbid the taking of Intereſt; but has only ſaid, that we muſt lend without hopes even of receiving back what we have lent[p].

Anſwer.

The conſequence would be much better and more natural to conclude from the ſaid paſſage, that Jeſus Chriſt having commanded his diſciples to lend even with the danger of loſing, on ſuch occaſions where Charity does require it, in the ſame manner as he has commanded them to give Alms; it is natural to infer from thence, that it is much more his will and pleaſure, that they ſhould not take any more than what they have lent. And if it were true that he had permitted Uſury, what he has ſaid of himſelf would not be true, that he was come to give the Law its perfection, and its final accompliſhment, and not to aboliſh it[q]; ſeeing he would have aboliſhed the prohibition of Uſury, and permitted what the Law had prohibited as a very great crime, and one of thoſe that are moſt contrary to Charity.

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[f] *Exod.* xi. 2. and xii. 35.

[g] A ſtiff-necked people. *Exod.* xxxii. 9. For thou art a ſtiff-necked people. *Deut.* ix. 6.

[h] *Deut.* xxiv. 1.

[i] *Moſes*, becauſe of the hardneſs of your hearts, ſuffered you to put away your wives: but from the beginning it was not ſo. *Matt.* xix. 8. Shall cleave unto his wife; and they two ſhall be one fleſh. What therefore God hath joined together, let no man put aſunder. *Matt.* xix. 5. *Gen.* ii. 23.

[l] All theſe things happened unto them for enſamples. 1 *Cor.* x. 11.

[m] But in every nation he that feareth him, and worketh righteouſneſs, is accepted with him. *Acts* x. 35. *Rom.* iii. 29. and xv. 10.

[n] Which of theſe three, thinkeſt thou, was neighbour unto him that fell among the thieves? *Luk.* x. 36.

[o] For there is no difference between the *Jew* and the *Greek*, for the ſame Lord is over all. *Rom.* x. 12. *Gal.* iii. 28. *Rom.* iii. 29. and xv. 10. *Acts* x. 28, 35.

[p] Lend, hoping for nothing back. *Luke* iii. 6.

[q] Think not that I am come to deſtroy the Law, or the Prophets; I am not come to deſtroy, but to fulfil. *Matt.* v. 17.

If it be therefore true, that we dare not ſo much as have a thought that *Jeſus Chriſt* has ſaid any thing contrary to truth, we muſt acknowledge that this ſaying alone, that he is come to perfect the Law, implies the prohibition of Uſury as much as that prohibition is contained in all thoſe moſt holy and refined precepts which he has given us, in order to diſſuade us from ſetting our affections on earthly things. And we cannot be of opinion that he has permitted the great liberty of Uſury, without being guilty of an Impiety which comes very near to Blaſphemy. For it is nothing leſs than Blaſphemy againſt the Divine Sanctity of *Jeſus Chriſt*, to ſay, that he who is come to give the Law its Perfection, has been more indulgent in the matter of Uſury, than was even that Law which he came to perfect; and that that Divine Lawgiver, of whom it had been foretold, that he would deliver his People both from Uſury, and all other Iniquity [r], and that he was to wean Men from ſetting their affections on the Things of this World, ſhould countenance Covetouſneſs to that exceſs as to ſuffer a Commerce, which the old Law and the Prophets had condemned as a moſt heinous Crime, and which is ſo directly oppoſite to the Principles of his Goſpel.

Another Objection. Liberty of Uſury under the Roman *Law.*

Anſwer.

As to the liberty of taking Uſury granted by the *Roman* Law, that is an Authority which can no ways counterbalance that of the Law of God, nor that of the Councils, and the Ordinances of our Kings, which condemn Uſury, and puniſh it. But we may ſay moreover, that this liberty of Uſury mentioned in the Books of the *Roman* Law, is no other than a Relaxation of the Prohibitions that had been made of it, as has been already obſerved. So that what we ſee concerning Uſury in thoſe Books, is no more than a condeſcenſion to an Evil, which had got the better of all the Remedies uſed to prevent it, and an abuſe which paſt for a juſt title, and which went even to that exceſs, that we ſee in one of the Laws of the *Digeſt* [s], that it was a lawful Covenant to ſtipulate not only Intereſt from the time of the Loan to the time of Payment, but even to ſtipulate over and above a larger Intereſt, if the Debtor ſhould fail to pay at the time appointed.

But we may ſay farther, that this Liberty of Uſury under the *Roman* Law was unjuſt, even according to the Principles of thoſe very Lawyers who did juſtify it. For we ſee in a Law that is taken from one of the moſt eminent among them, that the Gain made by Uſury is not natural. *Uſura non naturâ pervenit, ſed jure percipitur.* l. 62. ff. de rei vind. *Uſura pecuniæ, quam percipimus, in fructu non eſt: quia non ex ipſo corpore, ſed ex alia cauſa eſt, id eſt novâ obligatione.* l. 121. ff. de verb. ſignif. And what is added in the Law 62. *ff. de rei vind.* that Uſury which is not a Natural Profit, is exacted by vertue of a Right, does not ſignify that it was due by any Law; but that Right was a Stipulation which they thought ſufficient to juſtify their taking of Uſury, altho' they themſelves were of opinion that a bare Paction was not ſufficient for that purpoſe [t]. Which plainly ſhews, that they knew of no other title to warrant their taking of Uſury, beſides the Formality of a Stipulation. As if Uſury, which they knew to be naturally unlawful, and ſuch as could not even be demanded by vertue of any Paction, were become lawful by the bare pronunciation of the words which made the Stipulation.

Uſury unlawful without Exception.

All theſe proofs which ſhew that Uſury is not only unlawful, but that it is a Crime, do likewiſe ſufficiently evince, that there is no caſe wherein it is lawful; and that every Covenant, or Commerce, whereby Intereſt is taken for a Loan, whatever pretext is made uſe of to colour it, is a criminal Uſury, moſt piouſly condemned by the Law of God, and that of the Church, and moſt juſtly puniſhed by the Ordinances.

Theſe Prohibitions of Uſury in general, that is to ſay, of taking any Intereſt at all for a Loan, reach even to all ſorts of Uſurious Contracts, ſuch as Mortgages, or Pawns, where the Creditor is to receive out of the Revenue of the Thing mortgaged, or pawned, more than the Laws allow him to take for the Money lent, and other Contracts, where they colour Uſury under the appearance of a lawful Contract. We ſhall not explain under this Title the Rules of theſe ſorts of Contracts, and the Characters which may diſtinguiſh Uſurious Contracts, from thoſe which are not [u]; becauſe our Rules touching this matter are different from thoſe of the *Roman* Law, by which it was lawful to lend upon Uſury, and even to take inſtead of Intereſt, Lands to be enjoyed till the payment of the Debt, altho' the Revenue of the ſaid Lands might be of much greater value than the Intereſt of the Money lent [x].

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[r] He ſhall redeem their ſoul from deceit and violence. *Pſal.* lxxii. 14.

[s] *L.* 12. *ff. de uſur.*

[t] Quamvis uſuræ fœnebris pecuniæ, citra vinculum ſtipulationis peti non poſſint. *l.* 3. *Cod. de uſur.* *l.* 24. *ff. de præſcr. verb.*

Intereſt lawful after the term, and a Judicial Demand of it. It is not neceſſary to acquaint the Reader, that under the Prohibitions of Uſury we are not to take in the caſes where the Borrower not paying at the time appointed, the Creditor demands payment of his Money Judicially, with Intereſt for the delay of Payment after the Demand. For then the Lender not being any longer obliged to grant a new delay, it is but juſt that he ſhould have Intereſt to indemnify him for the loſs he ſuſtains by the injuſtice of the Debtor, who fails to pay at the time appointed. But this Intereſt hath nothing in it like to that which the Creditor takes before the Demand, whether it be that the Debtor conſents to it voluntarily, or that the Creditor exacts it otherwiſe.

Contracts in relation to Annuities. Neither is it neceſſary to obſerve here, that we are not to comprehend under Uſury the Contracts in relation to Annuities. For there is this eſſential difference between a Loan and an Annuity, that whereas in a Loan the Debtor may be compelled to pay the Principal Sum at the Term; he who owes an Annuity may keep the Principal as long as he pleaſes, paying the Annuity. And moreover, the Contract of an Annuity is a real Sale, which he who takes the Money on this ſcore makes; for he ſells in effect a certain Revenue out of his whole Eſtate, in conſideration of a Price.

Moderate Intereſt of Money allowed in Great Britain. *But Uſury prohibited.* [*In* Great Britain, *we make a diſtinction between* Uſury *and* Legal Intereſt. *For whatever exceeds the Legal Intereſt is called* Uſury, *and he who exacts it is puniſhed as an* Uſurer. *But our Laws do allow a certain moderate Profit to be taken for the Uſe of Money. By* Stat. 12 Car. II. Chap. 13. *the Intereſt of Money is fixed at the Rate of ſix Pounds for the forbearance of One Hundred Pounds for a year. And whoever exacts more, forfeits the treble value of the Monies lent. By later Acts of Parliament the Legal Intereſt is reduced to Five* per Cent.]

SECT. I.

Of the Nature of the Loan of Things to be reſtored in Kind.

The CONTENTS.

1. *Definition of this kind of Loan.*
2. *The thing lent is alienated.*
3. *Definition of Creditor, and Debtor.*
4. *What Things may be lent in this manner.*
5. *Delivery neceſſary in the Loan, to form the Engagement.*
6. *Why all Obligations are converted into that of Loan.*
7. *The Obligation of a Loan cannot exceed the Thing lent.*
8. *Of the change of the Value of Money.*
9. *Of the change of the Value of Proviſions.*
10. *A Loan in appearance, which is a Sale.*
11. *A Thing given to be ſold, in order to lend the Price of it.*
12. *Money depoſited in order to be lent.*

I.

THE Loan of Things to be reſtored in kind, is a Covenant by which one gives to another a certain quantity of thoſe kinds of Things that are given by Number, Weight, or Meaſure; ſuch as Money, Corn, Wine, and other things of the like nature, on condition that, ſince one ceaſes to have ſuch Things in his poſſeſſion whenever he uſes them, the Borrower ſhall reſtore, not the ſame Individual Thing he borrowed, but as much of the ſame Kind, and of the like Quality [a]. *1. Definition of this kind of Loan.*

II.

In this kind of Loan, the Thing lent is alienated, and the Borrower becomes Proprietor of it; for otherwiſe he would have no right to conſume it [b]. *2. The thing lent is alienated.*

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[w] *See the firſt Section of the Title of Intereſt.*

[x] *L. 17. Cod. de uſur.*

[a] Mutui datio in his rebus conſiſtit, quæ pondere, numero, menſurâ, conſtant. Veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res aut numerando, aut metiendo, aut adpendendo in hoc damus, ut accipientium fiant. Et quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ & qualitatis redduntur, inde etiam mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl. l. 2. §. 1. & 2. ff. de reb. cred.* Quæ uſu tolluntur, vel minuuntur. *l. 1. ff. de uſufr. ear. rer. que uſ. conſ. vel. min.* Mutuum damus recepturi non eandem ſpeciem quam dedimus, (alioquin commodatum erit, aut depoſitum) ſed idem genus. *d. l. 2. ff. de reb. cred.*

[b] Inde mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl.* See the firſt Article of the ſecond Section.

III.

3. Definition of Creditor, and Debtor.

He who lends ſuch Things as are conſumed by Uſe, is called Creditor, becauſe of the credit he gives to the promiſe of the perſon to whom he lends: and he who borrows is called Debtor, becauſe he is bound to reſtore the ſame Sum, or the ſame Quantity, which he has borrowed. But perſons may likewiſe become Debtor and Creditor for other cauſes, beſides that of Loan; becauſe there are other ways of being indebted, as well as by borrowing. Thus, in a Sale where the Price is payable at a certain term, the Seller is Creditor as to the Price, and the Buyer is Debtor of it. Thus, in Letting and Hiring, the Proprietor is Creditor of the Rent, or Hire, and the Tenant is Debtor of it[c].

[c] Creditorum appellatione non hi tantùm accipiuntur, qui pecuniam crediderunt; ſed omnes quibus ex qualibet cauſâ debetur. *l.* 11. *ff. de verb. ſign. l.* 10. *eod.* Credendi generalis appellatio eſt —— nam cuicumque rei aſſentiamur, alienam fidem ſecuti, mox recepturi quid ex contractu, credere dicimur. *l.* 1. *ff. de reb. cred.*

Creditum ergo à mutuo differt quà genus à ſpecie, nam creditum conſiſtit extrà eas res quæ pondere, numero, menſurâ continentur, *l.* 2. §. 3. *eod.*

IV.

4. What Things may be lent in this manner.

We may lend in this manner of Loan, all things that are of ſuch a nature that they may be repaid in Kind, in the ſame Quantity, and of the ſame Quality. Thus, beſides Money, Corn, Wine, and other Grain, and Liquors, we may likewiſe lend Gold, or Silver in Bullion, Copper, Iron, and other Metals, Silk, Wool, Leather, Sand, Lime, Plaiſter, and all other Things which may be repaid in kind, without difference of Quantity and Quality, in ſuch a manner as that which is reſtored to the Lender, may intirely ſupply the place of that which was lent[d]. Thus, on the contrary, we do not lend after this manner Beaſts and other Things, which altho' they be of the ſame Kind, yet every Individual of the Kind differs ſo much from another in Quality, that the Creditor cannot be compelled againſt his will to take in payment one Thing for another[e].

[d] Mutui datio in iis rebus conſiſtit, quæ pondere, numero, menſurâ conſtant. Veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro *inſt. quib. mod. re contr. obl.* Quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ, & qualitatis redduntur. *ibid.* Quoniam eorum datione poſſumus in creditum ire, quia in genere ſuo functionem recipiunt, ſed per ſolutionem. *l.* 2. §. 1. *ff. de reb. cred.*

[e] In cæteris rebus, ideo in creditum ire non poſſumus, quia aliud pro alio invito creditore, ſolvi non poteſt. *d. l.* 2. §. 1. *in f. ff. de reb. cred.*

V.

5. Delivery necessary in the Loan, to form the Engagement.

In the Contract of Loan, the Borrower obliging himſelf to reſtore a Sum of Money, or a certain Quantity, equal to what he has borrowed; this Contract is of the number of thoſe where the Obligation is not formed, but by the Delivery of the Thing for which the Borrower obliges himſelf[f].

[f] Re contrahitur obligatio, veluti mutui datione. *inſt. quib. mod. re contr. obl.* See the ninth Article of the firſt Section of Covenants.

VI.

6. Why all Obligations are converted into that of Loan.

Since Money makes the Price of all Things that are vendible, and that it is often neceſſary to reduce into Money the Value of the Things which one owes to another; it is frequent and natural to convert into an Obligation of Loan, thoſe which proceed from other Cauſes that are quite different. Thus, for Example, when Perſons make up their Accounts of Sums of Money, or other Things, with which they ſupplied one another: when they agree their Differences by Tranſactions, and in other caſes of the like nature, if he who is found to be Debtor by the Balance of the Account, by the Tranſaction, or by other Cauſes, does not pay in ready Money that which he owes, he binds himſelf by an Obligation of Loan, becauſe what he owes is eſtimated in Money, and he becomes Debtor for it, in the ſame manner as if he had borrowed the Sum of Money that is Equivalent to the Thing which he was to have given[g].

[g] Æſtimatio rerum quæ mercis numero habentur, in pecunia numerata fieri poteſt. *l.* 42. *ff. de fidejuſſ. & mand.* Si in creditum abii, filio familias, vel ex cauſa emptionis, vel ex alio contractu, in quo pecuniam non numeravi, & ſi ſtipulatus ſim, licèt cœperit eſſe mutua pecunia, &c. *l.* 3. §. 3. *ff. de Senat. Maced. l.* 5. §. 18. *ff. de tribut. act.*

VII.

7. The Obligation of a Loan cannot exceed the Thing lent.

The Creditor may ſtipulate with the Debtor for leſs than what he has lent, but not for more. For he may give, but not take too much. And if it ſhould appear that an Obligation were for a greater Sum than that which had been lent, it would be null as to the Overplus, that being without a cauſe[h].

[h] Si tibi dedero decem ſic ut novem debeas: Proculus ait, & rectè, non amplius te ipſo jure debere quàm novem: ſed ſi dedero ut undecim debeas, putat Proculus, ampliùs quàm decem condici non poſſe. *l.* 11. §. 1. *ff. de reb. cred.* See the fifth Article of the firſt Section of Covenants.

VIII.

8. Of the change of the Value of Money. In the Loan of Money the Debtor is obliged only to repay the ſame Sum: and if it happens that after the Loan the Species riſes in Value, he is not bound to pay the preſent Value of the Species which he received, but only ſo much as they were worth when he borrowed them. And if on the contrary the Value of the Species is diminiſhed, the Debtor nevertheleſs is bound to pay the Sum he borrowed[i].

[i] Quia in genere ſuo functionem recipiunt per ſolutionem. *l.* 2. §. 1. *ff. de reb. cred.* Id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, qua datum ſit. *l.* 3. *in f. ff. de reb. cred.*

IX.

9. Of the change of the Value of Proviſions. In the Loan of Corn, Wine, and other Things of the like nature, whereof the Price riſes or falls, the Debtor owes the ſame Quantity which he has borrowed, and neither more nor leſs, whether the Price be riſen or fallen[l]. Unleſs it be that in the caſe of Augmentation of the Price, it ſhould appear by the circumſtances that the Creditor had made an Uſurious Loan, as thoſe do, for Example, who in the time of Harveſt lend their Corn, which is then at a low Price, that they may receive the ſame Quantity in another Seaſon, when it will be dearer.

[l] Mutuum damus recepturi idem genus. *l.* 2. *ff. de reb. cred.* Quatenus mutua vice fungantur, qua tantumdem præſtent. *l.* 6. *in f. ff. eod.* See the fifth Article of the third Section.

X.

10. A Loan in appearance, which is a Sale. If one gives Money to receive Corn, or other Things of the like Nature, or gives theſe kinds of Things to receive Money; it is not a Loan, but a Sale, lawful or unlawful, according to the circumſtances[m].

[m] *This is a Conſequence of the Nature of Loan, and of that of Sale.*

XI.

11. A Thing given to be ſold, in order to lend the Price of it. If one of whom another deſires to borrow Money, gives him Gold, or Silver Plate, or any other Thing to ſell, that he may keep the Price, as Money lent; he who has taken it will become Debtor on the ſcore of Loan, till after the Sale is made. But if the Thing periſhes in his hands before the Sale, by an accident, the loſs will fall upon him, becauſe the thing was given him for his benefit. But if the Owner of the ſaid Plate had a deſign to ſell it however, and prevented the Borrower's requeſt, by aſking him to take the trouble of ſelling the ſaid Plate, and promiſing him as an encouragement, to let him keep the Price, as Money lent; then in that caſe if the Thing periſhes before the Sale by an accident, the loſs will fall upon the Owner; for it was for his own intereſt that he gave the Thing[n].

[n] Rogaſti me ut tibi pecuniam crederem: ego, cùm non haberem, lancem tibi dedi, vel maſſam auri, ut eam venderes, & nummisutereris. Si vendideris, puto mutuam pecuniam factam. Quod ſi lancem vel maſſam ſine tua culpa perdideris, priuſquam venderes: utrùm mihi, an tibi perierit, quæſtionis eſt. Mihi videtur Nervæ diſtinctio veriſſima, exiſtimantis, multùm intereſſe, venalem habui hanc lancem vel maſſam, nec ne: ut ſi venalem habui, mihi perierit, quemadmodum ſi alii dediſſem vendendam. Quod ſi non fui propoſito hoc ut venderem, ſed hæc cauſa fuit vendendi, ut tu utereris, tibi eam periiſſe, & maximè, ſi ſine uſuris credidi. *l.* 11. *ff. de reb. cred.* Qui rem vendendam acceperit ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *eod.* See the following Article.

XII.

12. Money depoſited in order to be lent. If he who borrows with a deſign to purchaſe, or to lay out the Money ſome other way, takes the Money into his keeping, on condition that the Loan ſhall not be contracted till the Purchaſe is made, or the Money be otherwiſe employed, and it happens that the Money is loſt by ſome accident, this perſon with whom it was depoſited will be anſwerable for it in the ſame manner as if the Loan were conſummated, becauſe it was for his behoof that the Money was left with him[o].

[o] Si quis nec cauſam nec propoſitum fœnerandi habuerit, & tu empturus prædia, deſideraveris mutuam pecuniam, nec volueris creditæ nomine antequam emiſſes ſuſcipere, atque ita creditor quia neceſſitatem fortè proficiſcendi habebat, depoſuerit apud te hanc eamdem pecuniam, ut ſi emiſſes crediti nomine obligatus eſſes: hoc depoſitum periculo eſt ejus qui ſuſcepit, nam & qui rem vendendam acceperit, ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *ff. de reb. cred.*

SECT. II.

Of the Engagements of the Lender.

The CONTENTS.

1. *The Lender ought to be Owner of the Thing, that he may transfer the Property of it to the Borrower.*
2. *If the Thing lent belongs to a third perſon.*
3. *Redhibition in Loan.*
4. *The Lender can aſk no more than what he has lent.*
5. *Payment of a part of the Debt which is not controverted.*

I.

1. The Lender ought to be Owner of the thing, that he may transfer the property of it to the Borrower.

THE firſt Engagement of one that lends Things to be reſtored in Kind, is that he be Owner of the Thing which he lends, in order to transfer the ſame Right to the Borrower. For people borrow theſe kinds of Things for no other end but to uſe them as their own, and to have the liberty of conſuming them[a].

[a] In mutui datione oportet dominum eſſe dantem. *l. 2. §. 4. ff. de reb. cred.* Inde mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl.* Et ideo ſi non fiat tuum, non naſcitur obligatio. *d. l. 2. §. 2. ff. de reb. cred.* See the following Article.

II.

2. If the Thing lent belongs to a third perſon.

If the Lender is not Owner of the Thing which he lends, he does not convey the Property to the Borrower. And if he who is the true Owner of the Thing finds it in being, and claims it as his own, and proves his Right to it, the Borrower ſhall have his recourſe againſt the Lender, and recover Damages of him[b].

[b] Si ſocius propriam pecuniam mutuam dedit, omnino creditam pecuniam facit, licet cæteri diſſenſerint. Quod ſi communem numeravit, non aliàs creditam efficit, niſi cæteri quoque conſentiant, quia ſuæ partis tantùm alienationem habuit. *l. 16. ff. de reb. cred. v. l. 13. init. & §. 1. eod.* See the ſixth Article of the tenth Section of the Contract of Sale.

III.

3. Redhibition in Loan.

The ſecond Engagement of the Lender, is to give the Thing ſuch, that it be fit for its Uſe. For it is for this Uſe that it is borrowed. Thus, he ought to give Money that is neither counterfeited, nor cried down, and Corn, or Liquors that are not ſpoiled, or ſophiſticated. And he is to warrant them againſt all theſe defects, according to the Rules explained in the eleventh Section of the Contract of Sale[c].

[c] *This is a conſequence of the Nature of Loan, where a Thing is borrowed only for its uſe.*

IV.

4. The Lender can ask no more than what he has lent.

The third Engagement of the Lender, is not to exact any thing either in Value, or Quantity, over and above what he has lent[d].

[d] Si tibi dedero decem ut undecim debeas, putat Proculus amplius quàm decem condici non poſſe. *l. 11. §. 1. ff. de reb. cred.*

V.

5. Payment of a part of the debt which is not controverted.

If the Debtor of a Sum of Money, or of any other Thing, conteſts with ſome reaſon a part of the Debt, and offers to pay the Overplus, the Judge may oblige the Creditor to receive payment of that part which is not controverted; for the Judge is bound in Humanity, and by vertue of his Office, to leſſen the occaſions of Law-ſuits[e].

[e] Quidam exiſtimaverunt neque eum qui decem peteret cogendum quinque accipere & reliqua perſequi, neque eum qui fundum ſuum diceret partem dumtaxat judicio proſequi, ſed in utraque cauſa humaniùs facturus videtur prætor, ſi actorem compulerit ad accipiendum id quod offeratur. Cùm ad officium ejus pertineat lites diminuere. *l. 21. ff. de reb. cred.*

Altho' this Rule is but little obſerved, yet we have nevertheleſs inſerted it here in the ſenſe explained in the Article. For it is highly equitable, and it is juſt to obſerve it according to the circumſtances.

SECT. III.

Of the Engagements of the Borrower.

The CONTENTS.

1. *Payment at the term.*
2. *Accidents do not diſcharge the Debtor.*
3. *Intereſt due after the term, and legal demand.*
4. *Payment of the value of the Things lent.*
5. *Time and Place of the Eſtimation of Things lent.*
6. *Payment in the ſame Quantity, and Quality.*
7. *Intereſt of the Value of the Thing lent.*
8. *Intereſt of Intereſt unlawful.*

I.

1. Payment at the term.

THE firſt Engagement of the Borrower is to repay the ſame Sum, or the ſame Quantity, which he has borrowed, and to pay it at the term agreed on[a].

[a] Aliæ ejuſdem naturæ & qualitatis redduntur. *inſt. quib. mod. re contr. obl.* Dies ſolutionis, ſicuti ſumma, pars eſt ſtipulationis. *l. 1. §. 2. ff. de edendo.*

II.

2. Accidents do not diſcharge the Debtor.

Altho' the Thing lent have periſhed by an accident, ſuch as Fire, Shipwrack, or the Incurſion of an Enemy, before the Borrower could make uſe of it, he is nevertheleſs bound to reſtore as much; becauſe he was made Maſter of it by the Loan; and it is he that ought to bear the loſs[b].

[b] Is qui mutuum accepit, ſi quolibet fortuito caſu amiſerit quod accepit, veluti incendio, ruina, naufragio, aut latronum, hoſtiumve incurſu: nihilominus obligatus remanet. *§. 2. inſt. quib. mod. re contr. obl.* Incendium ære alieno non exuit debitorem. *l. 11. C. ſi cert. pet.*

III. If

III.

3. Intereſt due after the Term, and Legal Demand.

If he who has borrowed Money, fails to pay it at the term, he will be bound to pay Intereſt from the time that a Legal Demand of it has been made[c], that the Creditor may be indemnified for the loſs he ſuſtains by the delay.

[c] Mora fieri intelligitur non ex re, ſed ex perſona, id eſt, ſi interpellatus, opportuno loco non ſolverit. *l. 32. ff. de uſur.* See the fifth Article of the firſt Section of the Title of Intereſt.

IV.

4. Payment of the value of the Things lent.

If he who has borrowed other Things than Money, does not repay them at the term, or does not give them ſuch as they ought to be, he ſhall pay the Value of them[d].

[d] Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam, Caſſius ait quanti fuiſſet. *l. ult. ff. de condict. tritic.*

V.

5. Time and Place of the Eſtimation of Things lent.

The Eſtimation of a Thing lent which the Debtor delays to pay after the Term, ſuch as Wine, Corn, and other Things, is made according to the Price of that Commodity, at the Time and Place where it ought to be delivered, becauſe it was due at that Time, and in that Place: and if the Time and Place were not regulated by the Covenant, the Eſtimation will be made according to the Price which the Thing bears at the Time and Place where it is demanded[e]. Unleſs it be that the circumſtances of the caſe, and the preſumptions of the Intention of the Contracters ſhould require this Eſtimation to be regulated on another foot[f].

[e] Vinum, quod mutuum datum erat, per judicem petitum eſt. Quæſitum eſt: cujus temporis æſtimatio fieret; utrùm cùm datum eſſet, an cùm litem conteſtatus fuiſſet, an cùm res judicaretur? Sabinus reſpondit, ſi dictum eſſet quo tempore redderetur, quanti tunc fuiſſet, ſi non, quanti tunc cùm petitum eſſet. Interrogavi cujus loci pretium ſequi oporteat? Reſpondit, ſi conveniſſet, ut certo loco redderetur, quanti eo loco eſſet, ſi dictum non eſſet, quanti, ubi eſſet petitum. *l. 22. ff. de reb. cred.*

[f] *See before the ninth Article of the firſt Section.*

VI.

6. Payment in the ſame Quantity and Quality.

He who has borrowed Corn, Wine, or other Things of the like nature, without having them eſtimated at a certain Price, which would make a Sale, ought to reſtore Corn, Wine, and the other Things, not only in the ſame Quantity, but of the like Quality with thoſe which he had received[g].

[g] Cùm quid mutuum dederimus, & ſi non capimus ut æquè bonum nobis redderetur, non licet debitori deteriorem rem quæ ex eodem genere ſit reddere, veluti vinum novum pro vetere: nam in contrahendo, quod agitur pro cauto habendum eſt: id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, quâ datum ſit. *l. 3. ff. de reb. cred.* Ejuſdem naturæ & qualitatis. *inſt. quib. mod. re contr. obl.*

VII.

7. Intereſt of the Value of the Thing lent.

If he who owes theſe kinds of Things does not pay them at the Term, or their Value; he will be liable for the Intereſt of them on the foot of their Eſtimation, reckoning from the time that the Creditor made a Legal Demand of them[h].

[h] *See the third Article of this Section, and the firſt Section of the Title of Intereſt.*

VIII.

8. Intereſt of Intereſt unlawful.

The Debtor by a Contract of Loan can never owe Intereſt for the Intereſt which he is in arrears of to his Creditor[i].

[i] Nullo modo uſuræ uſurarum à debitoribus exigantur. *l. 28. Cod. de uſur.*

It is the ſame thing as to Intereſt due for other Cauſes. See the general Rule in the Title of Intereſt, Sect. 1. Art. 10. and 11.

SECT. IV.

Of the Prohibitions to lend Money to Sons living under the Paternal Juriſdiction.

Cauſes of theſe Prohibitions.

THE Lending of Money to Sons who are ſtill under the Power and Tuition of their Fathers, being to them an occaſion of Debauchery, is one of the pernicious effects of Uſury. And it was by reaſon of the facility of borrowing Money of Uſurers, that the corruption of the Manners of the Youth in *Rome* was come to ſuch a height, and attended with ſuch conſequences, that to reſtrain this Diſorder, a Regulation was made by a Decree of the Senate, called the *Macedonian Decree*, from the name of the Uſurer who gave occaſion to it; by which all Obligations of Sons living under the Paternal Juriſdiction, contracted by the Loan of Money, were declared null without any diſtinction. And if any Creditor had lent Money for a cauſe that was juſt and reaſonable, ſufficient to ſupport the Equity of the Obligation, it was by a favourable Interpretation of the Decree of the Senate, that this caſe was to be excepted from the general Prohibition, according to the quality of the Uſe to which the Son put the Money which he had borrowed.

But becauſe the Lending of Money in general to Sons that are under the Paternal Juriſdiction, is not unlawful in itſelf, and becomes unjuſt only by the circumſtances of the bad uſe to which they put the Money; the general Prohibitions of Lending Money to thoſe who are under the Tuition of their Parents, not being part of the Law of Nature, but only a poſitive Law of the Commonwealth of *Rome*, they have not the force of a Law in *France*. And it is not agreeable to the uſage with us, to annul without diſtinction, as that Decree of the Senate did, all the Obligations of Loan to Sons living under the Power of their Fathers, but only thoſe where the Loan is an occaſion of Debauchery; and it depends on the prudence of the Judges to diſtinguiſh them according to their circumſtances. The Rules therefore which ſhall be laid down in this Section, are to be conſidered as Principles of Equity, which may be applied by the Judge, according as he ſees proper.

It is neceſſary to remark on this Subject of Lending Money to Sons living under the Juriſdiction of their Fathers, that this Regulation reſpects not only Sons who are Minors, for their Minority alone would be ſufficient to annul the Obligation; but that it extends to thoſe who being of full Age, are ſtill under the Paternal Juriſdiction, not having been emancipated. See the fifth and ſixth Articles of the ſecond Section of the Title of Perſons.

The CONTENTS.

1. *In what manner it is forbidden to lend Money to Sons living under the Paternal Juriſdiction.*
2. *The death of the Father does not validate the Loan made to the Son.*
3. *It is not forbidden to lend Money to a Son that is emancipated.*
4. *If the Obligation of the Son has been acquitted or approved.*

I.

1. In what manner it is forbidden to lend Money to Sons living under the Paternal Juriſdiction.

THoſe who lend Money to Sons living under their Father's Juriſdiction, without a juſt cauſe, and only to aſſiſt them in their Debauchery, cannot demand what they have lent in this manner[a]. And it would be the ſame thing, if inſtead of lending Money, the Lender had diſguiſed the Obligation under the colour of another Contract[b], or lent other Things than Money[c]. And it is by the circumſtances that we ought to judge of the motive of the Loan, and whether it ought to ſubſiſt, or be annulled[d].

[a] Verba Senatuſconſulti Macedoniani hæc ſunt. Cùm inter cæteras ſceleris cauſas Macedo quas illi natura adminiſtrabat, etiam æs alienum adhibuiſſet, & ſæpe materiam peccandi, malis moribus præſtaret: qui pecuniam (ne quid ampliùs diceretur) incertis nominibus crederet: placere ne cui, qui filio familiàs mutuam pecuniam dediſſet, etiam poſt mortem parentis ejus, cujus in poteſtate fuiſſet, actio petitioque daretur. Ut ſcirent qui peſſimo exemplo fœnerarent, nullius poſſe filii familiàs bonum nomen, expectata patris morte, fieri. *l.* 1. *ff. de Senat. Maced.*

[b] Is autem ſolus Senatuſconſultum offendit, qui mutuam pecuniam filio familiàs dedit, non qui aliàs contraxit —— quod ita demum erit dicendum, ſi non fraus Senatuſconſulto ſit cogitata. *l.* 3. §. 3. *ff. de Senat. Maced.*

[c] Si fraus ſit Senatuſconſulto adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut his diſtractis fructibus, uteretur pecunia, ſubveniendum eſt filio familiàs. *l.* 7. §. 3.

[d] *Touching the lawful cauſes of lending Money to Sons living under the Paternal Juriſdiction.* See *l.* 7. §. 13, & 14.

II.

2. The death of the Father does not validate the Loan made to the Son.

The Obligation of Sons living under the Paternal Juriſdiction, which is liable to be vacated by reaſon of the Vice of the Motive of the Loan, will not be validated by the death of the Father[e]. For it was vicious in its Origine, and it is not ſo much in favour of the Son that it is annulled, as out of hatred to the Creditor, who had made an unlawful Loan[f].

[e] Placere ne cui, qui filio familiàs, mutuam pecuniam dediſſet, etiam poſt mortem parentis ejus: cujus in poteſtate fuiſſet, actio petitioque daretur. *l.* 1. *ff. de Senat. Maced.*

[f] Ob pœnam creditorum, actione liberantur, non quoniam exonerare eos lex voluit. *l.* 9. §. 4. *eod.*

III.

3. It is not forbidden to lend Money to a Son that is emancipated.

After the Son is emancipated from the Father's Juriſdiction, theſe Prohibitions ceaſe, and his Obligation ſubſiſts without any enquiry into the Motives of the Loan[g]. And it would be the ſame thing, if he who was not really emancipated did act ſo as to be publickly reputed Maſter of his own concerns[h].

[g] *The Prohibitions being only againſt lending Money to Sons who live under the Paternal Juriſdiction, they ceaſe with reſpect to him that is emancipated: for he is become Maſter of himſelf, and has the management of his own Affairs.* See the fifth and ſixth Articles of the ſecond Section of the Title of Perſons.

[h] Si quis patrem familiàs eſſe crediderit, non vana neceſſitate deceptus, nec juris ignorantia, ſed quia publicè pater familiàs pleriſque videbatur, ſic

agebat, ſic contrahebat, ſic muneribus fungebatur, ceſſabit Senatuſconſultum. Inde Julianus, libro duodecimo in eo qui vectigalia conducta habebat, ſcribit, & eſt ſæpe conſtitutum, ceſſare Senatuſconſultum. *l.* 3. *ff. de Senat. Maced. v. l.* 3. *ff. de off. Præt.*

IV.

4. If the Obligation of the Son has been acquitted, or approved. If the Father has approved, or ratified the Obligation, if he pays a part of it, or if the Son acquits it himſelf, the Obligation, or the Payment, cannot afterwards be revoked[i].

[i] Si tantum ſciente patre creditum ſit filio dicendum eſt ceſſare Senatuſconſultum. *l.* 12. *ff. de Senat. Maced.* Tum hoc ampliùs ceſſabit Senatuſconſultum, ſi pater ſolvere cœpit, quod filius familiàs mutuum ſumpſerit: quaſi ratum habuerit. *l.* 7. §. 15. *eod.* Sed & ipſe filius (ſi ſolverit) non repetit. *l.* 9. §. 4. *eod.*

TITLE VII.

Of a Depoſitum, *and of Sequeſtration.*

Uſe of Depoſitum. IT happens often, that the Owners, or Poſſeſſors of Things are obliged to entruſt them to the keeping of other perſons; either becauſe they themſelves happen to be in ſuch circumſtances that they cannot keep them themſelves, or becauſe the things would not be ſafe in their cuſtody, or for other cauſes. And in all theſe caſes care is taken of the Things, by putting them into the hands of perſons whom the Owners believe to be honeſt, and who are willing to take charge of them. It is this Covenant which is called a *Depoſitum*.

The conſequence of the fidelity of the Depoſitary. Seeing a *Depoſitum* is made moſtly in private, and without writing, and it being a Contract of frequent and neceſſary uſe, and the ſafety of the thing depoſited depending on the honeſty of the perſon who takes charge of it[a]; ſo there is no Engagement which demands more particularly Fidelity, than that of the Depoſitary.

[a] Totum fidei ejus commiſſum. *l.* 1. *depoſ.*

Sequeſtration. The firſt kind of *Depoſitum* is tranſacted only between two perſons, the one who depoſites the Thing, and the other who takes charge of it. But there is another ſort of *Depoſitum*, when two, or more perſons being in diſpute about the Rights of Property or Poſſeſſion, which every one of them pretends to have in one and the ſame Thing, they depoſite it into the hands of a third perſon, who is called *Sequeſtrator*, that he may keep it till the controverſy be decided, and then reſtore it to the perſon who ſhall be declared to be the right Owner. And the uſe of this Sequeſtration is to prevent the miſchiefs that would happen, in caſe any of the Parties ſhould attempt by force to take poſſeſſion of the Thing, and exclude the others. Thus, the effect of this Sequeſtration is, to preſerve to every one of the perſons that agree to it, the right which they have to the Thing ſequeſtred, by preſerving the Thing itſelf; and to deprive them all of the uſe of this Right, in ſo far as concerns the Poſſeſſion and Enjoyment, laying up ſafely the Fruits or other Revenues, if the thing produces any, that they may be reſtored together with the Thing it ſelf, to the perſon who ſhall be found to be the true Owner.

The Sequeſtrator may be named either by the common conſent of the Parties, when they all agree to it; or by the Judge, when the uncertainty of the true Owner of a Thing controverted, and the neceſſity of committing it to the care and keeping of ſome body, oblige the Judge to order the Thing to be ſequeſtred, pending the Suit. And this is a Judicial Sequeſtration, which is different from that made by conſent of Parties, this being a Covenant, and the other a Regulation made by the Judge.

The Judicial Sequeſtration does not come within the deſign of this Work, it being a part of the Order that is obſerved in Judicial Proceedings: But becauſe the Natural Rules of Sequeſtration by conſent of Parties, have for the moſt part their uſe in Judicial Sequeſtrations, we may apply to them the Rules of this Title which have any relation thereto.

Depoſitum of Things immoveable. Altho' the uſe of a *Depoſitum* ſeems to be confined to Things that are Moveable, becauſe of the origine of the word, which implies the thing that is depoſited to be moved from one place to another: and that Sequeſtration is chiefly uſed in Things Immoveable, yet nevertheleſs Things that are Moveable may be ſequeſtred, when the Poſſeſſion is controverted: and Things Immoveable may be committed to one's keeping, by way of *Depoſitum*, when there is occaſion for it; as thoſe perſons do, who during their abſence give their Houſe, with all that is in it, in keeping to a

Friend, with whom they leave the keys: and the Houſe it ſelf is as it were depoſited into the hands of the perſon to whoſe care it is committed, whether he dwell in it, or not.

Wagers. There is another ſort of *Depoſitum* in Wagers, when the Wagerers depoſite the Bet in the hands of a third perſon. Thus people lay Wagers, where the Bet is to be given to the moſt ſkilful in ſome lawful Exerciſe, ſuch as Fencing, Wreſtling, Running, and others; and this was the only kind of Game where it was lawful by the *Roman* Law to play for Money; and even at this, the *Romans* were allowed to play but for a very ſmall matter; the wealthieſt were not to exceed a Shilling a time[b].

Seeing this *Depoſitum* of Wagers has no other Rules beſides thoſe of other *Depoſitums*, and the Agreement of the Wagerers; we ſhall not inſert in this Title any thing concerning Wagers in particular.

A Neceſſary Depoſitum. There is yet another kind of *Depoſitum*, which is called Neceſſary; becauſe it is Neceſſity that forces people upon it. Thus, in a Fire, Earthquake, Shipwreck, or other caſes of the like nature, people give to their Neighbours, or to other perſons whom they accidentally meet with, the Things which they ſave from ſuch kinds of Loſſes: And altho' this *Depoſitum* is often made without Agreement, at leaſt without any expreſs Agreement, as when people throw Goods out of Houſes that are on Fire, into the Houſes of their Neighbours, Natural Equity ſtrictly obliges thoſe to whoſe keeping Things are committed on ſuch occaſions, to take care of them. And the *Roman* Laws puniſhed ſuch as did not readily reſtore Things that were depoſited on ſuch doleful occaſions, by obliging them to pay double the Value[c].

Since this *Depoſitum*, altho' Neceſſary, is always a kind of Agreement, either expreſs or tacit, and that it obliges in the ſame manner, and by the ſame Rules, as other *Depoſitums*, it ſhall likewiſe be inſerted in this Title.

Depoſitum *of Things diſtrained.* We do not ſet down among the matters treated of under this Title, the *Depoſitum* of Things that are diſtrained from Debtors, and which the Magiſtrate commits to the keeping of certain perſons. For beſides that this *Depoſitum* is not a Covenant, it is a part of the Order of Judicial Proceedings, and does not belong to the deſign of this Work, altho' many of the Rules explained in this Title may be applied to it.

Things depoſited with Inn-keepers. There is likewiſe another ſort of *Depoſitum* of Cloaths, and Goods, which Travellers put into the hands of Innkeepers, Maſters of Ships, and Carriers. But ſeeing this *Depoſitum* is only a conſequence of the Engagements of thoſe kinds of perſons, who are accountable not only for their own proper deed, but alſo for that of their Servants, and Agents, this matter will come in more properly under the ſixteenth Title of this Book, where the Engagements of ſuch Perſons ſhall be conſidered.

SECT. I.

Of the Nature of a Depoſitum.

The CONTENTS.

1. *Definition of a* Depoſitum.
2. *The* Depoſitum *ought to be gratuitous.*
3. *Immoveables may be depoſited.*
4. *People may depoſite the Goods of others; and a Thief may depoſite what he has ſtole.*
5. *Reſtitution of the Thing to its Owner.*
6. *In what caſe the Thing depoſited may be reſtored to another than the Owner.*
7. *The Thing depoſited may be taken back when the Maſter pleaſes.*
8. *Of the place where the Thing depoſited ought to be reſtored.*
9. *The Produce of the Thing depoſited is likewiſe comprehended in the* Depoſitum.
10. *Leave given to the Depoſitary to make uſe of the Thing depoſited.*
11. *If the Thing depoſited belongs to ſeveral perſons.*
12. *If after one of the Co-Heirs has received his portion of the Thing depoſited, the Depoſitary becomes inſolvent.*

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[b] Senatuſconſultum vetuit in pecuniam ludere, præterquam, ſi quis certet haſta, vel pilo jaciendo, vel currendo, ſaliendo, luctando, pugnando, quod virtutis cauſa fiat. In quibus rebus ex lege Titia, & Publicia, & Cornelia, etiam ſponſionem facere licet; ſed ex aliis ubi pro virtute certamen non fit, non licet. *l.* 2. §. 1. & *l.* 3. *ff. de aleat. v. tot. tit. C. eod.*

Liceat quidem ditioribus, ad ſingulas commiſſiones, ſeu ad ſingulos congreſſus aut vices, unum aſſem, ſeu numiſma, ſeu ſolidum deponere & ludere, cæteris autem longè minori pecunia. *l.* 1. *in f. C. eod.*

[c] *L.* 1. §. 1. & §. 4. *ff. depoſ.* §. 17. *Inſt. de action.*

13. *If the Thing depoſited belonging to many Owners, it be agreed, that any one of them may call for it.*
14. *A Thing depoſited with ſeveral perſons.*
15. *If the Depoſitary uſes the Thing depoſited.*
16. *A Thing depoſited for the behoof of the Depoſitary.*
17. *A Coffer depoſited, in which are many Things.*

I.

1. *Definition of a* Depoſitum.

A *Depoſitum* is a Covenant, by which one perſon gives to another ſome Thing to keep[a]; which he is to reſtore whenever the Depoſitor ſhall think fit to call for it[b].

[a] Depoſitum eſt quod cuſtodiendum alicui datum eſt. *l. 1. ff. dep.*

[b] Eſt autem & apud Julianum libro tertio decimo Digeſtorum ſcriptum, eum, qui rem depoſuit, ſtatim poſſe depoſiti actione agere. Hoc enim ipſo, dolo facere eum qui ſuſcepit, quòd depoſcenti rem non reddat. *l. 1. §. 22. eod.*

II.

2. *The* Depoſitum *ought to be gratuitous.*

The *Depoſitum* ought to be gratuitous; for otherwiſe it would be a Hiring and Letting to Hire, where the Depoſitary would let out his Care[c].

[c] Si veſtimenta ſervanda balneatori data perierunt: ſi quidem nullam mercedem ſervandorum veſtimentorum accepit, depoſiti eum teneri, & dolum dumtaxat præſtare debere puto: quod ſi accepit, ex conducto. *l. 1. §. 8. dep.*

III.

3. *Immoveables may be depoſited.*

Altho' a *Depoſitum* be properly only of Moveables, yet Immoveables may be depoſited, as a Houſe, or any other Tenement, with the Fruits ariſing from it[d].

[d] Si poſſeſſionem naturalem revocem, proprietas mea manet, Videamus de fructibus. Et quidem in depoſito, & commodato, fructus quoque præſtandi ſunt. *l. 38. §. 10. ff. de uſur. l. 1. §. 24. ff. dep.*

IV.

4. *People may depoſite the Goods of others; and a Thief may depoſite what he has ſtole.*

People may depoſite not only what is their own, but likewiſe what belongs to others; whether they came by the poſſeſſion of the thing honeſtly, as an Agent, or Factor; or whether they came by it diſhoneſtly. Thus even Thieves and Robbers may depoſite what they have taken by Theft, or Robbery. For it is reaſonable that the Thing ſhould be preſerved, in order to be reſtored to the true Owner[e].

[e] Si prædo, vel fur depoſuerint, & hos Marcellus, libro ſexto Digeſtorum, putat rectè depoſiti acturos. Nam intereſt eorum, eo quod teneantur. *l. 1. §. 39. ff. dep.*

V.

5. *Reſtitution of the Thing to its Owner.*

When one depoſites the Goods of another Man, the Depoſitary is not obliged to reſtore them to the perſon who depoſited them, if the right Owner appears, and claims his Goods. Thus, if it is a Thief that has depoſited what he ſtole, the fidelity required in a *Depoſitum* does not oblige the Depoſitary any longer to the Thief: but the knowledge of the Theft obliges him to reſtore the thing to its Owner[f]. But if there is any doubt as to the Right of the perſon who calls himſelf Owner, or if his Right is diſputed by the perſon who has depoſited the Thing; the Depoſitary becomes in that caſe a Judicial Depoſitary, and as it were a Sequeſtrator. And he is to wait for the deciſion of the controverſy, that he may reſtore the Thing to the perſon who ſhall be declared the true Owner of it.

[f] Incurrit hic & alia inſpectio, bonam fidem inter eos tantùm quos contractum eſt: nullo extrinſecus aſſumpto æſtimare debemus, an reſpectu etiam aliarum perſonarum, ad quas id quod geritur pertinet? exempli loco, latro ſpolia, quæ mihi abſtulit, poſuit apud Seium inſcium de malitia deponentis: utrùm latroni, an mihi reſtituere Seius debeat? Si per ſe dantem accipientemque intuemur, hæc eſt bona fides, ut commiſſam rem recipiat is qui dedit. Si totius rei æquitatem, quæ ex omnibus perſonis, quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quo facto ſceleſtiſſimo adempta ſunt, & probo hanc eſſe juſtitiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione. *l. 31. §. 1. ff. dep.*

VI.

6. *In what caſe the Thing depoſited may be reſtored to another than the Owner.*

If one depoſites a thing belonging to another, or a Servant that which is his Maſter's, the Depoſitary may reſtore it to the perſon who depoſited it, if he has no juſt cauſe to think he does ill in reſtoring it to him. Which he would certainly have, if he knew that this Servant, for Example, were not any longer in the Service of that perſon, or that he ought to miſtruſt his Honeſty. And it is by the circumſtances that we are to judge whether the Depoſitary ought to have reſtored it to another than the Owner[g].

[g] Quod ſervus depoſuit, is apud quem depoſitum eſt, ſervo rectiſſimè reddet, ex bona fide. Nec enim convenit bonæ fidei, abnegare id quod quis accepit, ſed debebit reddere ei à quo accepit. Sic tamen, ſi ſine dolo omni reddat. Hoc eſt, ut nec culpæ quidem ſuſpicio ſit. Denique Sabinus hoc explicuit, addendo, nec ulla cauſa intervenit, quare putare poſſit dominum reddi nolle. *l. 11. ff. depoſ.*

VII.

7. *The Thing depoſited may be ta-*

Since it is the Nature of a *Depoſitum*, that the Things are not depoſited for the behoof *ken back when the Maſter pleaſes.* behoof of the Depoſitary, as Things are lent for the uſe of the Borrower, but for the bare advantage of the Depoſitor, he may take back the thing depoſited whenever he pleaſes; even altho' the time of Reſtitution were regulated by the Contract. For it depends on the Owner to take back the Thing depoſited, whenever he pleaſes, provided he do not do it at an unſeaſonable time, when the Depoſitary cannot reſtore it, becauſe of ſome impediment which he is not to blame for[h].

[h] Si depoſuero apud te, ut poſt mortem tuam reddas, & tecum, & cum hærede tuo poſſum depoſiti agere, poſſum enim mutare voluntatem, & ante mortem tuam depoſitum repetere. Proinde, & ſi ſic depoſuero, ut poſt mortem meam reddatur: potero & ego, & hæres meus agere depoſiti. Ego, mutata voluntate. *l.* 1. §. 45. §. 46. *ff. dep.*

Eſt autem & apud Julianum libro tertio decimo Digeſtorum, ſcriptum, eum qui rem depoſuit, ſtatim poſſe depoſiti actione agere. Hoc enim ipſo, dolo facere eum qui ſuſcepit, quod repoſcenti rem non reddat. Marcellus autem ait, non ſemper videri poſſe dolo facere eum qui repoſcenti non reddat, quid enim ſi in provincia res ſit, vel in horreis quorum aperiendorum condemnationis tempore non ſit facultas, vel conditio depoſitionis non extitit. *l.* 1. §. 22. *ff. depoſ.*

VIII.

8. Of the place where the Thing depoſited ought to be reſtored.

The *Depoſitum* obliging the Depoſitary only to the bare cuſtody of the Thing, it is the Nature of this Contract that the Thing depoſited be reſtored in the place where it is kept; and the Depoſitary is not obliged to tranſport it in order to deliver it, unleſs he has knaviſhly removed it out of the place where he ought to have kept it[i].

[i] Depoſitum eo loco reſtitui debet, in quo, ſine dolo malo ejus eſt, apud quem depoſitum eſt. Ubi verò depoſitum eſt, nihil intereſt. *l.* 12. §. 1. *ff. depoſ.*

IX.

9. The Produce of the Thing depoſited is likewiſe comprehended in the Depoſitum.

The *Depoſitum* extends not only to the Thing that has been depoſited, but if the Thing produces any Fruits, or other Profits, whatever is the Produce of it will likewiſe be comprehended in the *Depoſitum*, and the Depoſitary will be charged with the Produce, as well as with the Thing it ſelf that was depoſited. Thus, he who has undertaken the charge of a Flock of Sheep, muſt reſtore the Wool, and the Lambs which they produce[l].

[l] Hanc actionem bonæ fidei eſſe dubitari non oportet. Et ideo & fructus in hanc actionem venire, & omnem cauſam, & partum dicendum eſt, ne nuda res veniat. *l.* 1. §. 23. & 24. *ff. depoſ.* In depoſito, & commodato fructus quoque præſtandi ſunt. *l.* 38. §. 10. *ff. de uſur.*

X.

10. Leave given to the Depoſitary to make uſe of the Thing depoſited.

If one depoſites Money, or any other Thing, giving leave to the Depoſitary to uſe it, and he makes no manner of uſe of it, he ſhall be liable only to the Engagements of a Depoſitary, and purſuant to the Rules which ſhall be explained in the third Section. But if he uſes the Thing depoſited, his Engagement changing its Nature, he ſhall be bound, either according to the Rules of the Loan of Things to be reſtored in Specie, if it is a Thing that is not deſtroyed by its Uſe, or according to the Rules of the Loan of Things to be reſtored in Kind, if the Thing is of ſuch a nature that it ceaſes to be in the Borrower's poſſeſſion as ſoon as he makes uſe of it[m].

[m] Si pecunia apud te ab initio ac lege depoſita ſit, ut ſi voluiſſes, utereris: priuſquam utaris, depoſiti teneberis. *l.* 1. §. 34. *ff. dep.*

XI.

11. If the Thing depoſited belongs to ſeveral perſons.

If the Thing depoſited belongs to ſeveral perſons, whether it be that it had ſeveral Owners at the time that it was depoſited, or that it has paſſed to ſeveral Co-Heirs of the perſon who depoſited it; the Depoſitary ought not to reſtore it but to all of them together, if it is a Thing that cannot be divided; or he ought to give to every one his ſhare, if the Thing is diviſible, ſuch as a Sum of Money, and that all the Partners are agreed, as to their Portions. And if the Thing depoſited was ſealed up, it ſhall not be opened, but in preſence of all the Owners, that it may be delivered to them all together. But if any of them were abſent; or if there was a diſpute among thoſe that were preſent, the Depoſitary ought not to reſtore the Thing depoſited, till Security is given him that he ſhall not be moleſted by any of the Parties; or till he be Judicially diſcharged of his Truſt, by conſigning the Thing in Court, according to the uſual form, that the Judge may ſee to the opening, and dividing of the Thing depoſited, and take care of the Shares belonging to the Partners that are abſent[n].

[n] Si pecunia in ſacculo ſignato, depoſita ſit, & unus ex hæredibus ejus qui depoſuit, veniat repetens: quemadmodum ei ſatisfiat, videndum eſt. Promenda pecunia eſt, vel coram prætore, vel intervenientibus honeſtis perſonis, & exolvenda pro parte hæreditaria. Sed etſi reſignetur, non contra legem depoſiti fiet, cum vel prætore authore, vel honeſtis perſonis intervenientibus hoc eveniet: reſiduo, vel apud eum remanente, ſi hoc voluerit, ſigillis videlicet priùs ei impreſſis, vel à prætore, vel ab his quibus coram ſignacula remota ſunt: vel ſi

hoc recuſaverit, in æde deponendo. Sed ſi res ſunt, quæ dividi non poſſunt, omnes debebit tradere, ſatiſdatione idonea à petitore ei præſtanda, in hoc quod ſupra ejus partem eſt. Satiſdatione autem non interveniente, rem in ædem deponi: & omni actione depoſitarium liberari. *l.* 1. §. 36. *ff. dep.* Si plures hæredes extiterint ei qui depoſuerit: dicitur ſi major pars adierit, reſtituendam rem præſentibus. Majorem autem partem non ex numero utique perſonarum, ſed ex magnitudine portionum hæreditariarum intelligendam, cautela idonea reddenda. *l.* 14. *eod.*

XII.

12. *If after one of the Co-Heirs has received his portion of the Thing depoſited, the Depoſitary becomes inſolvent.* If in the caſe of a Thing depoſited belonging to ſeveral Co-Heirs, after that one of them has received his Share, the Depoſitary becomes inſolvent, or loſes the Thing without any Fraud of his; this Co-Heir will not be bound to divide his Share with his Co-heirs[o]? For altho' what he has received did belong in common to them all, while it was in the hands of the Depoſitary, yet ſince that Heir received only his own Portion by his diligence, before the Inſolvency of the Depoſitary, or Loſs of the Thing, the others ought to bear the loſs of that Event, either as an effect of their own Negligence, or as an Accident happening to them.

[o] Supervacuam veterum differentiam è medio tollentes, ſi quis certum pondus auri, vel argenti confecti, vel in maſſa conſtituti depoſuerit: & plures ſcripſerit hæredes, & unus ex his contingentem ſibi portionem à depoſitario acceperit, alter ſuperſederit, vel aliàs fortuito caſu impeditus, hoc facere non potuerit: & poſtea depoſitarius in adverſam inciderit fortunam, vel ſine dolo depoſitum perdiderit: ſancimus, non eſſe cohæredi ejus licentiam venire contra eum cohæredem ſuum, & ex ejus parte avellere quod ipſe ex ſua parte conſequi minimè potuit. Quaſi eo quod cohæres accepit communi conſtituto. Cùm ſi certæ pecuniæ depoſitæ fuerint, & ſuam partem unus ex hæredibus accepit, nemini veniat in dubium bene eum accepiſſe partem ſuam. *l. ult. C. depoſ.*

XIII.

13. *If the Thing depoſited belonging to many Owners, it be agreed, that any one of them may call for it.* If many perſons depoſite the ſame Thing, and it be agreed, that one of them, or every one of them ſingle may take back the whole Thing that is depoſited, the Depoſitary will be diſcharged of his Truſt, by reſtoring the Thing to the perſon who had right ſingly to call for it. And if it is not regulated to whom the Thing depoſited ſhall be delivered, it ſhall be reſtored according to the Rule explained in the eleventh Article[p].

[p] Si duo depoſuerint, & ambo agant, ſi quidem ſic depoſuerunt ut vel unus tollat totum, poterit in ſolidum agere. Sin vero pro parte pro qua eorum intereſt, tunc dicendum eſt, in partem condemnationem faciendam. *l.* 1. §. 44. *ff. depoſ.*

XIV.

14. *A Thing depoſited with ſeveral perſons.* If two or more perſons are become Depoſitaries of one and the ſame Thing, each of them ſhall be bound for the Reſtitution of the whole. For the Thing depoſited is not reſtored, unleſs it be reſtored intire; and they ſhall be anſwerable for one another in caſe of any Fraud committed by any one of them; neither will the Action that is brought againſt one of the Depoſitaries, take away the right of ſuing afterwards all the others, until the whole Thing is reſtored[q].

[q] Si apud duos ſit depoſita res, adverſus unumquemque eorum agi poterit. Nec liberabitur alter, ſi cum altero agatur. Non enim electione, ſed ſolutione liberantur. Proinde ſi ambo dolo fecerunt, & alter quod intereſt præſtiterit, alter non convenietur: exemplo duorum tutorum. Quod ſi alter, vel nihil, vel minus facere poſſit, ad alium pervenietur. *l.* 1. §. 43. *ff. depoſ. V. l.* 15. *ff. de tutela & rat. diſt.* Niſi pro ſolido res non poteſt reſtitui. *l.* 22. *ff. depoſ.*

XV.

15. *If the Depoſitary uſes the Thing depoſited.* The Depoſitary who uſes the Thing depoſited, againſt the Owner's will, commits a ſort of Theft; and he will be liable for all the Damages which the Owner ſuffers thereby[r].

[r] Furtum fit non ſolùm cum quis intercipiendi cauſâ rem alienam amovet, ſed generaliter cùm quis alienam rem invito domino contrectat: itaque, ſive creditor pignore, ſive is apud quem res depoſita eſt, ea re utatur—— furtum committit. §. 6. *Inſt. de obl. quæ ex del. naſc.* Qui rem depoſitam, invito domino, ſciens prudenſque in uſus ſuos converterit, etiam furti delicto ſuccedit. *l.* 3. C. *depoſ.*

XVI.

16. *A Thing depoſited for the behoof of the Depoſitary.* If the Thing is depoſited for the behoof of the Depoſitary, as if any Goods are left with him to be ſold, that he may keep the Price as Money lent: or if a Sum of Money is given him on condition that if he meets with a Purchaſe, he ſhall make uſe of the Money; and it happens that what was given him on that condition periſhes before it was uſed, this Depoſitary ſhall be bound to make it good, even altho' it periſhed by an Accident[ſ]. For he was not a Depoſitary under Obligation to reſtore the Thing to the Owner, but to ſell it, and to lay out the Money on his own Affairs, which changes the Nature and Effect of the *Depoſitum.*

[ſ] Si quis nec cauſam nec propoſitum fœnerandi habuerit, & tu empturus prædia, deſideraveris mutuam pecuniam, nec volueris creditæ nomine, antequam emiſſes, ſuſcipere, atque ita creditor quia neceſſitatem fortè proficiſcendi habebat, depoſuerit apud te hanc eamdem pecuniam, ut ſi emiſſes crediti nomine obligatus eſſes: hoc depoſitum periculo lo eſt ejus qui ſuſcepit. Nam & qui rem vendendam acceperit, ut pretio uteretur, periculo ſuo rem habebit. *l.* 4. *ff. de reb. cred.*

XVII.

17. *A Coffer depoſited, in which are many things.*

One may depoſite Things which are not ſhewn to the Depoſitary; as if one gives him in keeping a Coffer ſealed up, or under Lock and Key, without letting him know what is in it, whether it be Money, Papers, or other things. And in this caſe, he is bound only to reſtore the Coffer in the ſame condition, without being accountable for the Things which the Depoſitor may pretend to have put in it. But if he has ſhewn to the Depoſitary all the particular things that were in the Coffer, he ought to anſwer for every one of the things which he took charge of[t].

[t] Si ciſta ſignata depoſita ſit, utrùm ciſta tantùm peratur; an & ſpecies comprehendendæ ſint? & ait Trebatius ciſtam repetendam, non ſingularum rerum depoſiti agendum. Quod & res oſtenſæ ſunt, & ſic depoſitæ, adjiciendæ ſunt & ſpecies. *l.* 1. §. 41. *ff. depoſ.*

SECT. II.

Of the Engagements of the Depoſitor.

The CONTENTS.

1. *Expences of keeping the Thing depoſited.*
2. *The Charges of preſerving it.*
3. *The Charges of tranſportation.*
4. *Diſcharge of the Depoſitary.*

I.

1. *Expences of keeping the Thing depoſited.*

IF the Depoſitary finds himſelf obliged, either becauſe of the quality of the Thing depoſited, or becauſe of ſome event, to be at any charge in keeping it, he ſhall recover what he has laid out. As if, for Example, he was obliged to hire a Stable for keeping a Horſe, that was left with him in truſt[a].

[a] *This is a conſequence of the nature of a* Depoſitum, *which being made only for the behoof of the Depoſitor, ought to be no ways chargeable to the Depoſitary.* See the following Article.

II.

2. *The Charges of preſerving it.*

The Depoſitary will likewiſe recover whatever he has laid out on the preſervation of the Thing depoſited, as if he has made any Repairs in it: or if having in his cuſtody ſome Cattle, he has been at the charges of their Nouriſhment[b].

[b] Actione depoſiti conventus, ſervo conſtituto, cibariorum nomine apud eumdem judicem, utiliter experitur. *l.* 23. *ff. depoſ.* Sumptus cauſâ qui neceſſariè factus eſt, ſemper præcedit, nam ducto eo, bonorum calculus ſubduci ſolet. *l.* 8. *in f. ff. eod.* See the ſeventh Article of the third Section of Letting and Hiring, and the fourth Article of the third Section of the Loan of Things to be reſtored in Specie.

III.

3. *The Charge of tranſportation.*

If to reſtore the Thing depoſited, Carriages are neceſſary for tranſporting it, the Depoſitary is not bound to be at the charges, and the Owner is obliged to go and fetch it, and to be at the charges of tranſporting it, if any are neceſſary, or to reimburſe the Depoſitary, if he has advanced the Money[c].

[c] Si in Aſia depoſitum fuerit ut Romæ reddatur: videtur id actum ut non impenſâ ejus id fiat, apud quem depoſitum ſit, ſed ejus qui depoſuit. *l.* 12. *ff. depoſ.*

IV.

4. *Diſcharge of the Depoſitary.*

If the Depoſitary is not willing to keep the Thing depoſited any longer, and offers to reſtore it, either after the time fixt by the Contract, if any ſuch Regulation was made, or even before; the Depoſitor ſhall be bound to take back the Thing, provided it be not at an unſeaſonable time, when the Depoſitary being able to keep the Thing without any loſs, the Owner cannot conveniently take it back. For in this caſe, it would be neceſſary to regulate a time for diſcharging the Depoſitary of his Truſt[d].

[d] *By the ſame reaſon that the Depoſitor is permitted to take back the Thing depoſited before the time, and whenever he pleaſes.* See the ſeventh Article of the firſt Section of this Title. *V. l.* 1. §. 36. *ff. depoſ. in verbis,* ſi hoc voluerit: ſi hoc recuſâverit.

SECT. III.

Of the Engagements of the Depoſitary, and his Heirs, Executors or Adminiſtrators.

The CONTENTS.

1. *The foundation of the care of the Depoſitary.*
2. *Care of the Depoſitary.*
3. *Fraud, or Negligence near a-kin to it.*
4. *The ſame.*
5. *A Depoſitary negligent of his own Affairs.*

6. *If the Thing is loſt without the Depoſitary's fault.*
7. *Agreement touching the quality of the Care to be taken by the Depoſitary.*
8. *A Depoſitary that obtrudes himſelf.*
9. *Of the Depoſitary who has ſold the Thing depoſited, and bought it again.*
10. *If the Depoſitary delays to reſtore the Thing.*
11. *When the Thing may be reſtored, in any one of many places.*
12. *Executor or Adminiſtrator of the Depoſitary.*
13. *If the Executor or Adminiſtrator of the Depoſitary, ſells the Thing depoſited.*
14. *A Thing depoſited does not enter into Compenſation.*

I.

1. The foundation of the care of the Depoſitary. THE Depoſitary being obliged to keep the Thing intruſted with him, he is by conſequence bound to take ſome care of it[a]. But becauſe he does this ſervice for nothing, and only to do a kindneſs, his condition is diſtinguiſhed from that of other perſons, who for their own advantage have in their poſſeſſion things belonging to others; ſuch as he who borrows, and he who hires, and the Depoſitary is bound only according to the Rules which follow.

[a] Depoſitum eſt quod cuſtodiendum alicui datum eſt. *l.* 1. *ff. depoſ.*

II.

2. Care of the Depoſitary. The Depoſitary is bound to take the ſame care of the Things depoſited, that he does of his own. And he would be unfaithful to his Truſt, if he were leſs careful of them than of what belongs to himſelf[b].

[b] Niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret. Nec enim, ſalva fide, minorem iis, quam ſuis rebus, diligentiam præſtabit. *l.* 32. *ff. depoſ.*

III.

3. Fraud, or Negligence near a-kin to it. If the Depoſitary ſuffers the Thing depoſited to be loſt, to periſh, or be ſpoiled, thro' any Fraud or Knavery, or thro' any Fault or Negligence of his that cannot be excuſed, he ſhall be bound to make it good[c]: And the Fault will be of this nature, if it is ſuch as the Depoſitary would not have readily fallen into, according to his uſual Management of his own Concerns[d].

[c] Dolum ſolum, & latam culpam, ſi non aliud ſpecialiter convenerit, præſtare debuit. *l.* 1, *C. depoſ.* Quod Nerva diceret, latiorem culpam dolum eſſe, Proculo diſplicebat: mihi veriſſimum videtur. *l.* 32. *eod.*

[d] Niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret. *d. l.*

IV.

4. The ſame. It is alſo an inexcuſable Fault, and which the Depoſitary ought to account for, if he fails to uſe ſuch precautions as no other perſon would omit, ſuch as keeping Money under Lock and Key[e].

[e] Latæ culpæ finis eſt, non intelligere id, quod omnes intelligunt. *l.* 223. *ff. de verb. ſignif. By the Law of God, the Depoſitary is anſwerable for Theft, becauſe it does not happen, but for want of care.* And if it be ſtolen from him, he ſhall make reſtitution unto the Owner thereof, *Exod.* xxii. 10, 12. See the third Article of the eighth Section of Letting and Hiring, and the ſecond Article of the ſecond Section of the Loan of Things to be reſtored in Specie.

V.

5. A Depoſitary negligent of his own Affairs. If the Depoſitary is a perſon of a weak Judgment, or a Minor without experience, or one that is negligent in his own Affairs, ſuch as a Prodigal; he who has depoſited any Thing in the hands of ſuch a Depoſitary, cannot require of him the ſame care that a diligent and careful perſon would take of it. And if the thing depoſited periſhes thro' any fault which the ſaid perſon was not able to avoid, the Depoſitor ought to blame himſelf for having choſen ſuch a Depoſitary[f].

[f] Si quis non ad eum modum quem hominum natura deſiderat, diligens eſt. *l.* 32. *ff. depoſ.* Ex eo ſolo tenetur ſi quid dolo commiſerit. Culpæ autem nomine, il eſt, deſidiæ, ac negligentiæ, non tenetur. Itaque ſecurus eſt qui purum diligenter cuſtoditam rem furto amiſerit: quia qui negligenti amico rem cuſtodiendam tradit, non ei, ſed ſua facilitate id imputare debet. §. 3. *Inſt. quib. mod. re contr. obl.*

We muſt underſtand the expreſſions of this text in a ſenſe which agrees with the preceding Rules. For we ought not to diſcharge indifferently all Depoſitaries, of the loſſes which may happen thro' their Slothfulneſs and Negligence.

VI.

6. If the Thing is loſt without the Depoſitary's fault. If the Thing depoſited happens to be loſt, or periſhes, whether thro' its own Nature, as if a Horſe, altho' he be kept, makes his eſcape and is loſt; or by an Accident, which cannot be imputed to the Depoſitary, he ſhall be diſcharged, by reſtoring whatever remains of the Thing depoſited[g].

[g] Si incurſu latronum, vel alio fortuito caſu, ornamenta depoſita apud interfectum perierint, detrimentum ad hæredem ejus qui depoſitum accepit, qui dolum ſolum & latam culpam (ſi non aliud ſpecialiter convenit) præſtare debuit, non pertinet. *l.* 1. *C. depoſ. v. l.* 12. §. 3. *l.* 14. §. 1. *ff. eod.* Caſus à nullo præſtantur. *l.* 23. *in f. ff. de reg. jur. v. l.* 5.

v. l. 5. §. 2. *ff. de cond. cauſ. dat. cauſ. n. ſec. in his verbis.* Si ante deceſſiſſe proponatur, nihil præſtabit, ſi modo per eum factum non eſt. *V. l.* 20. *ff. depoſ.* Si comeſtum à beſtia, deferat ad eum quod occiſum eſt, & non reſtituet. *Exod.* xxii. 13.

VII.

7. Agreement touching the quality of the Care to be taken by the Depoſitary.

If becauſe of ſome particular conſideration, it has been regulated what the Depoſitary ſhall be bound to, his Engagement ſhall be to him in place of a Law. And he ſhall be bound to anſwer, either for what ſhall happen for want of the care which he promiſed to take, or for the Events which he has charged himſelf withal. For the Thing would not have been entruſted with him but upon this condition [h].

[h] Si convenit ut in depoſito & culpa præſtetur, rata eſt conventio. contractus enim legem ex conventione accipiunt. *l.* 1. §. 6. *ff. depoſ. d. l.* §. 35. *l.* 23. *ff. de reg. jur. l.* 1. *C. depoſ.* Si quis pactus ſit, ut ex cauſa depoſiti omne periculum præſtet, Pomponius ait, pactionem valere: nec quaſi contra juris formam, non eſſe ſervandam. *l.* 7. §. 15. *ff. de pact.* Sæpè evenit ut res depoſita, vel nummi periculo ſint ejus apud quem deponuntur. Ut puta, ſi hoc nominatim convenit. *l.* 1. §. 35. *ff. depoſ.*

VIII.

8. *A Depoſitary that obtrudes himſelf.*

If the Depoſitary not being deſired, offers of his own accord to take care of the Thing depoſited, he ſhall be accountable not only for what he does fraudulently, and for groſs Miſtakes, but likewiſe for other Faults. For the Depoſitor might have choſen another Depoſitary that would have been more careful. But this Depoſitary ſhall not be anſwerable for what may happen without his fault thro' ſome Accident [i].

[i] Si quis ſe depoſito obtulit, idem Julianus ſcribit, periculo ſe depoſiti illigaſſe: ita tamen non ſolum dolum, ſed etiam culpam, & cuſtodiam præſtet, non tamen caſus fortuitos. *l.* 1. §. 35. *ff. depoſ.*

IX.

9. *Of the Depoſitary who has ſold the Thing depoſited, and bought it again.*

If the Depoſitary having ſold, or otherways alienated the Thing depoſited, recovers it again and keeps it as a *Depoſitum*, he ſhall be accountable thereafter not only for what he does fraudulently, and for groſs Errors, but alſo for the leaſt Faults he commits, as a puniſhment of his former Knavery in ſelling the Thing [l].

[l] Si rem depoſitam vendidiſti, eamque poſteà redemiſti in cauſam depoſiti: etiam ſi ſine dolo malo poſtea perierit, teneri te depoſiti: quia ſemel dolo feciſti, cum venderes. *l.* 1. §. 25. *ff. depoſ.*

X.

10. *If the Depoſitary delays to reſtore the Thing.*

If the Thing depoſited being demanded, the Depoſitary who is able to reſtore it delays to do it, his delay will make him anſwerable, not only for the leaſt Faults he commits, but likewiſe for the Accidents that may fall out after the time of the legal Demand [m]. But if the Thing periſhes thro' its own Nature, without any accident, and if it would have periſhed altho' the Depoſitary had reſtored it in time, this Loſs not being an effect of his Delay, he is not accountable for it [n].

[m] Depoſitum, eo die quo depoſiti actum ſit, periculo ejus apud quem depoſitum fuerit, eſt, ſi judicii accipiendi tempore potuit id reddere reus, nec reddidit. *l.* 12. §. 3. *ff. depoſ.* See the third Article of the ſeventh Section of the Contract of Sale, and the ſecond Article of the fourth Section of the Title of Damages occaſioned by Faults.

[n] Si ſuâ naturâ res ante rem judicatam interciderit, veluti ſi homo mortuus fuerit, Sabinus, & Caſſius, abſolvi debere eum cum quo actum eſt, dixerunt: quia æquum eſſet naturalem interitum ad actorem pertinere: utique cùm interitura eſſet ea res, & ſi reſtituta eſſet actori. *l.* 14. §. 1. *ff. depoſ.* See the ſame third Article of the ſeventh Section of the Contract of Sale.

Altho' the Thing periſhes thro' its own Nature, yet we muſt judge by the circumſtances, whether the delay of the Depoſitary ought to go unpuniſhed. For if the Thing depoſited was in good caſe at the time of the demand, and the Proprietor could have ſold it, as if it was a Horſe depoſited by a Jockey, the delay being without any juſt cauſe, it would be either Knavery, or a Fault in the Depoſitary that was able to reſtore it, which would make him anſwerable for the Loſs. Si fortè diſtracturus erat petitor, ſi accepiſſet, moram paſſo debere præſtari: nam ſi ei reſtituiſſet, diſtraxiſſet: & pretium eſſet lucratus. *l.* 15. §. *ult. ff. de rei vind.*

XI.

11. *When the Thing may be reſtored in any one of many places.*

If it is agreed that the Thing depoſited ſhall be reſtored in any one of many places, the Depoſitary ſhall have the choice of the place [o].

[o] Si de pluribus locis convenit, in arbitrio ejus eſt, quo loci exhibeat. *l.* 5. §. 1. *ff. depoſ.*

XII.

12. *Executor, or Adminiſtrator of the Depoſitary.*

The Executor, or Adminiſtrator of the Depoſitary is accountable for the deed of the deceaſed, even for the Fraud which he has been guilty of [p].

[p] Datur actio depoſiti in hæredem, ex dolo defuncti in ſolidum. *l.* 7. §. 1. *ff. depoſ.*

XIII.

13. *If the Executor or Adminiſtrator of the Depoſitary ſells the Thing depoſited.*

If after the death of the Depoſitary, his Executor or Adminiſtrator being ignorant of the Truſt, ſells the Thing depoſited, believing it to be a part of the Succeſſion; as if it happen that the Memorandum which the Depoſitary had made to diſtinguiſh the Thing depoſited from his own, being ſealed up with other Papers, it is neceſſary in the mean while to ſell ſome of the Moveables, and the Thing depoſited chances to be among

mong them, having no Mark to diſtinguiſh it from the Goods of the deceaſed; as if it was a Horſe, who ſtanding in the Stable with other Horſes, had been ſold, the perſon who depoſited him having perhaps neglected to take him away; this Event would be as it were an Accident that would diſcharge this Executor, or Adminiſtrator, from making reſtitution of the thing depoſited, he paying always the Price which he got for the Thing when he ſold it[q]. The Proprietor would nevertheleſs retain his Right of claiming the Thing in whoſe hands ſoever he ſhould find it.

[q] Quia autem dolus dumtaxat in hanc actionem venit, quæſitum eſt, ſi hæres rem apud teſtatorem depoſitam, vel commodatam diſtraxit, ignarus depoſitam, vel commodatam: an teneatur? Et quia dolo non fecit, non tenebitur de re. An tamen vel de pretio teneatur, quod ad eum pervenit? Et verius eſt teneri eum. Hoc enim ipſo, dolo facit, quod id, quod ad ſe pervenit, non reddit. Quid ergo, ſi pretium nondum exegit? Aut minoris quàm debuit vendidit? Actiones ſuas tantummodo præſtabit. *l. 1. §. ult. & l. 2. ff. depoſ.*

We have ſet down in this Article the particular circumſtances, which may juſtify the conduct of this Executor, or Adminiſtrator. For there may be other circumſtances, where the Executor, or Adminiſtrator, would not be eaſily diſcharged on his pretending Ignorance of the Truſt; ſince he is accountable for the deed of the deceaſed, as has been ſaid in the foregoing Article; and that the deceaſed was obliged to diſtinguiſh the Thing depoſited from his own by ſome mark, or ſome memorandum. Thus, it ſeems to be by the circumſtances of the quality of the perſons, and of the Thing depoſited, of the conduct of the Depoſitary, and his Executor, or Adminiſtrator, and other circumſtances of the like nature, that we ought to judge of the Obligation of the Depoſitary's Executor, or Adminiſtrator.

It is to be remarked on the Law quoted on this Article, that altho' it diſcharges the Executor, or Adminiſtrator of him who had borrowed a Thing, if the ſaid Executor, or Adminiſtrator, had ſold it, in the ſame manner as it diſcharges the Executor and Adminiſtrator of the Depoſitary; yet we have not ſet down this Rule in the Title of the Loan of Things to be reſtored in Specie. For whereas the Depoſitum *is only for the behoof of the Depoſitor, the Loan of a Thing for uſe is barely for the advantage of the Borrower. And for this reaſon it ſeems to be juſt that this loſs ſhould fall upon the Executor, or Adminiſtrator of the Borrower, rather than on the Lender. See* Exod. xxii. 14.

XIV.

14. *A Thing depoſited does not enter into Compenſation.*

The Depoſitary cannot detain the Thing depoſited with him, in compenſation of what the Depoſitor owes him; even altho' it were another *Depoſitum*: but each Depoſitary ſhall be obliged to reſtore the Thing depoſited with him[r].

[r] Si quis vel pecunias, vel res quaſdam per depoſitionis acceperit titulum, eas volenti qui depoſuit, reddere illicò modis omnibus compellatur: nullamque compenſationem, vel deductionem, vel doli exceptionem opponat, quaſi & ipſe quaſdam contra eum qui depoſuit, actiones perſonales vel in rem, vel hypothecariam prætendens: cùm non ſub hoc modo depoſitum receperit ut non conceſſa ei retentio generetur, & contractus qui ex bona fide oritur, ad perfidiam retrahatur. Sed & ſi ex utraque parte aliquid fuerit depoſitum, nec in hoc caſu compenſationis præpeditio oriatur: ſed depoſitæ quidem res, vel pecuniæ ab utraque parte quam celerrimè, ſine aliquo obſtaculo, reſtituantur ei videlicet primùm, qui primus hoc voluerit. *l. 11. C. depoſ. l. ult. C. de compenſ. in. f.*

SECT. IV.

Of Sequeſtration by conſent of Parties.

The CONTENTS.

1. *Definition of a Sequeſtrator by conſent of Parties.*
2. *Every one of thoſe who have named the Sequeſtrator, may oblige him to the diſcharge of his Truſt.*
3. *Difference between a Depoſitary and a Sequeſtrator.*
4. *The Sequeſtrator's Poſſeſſion, and its effect.*
5. *The Sequeſtrator muſt account.*
6. *Diſcharge of the Sequeſtrator.*
7. *Rules of* Depoſitum, *which may be applied to Sequeſtration.*

I.

1. *Definition of a Sequeſtrator by conſent of Parties.*

THE Sequeſtrator by conſent of Parties, is a third perſon choſen by two or more perſons, to keep as a *Depoſitum* a Moveable or Immoveable Thing, the Property, or Poſſeſſion of which is controverted among them: and to reſtore it to the perſon who ſhall be acknowledged to be the true Owner. Thus every one of them is conſidered as if he alone had depoſited the whole Thing. Which diſtinguiſhes ſuch Depoſitors from thoſe who depoſiting a Thing that belongs to them in common, have only each of them their Share in it[a].

[a] Licèt deponere tam plures, quàm unus poſſunt: attamen, apud ſequeſtrem nonniſi plures deponere poſſunt. Nam tùm id fit, cùm aliqua res in controverſiam deducitur. Itaque hoc caſu in ſolidum unuſquiſque videtur depoſuiſſe. Quod aliter eſt, cùm rem communem plures deponunt. *l. 17. ff. depoſ.* propriè in ſequeſtre eſt depoſitum, quod à pluribus in ſolidum, certa conditione cuſtodiendum, reddendumque traditur. *l. 6. ff. eod.*

II.

2. *Every one of thoſe who have named the Sequeſtrator, may oblige him to the diſcharge of his Truſt.*

While a Thing is under Sequeſtration, each of the perſons who have depoſited it, is conſidered as capable of being declared the Owner of it. And this gives them all, and every one of them in particular, a right to ſee that the Sequeſtrator carefully perform the Truſt which he is bound to by his Office, whether it be in preſerving the Thing; or if it is Houſes or Lands that are depoſited, in repairing and cultivating them[b].

III.

3. *Difference between a Depoſitary and a Sequeſtrator.* Seeing the perſon into whoſe hands a piece of Ground is ſequeſtred is bound to cultivate it, and to take care of it; this kind of *Depoſitum* is not uſually gratuitous. But the Sequeſtrator is allowed a Salary, beſides his Expences, for the time and pains he beſtows on the Execution of his Commiſſion. And this diſtinguiſhes Sequeſtration from a bare *Depoſitum*, which ought to be gratuitous, and obliges the Sequeſtrator to the ſame care that he is bound to who undertakes a Piece of Work to be done[c].

IV.

4. *The Sequeſtrator's Poſſeſſion, and its effect.* While a Thing is depoſited, the Owner retains the Poſſeſſion, and his Depoſitary poſſeſſes for him. And in Sequeſtration, the Poſſeſſion of the right Owner remains in ſuſpence; for it cannot be ſaid of any one of the pretenders to the Thing ſequeſtred, that he poſſeſſes the Thing, ſince on the contrary, they are all of them diveſted of the Poſſeſſion. But becauſe the Sequeſtrator poſſeſſes the Thing only in order to preſerve it to the perſon who ſhall be declared the true Owner; this Poſſeſſion, after the controverſy is ended, will be conſidered with reſpect to the Owner, as if he himſelf had always poſſeſſed it. And this Poſſeſſion will be allowed a good Poſſeſſion to eſtabliſh a title by Preſcription[d].

V.

5. *The Sequeſtrator muſt account.* After the controverſy is ended, the Sequeſtrator is obliged to account to the perſon who is adjudged to be Maſter, and to reſtore to him the Thing ſequeſtrated, with the Fruits, if it produces any; he being paid his Salary, and his Expences[e].

VI.

6. *Diſcharge of the Sequeſtrator.* If the Sequeſtrator is deſirous to be diſcharged of his Truſt, and the perſons who named him, or any one of them does not conſent to it, he ought to apply himſelf to the Judge, and to get them all to be cited in order to name another perſon in his room. For he having accepted a Commiſſion which has divers conſequences, and which ought to have laſted till the Controverſy was ended; he ought not to be diſcharged without juſt cauſe[f].

VII.

7. *Rules of* Depoſitum, *which may be applied to Sequeſtration.* We may apply to Sequeſtration the Rules of a *Depoſitum*, which have any relation thereto[g].

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[b] Itaque hoc caſu in ſolidum unuſquiſque videtur depoſuiſſe, quod aliter eſt, cum rem communem plures deponunt. *l.* 17. *ff. depoſ.* In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *eod.*

[c] Si quis ſervum cuſtodiendum conjecerit fortè in piſtrinum, ſi quidem merces intervenerit cuſtodiæ: puto eſſe actionem adversùs piſtrinarium ex conducto. *l.* 1. §. 9. *ff. depoſ.* See the eighth Section of the Title of Letting and Hiring.

[d] Rei depoſitæ proprietas apud deponentem manet, ſed & poſſeſſio: niſi apud ſequeſtrem depoſita eſt. Nam tùm demum ſequeſter poſſidet: id enim agitur ea depoſitione, ut neutrius poſſeſſioni id tempus procedat. *l.* 17. §. 1. *ff. depoſ.* Intereſſe puto, qua mente apud ſequeſtrum deponitur res. Nam ſi omittendæ poſſeſſionis cauſâ, & hoc apertè fuerit approbatum, & uſucapionem poſſeſſio ejus partibus non procederet. At ſi cuſtodiæ cauſâ deponatur, ad uſucapionem eam poſſeſſionem victori procedere conſtat. *l.* 39. *ff. de acq. vel am. poſſeſ.*

[e] *This is an eſſential condition of this kind of* Depoſitum, *which is granted only in order to preſerve the Thing to the perſon who ſhall be declared the right Owner.* In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *ff. depoſ.*

[f] Si velit ſequeſter officium deponere, quid ei faciendum ſit. Et ait Pomponius: adire eum prætorem oportere, & ex ejus authoritate denuntiatione facta his qui eum elegerant, ei rem reſtituendam qui præſens fuerit. Sed hoc non ſemper verum puto: nam plerumque non eſt permittendum, officium quod ſemel ſuſcepit, contrà legem depoſitionis deponere: niſi juſtiſſima cauſa interveniente. *l.* 5. §. 2. *ff. depoſ.*

[g] In ſequeſtrem depoſiti actio competit. *l.* 5. §. 1. *ff. depoſ.*

SECT. V.

Of a Neceſſary Depoſitum.

The CONTENTS.

1. *Definition of a Neceſſary* Depoſitum.
2. *This* Depoſitum *is by agreement.*
3. *The duty of the Depoſitary in a Neceſſary* Depoſitum.
4. *The Rules of other* Depoſitums *may be applied to this.*

I.

1. *Definition of a Neceſſary* Depoſitum. A Neceſſary *Depoſitum*, is that of Things which are ſaved in a Fire, an Earthquake, or Shipwrack; in an Incurſion of Robbers, a Tumult, or any other ſudden and accidental Occaſion, which obliges the Owners to put what they can ſave into the hands of the firſt perſons they meet with, whether it be Neighbours, or others[a].

[a] Meritò has cauſas deponendi ſeparavit prætor, quæ continent fortuitam cauſam depoſitionis, ex neceſſitate deſcendentem, non ex voluntate proficiſcentem. *l.* 1. §. 2. *ff. depoſ.* Tumultûs, incendii, ruinæ, naufragii cauſa. *V. d. l.* 1. §. 1.

II.

2. *This* Depoſitum *is by agreement.*

This *Depoſitum*, altho' Neceſſary, is nevertheleſs voluntary, and by agreement, becauſe the Delivery of the Things to the perſons with whom they are depoſited, is in place of a Covenant, expreſs or tacit[b].

[b] Is apud quem res aliqua deponitur, re obligatur. §. 3. *inſt. quib. mod. re contr. obl.*

III.

3. *The duty of a Depoſitary in a Neceſſary* Depoſitum.

He with whom a Thing is depoſited thro' Neceſſity, is bound to be as faithful to his Truſt, or rather more than any other Depoſitary, not only becauſe of the compaſſion which the occaſion of this *Depoſitum* demands, but becauſe of the Neceſſity which puts the Thing into his hands, the Owner not being at liberty to chuſe another Depoſitary[c]. And if he fails to reſtore the Thing depoſited, or miſbehaves in his Truſt, it is for the Publick Good that this Infidelity ſhould be revenged and reſtrained by ſome Puniſhment, ſuch as the Judge ſhall think fit to inflict according to the circumſtances[d].

[c] Prætor ait, quod neque tumultus, neque incendii, neque ruinæ, neque naufragii cauſa depoſitum ſit, in ſimplum: ex earum autem rerum quæ ſuprà comprehenſæ ſunt, in ipſum in duplum —— judicium dabo. *l.* 1. §. 1. *ff. depoſ.* Hæc autem ſeparatio cauſarum juſtam rationem habet. Quippe cùm quis fidem elegit, nec depoſitum redditur, contentus eſſe debet ſimplo: cùm verò extante neceſſitate deponat, creſcit perfidiæ crimen, & publica utilitas coërcenda eſt vindicandæ reipublicæ cauſa. *l.* 1 §. 4. *ff. eod.*

[d] *Seeing we do not uſe this Penalty of the double, and that Penalties are arbitrary in* France, *we have thought proper to ſet down here this Rule in the manner that it is in the Article.*

IV.

4. *The* Rules *of other* Depoſitums *may be applied to this.*

We may apply to this kind of *Depoſitum* the other Rules which have been explained under this Title, according as they have relation thereto[e].

[e] *It will be eaſie to diſcern among the Rules of this Title, thoſe that are applicable to a Neceſſary* Depoſitum.

TITLE VIII.

Of PARTNERSHIP.

The Origin of this Contract, and its Uſe.

ALL Mankind together makes one Univerſal Society, in which thoſe who happen to be linked together by their Wants, form among themſelves different Engagements, proportioned to the Cauſes which render them neceſſary one to another. And among the different ways in which the Wants of men tie them together, this of *Partnerſhip*, which ſhall be the ſubject of this Title, is of neceſſary and frequent uſe: ſo that we ſee many Partnerſhips, and thoſe of many ſorts.

The Origin of this kind of Union proceeds from the Nature of certain Works, of certain Commerces, and other Affairs, which are of ſo large an extent that they demand the Union, and Application of many perſons. It is this which engages Men to erect Companies for carrying on Manufactures, for Trading into Foreign Countries, for Farming the King's Revenues, or thoſe of particular perſons, and for managing other Affairs of ſeveral kinds, according as they demand the united Labour, Induſtry, Care, Credit, Purſe, and other Aſſiſtance of many perſons. And the uſe of theſe kinds of Partnerſhip is to facilitate the Undertaking, the Work, the Trade, or other Affair for which the Partnerſhip is contracted: and to ſecure to every one of the Partners out of the Share which he has contributed, in conjunction with his Co-Partners, ſuch Profits and Advantages as none of them could be able to make by themſelves.

This firſt ſort of Partnerſhip is limited to certain kinds of Affairs, or Commerces; but there are others, where the Partners enter into a community of all that they are able to make by their Induſtry and Labour. There are likewiſe ſome Partnerſhips, where the Partners agree to a reciprocal communication of all that they may acquire, by Donation, Succeſſion, or otherways. And there are ſome where the Partners agree to a Community of all Goods whatſoever without exception.

Theſe are the ſeveral ſorts of Partnerſhips, which differ from one another according to the Intereſt and Intention of the Perſons who join in them, that we ſhall treat of under this Title.

We ought not to ſet down in the number of Partnerſhips, the Unions of perſons that have any Thing, or any Affair in common, independently of their will, ſuch as Co-heirs, the Legatees of one and the ſame thing, and thoſe who thro' other cauſes chance to have ſomething between them that is not divided, or ſome Affair belonging to them in common without any agreement. For theſe ways of having a Thing in common, are quite of another nature than Partnerſhip, which is formed by conſent, and they ſhall have a place among the Matters to be treated of in the ſecond Book.

SECT. I.

Of the Nature of Partnerſhip.

1. *Definition of Partnerſhip.*
2. *The Shares of Partners in the common Thing.*
3. *Shares in the Gain or Loſs.*
4. *Theſe Shares are equal if nothing is ſaid to the contrary.*
5. *The Share of the Profit regulates that of the Loſs.*
6. *Difference of Contributions, and of Portions.*
7. *Equality of Shares, notwithſtanding the difference of Contributions.*
8. *Inequality of the Share of the Gain, and of the Share of the Loſs.*
9. *One of the Partners diſcharged of all Loſs.*
10. *Fraudulent Partnerſhip.*
11. *Unlawful Partnerſhip.*
12. *Difference between Partnerſhip, and other Contracts, as to the extent of the Engagements.*

I.

1. Definition of Partnerſhip. Partnerſhip is a Covenant between two or more perſons, by which they join in common, either their whole Subſtance, or a part of it: or unite in carrying on ſome Commerce, ſome Work, or ſome other Buſineſs, that they may ſhare among them all the Profit, or Loſs, which they may have by the Joint Stock which they have put into Partnerſhip.

[a] Societates contrahuntur, ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius. *l. 5. ff. pro ſocio.* Quæ coëuntium ſunt, continuò communicantur. *l. 1. in f. ff. eod.* Sicuti lucrum ita damnum quoque commune eſſe oportet. *l. 52. §. 1. in f. eod.* Societas cùm contrahitur, tam lucri, quàm damni communio initur. *l. 67. eod. l. 52. §. 4. in f. eod.*

II.

2. The Shares of Partners in the common Thing. The Things or Affairs that are in common among Partners, belong to every one of them, for the Shares that are allotted to them by their Covenant [b].

[b] Ut fuerint partes ſocietati adjectæ. *l. 29. ff. pro ſoc.*

III.

3. Shares in the Gain, or Loſs. The conſequences of the Partnerſhip, ſuch as the Contributions, the Gain, the Loſs, regard every one of the Partners, in proportion to the Share they have in the Stock, or according as they have agreed among themſelves [c].

[c] Sicuti lucrum, ita damnum quoque commune eſſe oportet. *l. 52. §. 4. ff. pro ſoc.* Ut fuerint partes ſocietati adjectæ. *l. 29. eod.*

IV.

4. Theſe Shares are equal, if nothing is ſaid to the contrary. If the Portions of Loſs and Gain have not been adjuſted by the Covenant, they will be Equal: For if the Partners have made no diſtinction which gives more to one, and leſs to another, their conditions not being diſtinguiſhed, the condition of every individual Partner ought to be the ſame with that of the others [d].

[d] Si non fuerint partes ſocietati adjectæ, æquas eas eſſe conſtat. *l. 29. ff. pro ſoc.* §. 1. *inſt. eod.*

V.

5. The Share of the Profit regulates that of the Loſs. Altho' the Partners have not expreſly marked, both the Portions of the Gain, and thoſe of the Loſs, yet if the Portions of the Gain have been expreſſed, thoſe of the Loſs will likewiſe be regulated on the ſame foot. And if, without ſaying any thing of the Gain, or Loſs, it be ſufficiently expreſſed what every one has put into the common Stock, the Portions of the Gain and Loſs, will be the ſame with thoſe of the Stock [e].

[e] Illud expeditum eſt ſi in una cauſa pars fuerit expreſſa (veluti in ſolo lucro, vel in ſolo damno) in altera verò omiſſa: in eo quoque quod prætermiſſum eſt, eandem partem ſervari. §. 3. *inſt de ſociet.*

VI.

6. Difference of Contributions, and of Portions. Seeing the Partners may contribute differently, ſome more, and others leſs of Labour, Induſtry, Credit, Favour, Money, or other Thing, it is free for them to regulate in an unequal manner, their Portions, or Shares, according as every one ought to have his condition more or leſs advantageous, in proportion to the difference of what they contribute[f].

[f] Si placuerit ut quis duas partes, vel tres habeat, alius unam: an valeat? placet valere, ſi modò aliquid plus contulit ſocietati, vel pecuniæ, vel operæ, vel cujuſcumque alterius rei causâ. *l.* 29. *ff. pro ſoc.* Nec enim unquam dubium fuit quin valeat conventio, ſi duo inter ſe pacti ſint, ut ad unum quidem duæ partes & lucri, & damni pertineant, ad alium tertia. §. 1. *inſt. de ſociet.* Ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, gratiæ, pecuniæ in ſocietatem collaturus erat. *l.* 80. *ff. pro ſoc.*

VII.

7. Equality of Shares, notwithſtanding the difference of Contributions.

It is not neceſſary for the Equality of Shares of the Partners in the Profit ariſing from the Partnerſhip, that all their Contributions ſhould be Equal, that every one ſhould furniſh as much Money, as much Induſtry, as much Credit, as every one of the other Partners. But according as they contribute differently, one more Money, another more Induſtry, a third more Credit; their condition may be Equal, by the Equality of the Advantages ariſing from theſe different Contributions. And very often it is agreed, and with Reaſon, that one of the Partners ſhall contribute only his Induſtry, and the other all the Stock, and that nevertheleſs the Profit ſhall be equal, becauſe the Induſtry of the one is worth the Money of the other[g].

[g] Ita coïri poſſe ſocietatem non dubitatur, ut alter pecuniam conferat, alter non conferat; & tamen lucrum inter eos commune ſit. Quia ſæpè opera alicujus pro pecunia valet. §. 2. *Inſt. de ſociet. l.* 1. *C. eod.*

Societas coïri poteſt, & valet etiam inter eos qui non ſunt æquis facultatibus, cùm plerumque pauperior opera ſuppleat, quantùm ei per comparationem patrimonii deeſt. *l.* 5. §. 1. *ff. pro ſoc.*

VIII.

8. Inequality of the Share of the Gain, and of the Share of the Loſs.

This is another effect of the Inequality of the Contributions, that two Partners may agree, that the one ſhall have a greater ſhare of the Profit, than he ſhall bear of the Loſs; and that the other, on the contrary, ſhall bear a greater part of the Loſs, than he ſhall have in the Profit. And thus, for Example, the Partners may agree that one ſhall have two Thirds of the Profit, and bear one Third of the Loſs, and that the other ſhall have one Third of the Profit, and bear two Thirds of the Loſs. Which is to be underſtood in this manner, that in caſe in ſeveral Affairs of the Partnerſhip there be Gain on one ſide, and Loſs on another, that is only reckoned to be Gain, which ſhall remain clear after all the Loſſes are deducted[h].

[h] De illa ſanè conventione quæſitum eſt, ſi Titius & Seius inter ſe pacti ſint, ut ad Titium lucri duæ partes pertineant, damni tertia, ad Seium duæ partes damni, lucri tertia, an rata debeat haberi conventio? Quintus Mutius contra naturam ſocietatis talem pactionem eſſe exiſtimavit, & ob id non eſſe ratam habendam. Servius Sulpitius, cujus ſententia prævaluit, contrà ſenſit. Quia ſæpè quorundam ita pretioſa eſt opera in ſocietate, ut eos juſtum ſit conditione meliore in ſocietatem admitti. §. 2. *inſt. de ſociet. l.* 30. *ff. pro ſoc.* Quod tamen ita intelligi oportet ut ſi in alia re lucrum, in alia damnum illatum ſit: compenſatione facta, ſolùm quod ſupereſt intelligatur lucro eſſe. §. 2. *inſt. de ſociet.* Neque lucrum intelligitur niſi omni damno deducto, neque damnum niſi omni lucro deducto. *d. l.* 30.

IX.

9. One of the Partners diſcharged of all Loſs.

The ſame conſideration of the different Contributions of the Partners, may likewiſe juſtify the Covenant by which it is ſtipulated, that one of the Partners ſhall have a ſhare of the Gain, and be altogether free from Loſs; becauſe, for Example, of the uſefulneſs of his Credit, his Favour, his Intereſt, or of the Pains which he takes, the Journeys which he makes, and the Dangers to which he expoſes himſelf[i]. For theſe Advantages which the Company reaps from him, compenſate that which the Partners grant him, by freeing him of the Loſſes. And he might very lawfully have refuſed to engage himſelf, except on this condition, without which he would not have entred into the Partnerſhip, which perhaps could not have been ſettled and managed without him. But the Share which this Partner ſhall have in the Profits, is to be underſtood only of the clear Gain that remains, after deduction of all the Loſſes out of the Profits of the ſeveral Affairs of the Company, as has been ſaid in the foregoing Article[l].

[i] Contra Mutii ſententiam obtinuit, ut illud quoque conſtiterit, poſſe convenire, ut quis lucri partem ferat, de damno non teneatur. Quod & ipſum Servius convenienter fieri exiſtimavit. §. 2. *inſt. de ſociet.* Quia ſæpè quorundam ita pretioſa eſt opera in ſocietate, ut eos juſtum ſit conditione meliore in ſocietatem admitti. *d.* §. 2. Ita coïri ſocietatem poſſe, ut nullius partem damni alter ſentiat, lucrum verò commune ſit, Caſſius putat, quod ita demum valebit, ut & Sabinus ſcribit, ſi tanti ſit opera quanti damnum eſt. Plerumque enim tanta eſt induſtria ſocii, ut plus ſocietati conferat quàm pecunia. Item ſi ſolus naviget, ſi ſolus peregrinetur, periculo ſubeat ſolus. *l.* 29. §. 1. *ff. pro ſoc.*

[l] Quod tamen ita intelligi oportet, &c. *See this text as it is quoted on the preceding Article.*

X.

10. Fraudulent Partnerſhip.

All Partnerſhips in which there is any condition that is contrary to Equity and Honeſty, are unlawful. As if it ſhould be agreed, that the whole Loſs ſhould fall upon one of the Partners, without his having any Share of the Profit, and that the whole Profit ſhould go to the other Partner, without his bearing any Share of the Loſs[m].

[m] Societas ſi dolo malo aut fraudandi causâ coïta ſit, ipſo jure nullius momenti eſt. Quia fides bona contraria eſt fraudi, & dolo. *l.* 3. §. *ult. ff. pro ſoc.*

Ariſto refert, Caſſium reſpondiſſe, ſocietatem talem coïri non poſſe, ut alter lucrum tantùm, alter damnum ſentiret. Et hanc ſocietatem leoninam ſolitum appellare. Et nos conſentimus talem ſocietatem nullam eſſe ut alter lucrum ſentiret, alter verò nullum lucrum, ſed damnum ſentiret. Iniquiſſimum enim genus ſocietatis eſt ex qua quis damnum, non etiam lucrum ſpectet. *l.* 29. §. 2. *ff. eod.*

XI.

11. *Unlawful Partnerſhip.* We cannot enter into Partnerſhip, except it be of a Commerce, or other Thing, that is honeſt and lawful. And all Partnerſhips contrary to this Rule, would be Criminal[n].

[n] Si maleficii ſocietas coïta ſit, conſtat nullam eſſe ſocietatem. Generaliter enim traditur rerum inhoneſtarum nullam eſſe ſocietatem. *l.* 57. *ff. pro ſoc.* (ſocietas) flagitioſæ rei nullas vires habet. *l.* 35. §. 2. *ff. de contr. empt.* Delictorum turpis, atque fœda communio eſt. *l.* 53. *ff. pro ſocio.*

XII.

12. *Difference between Partnerſhip, and other Contracts, as to the Extent of the Engagements.* The Contract of Partnerſhip is in this different from other Contracts, that every one of the other Contracts hath its Engagements limited and regulated by its particular Nature; whereas Partnerſhip has a general Extent to the Engagements of the different Affairs, and of the ſeveral Covenants into which the Partners enter. Thus, their Engagements are general and indefinite, ſuch as thoſe of a Tutor, or of one who undertakes the Care of another's Concerns in his abſence, and without his knowledge[o]. And likewiſe Honeſty and fair dealing have in this Contract an Extent proportioned to that of the Engagements[p].

[o] Sive generalia ſunt, (bonæ fidei judicia) veluti pro ſocio, negotiorum geſtorum, tutelæ: ſive ſpecialia, veluti mandati, commodati, depoſiti. *l.* 38. *ff. pro ſoc.* See the beginning of the ſecond Section of Tutors.

[p] In ſocietatis contractibus fides exuberet. *l.* 3. *C. pro ſoc.*

SECT. II.

In what manner Partnerſhip is contracted.

The CONTENTS.

1. *Partners ought to chuſe one another reciprocally.*
2. *Difference between having a Thing in common, and being in Partnerſhip.*
3. *The Heir, or Executor, of a Partner, is not a Partner.*
4. *It cannot be ſtipulated, that the Heirs, or Executors, ſhall be Partners.*
5. *The Partner of one of the Partners, is not in Partnerſhip with the others.*
6. *Partnerſhip may be contracted without Writing, and which way.*
7. *Of thoſe who buy a Thing together.*
8. *The Partners are at liberty to enter into all manner of lawful Pacts.*
9. *Pacts concerning the duration of the Partnerſhip.*
10. *Penal Clauſes.*
11. *Pacts for regulating the Shares.*
12. *A Gift under colour of a Partnerſhip.*

I.

1. *Partners ought to chuſe one another reciprocally.* PArtnerſhip cannot be contracted, but by the conſent of all the Partners, who ought reciprocally to chuſe, and approve of one another[a], in order to form among themſelves a Tie, which is a kind of Brotherhood[b].

[a] Conſenſu fiunt obligationes in emptionibus, venditionibus, locationibus, conductionibus, ſocietatibus. *Inſt. de obl. ex conſ.*

[b] Societas jus quodammodo fraternitatis in ſe habet. *l.* 63. *ff. pro ſoc.*

II.

2. *Difference between having a Thing in common, and being in Partnerſhip.* It is not enough to form a Partnerſhip, that two or more perſons have any Thing in common among them, ſuch as the Co-heirs of one and the ſame Inheritance, Legatees, Donees, or Purchaſers of one and the ſame Thing. For theſe ways of having ſomething in common among many, not implying the reciprocal Choice of the Perſons, do not link them together in Partnerſhip[c].

[c] Ut ſit pro ſocio actio, ſocietatem intercedere oportet. Nec enim ſufficit, rem eſſe communem, niſi ſocietas intercedit. Communiter autem res agi poteſt, etiam citrà ſocietatem ut putà, cùm non affectione ſocietatis incidimus in communionem: ut evenit in re duobus legata, item ſi à duobus ſimul empta res ſit, aut ſi hæreditas, vel donatio communiter nobis obvenit: aut ſi à duobus ſeparatim emimus partes eorum, non ſocii futuri. *l.* 31. *ff. pro ſoc. l.* 32. *eod.* See the ſeventh Article of this Section.

III.

3. *The Heir, or Executor, of a Partner, is not a Partner.* The Choice of the Perſons is ſo eſſentially neceſſary to the conſtituting of a Partnerſhip, that even the Heirs, or Executors, of the Partners themſelves, do not ſucceed to this Quality of Partner[d], becauſe it may happen that they are not fit for it: and likewiſe that even

they may not either reliſh the Commerce that is carried on by the Partnerſhip, or not approve of the Perſons of the Co-Partners. And hence it is, that ſince the Tie of Partners can be no other than voluntary, the Partnerſhip is broke off by the death of one of the Partners, in the manner which ſhall be explained in the fifth and ſixth Sections.

[d] Nec hæres ſocii ſuccedit. *l. 65. §. 9. ff. pro ſoc.* Hæres ſocius non eſt. *l. 63. §. 8. eod.*

IV.

4. It cannot be ſtipulated that the Heirs, or Executors, ſhall be Partners. If it had been agreed among the Partners, that the Partnerſhip ſhould be continued between their Heirs, or Executors, this agreement would imply the condition, that the Heirs, or Executors, ſhould be liked by the Co-Partners, and that they alſo ſhould approve of the other Partners. And it would not have this effect, that perſons who could not ſort one with another, ſhould be linked together againſt their wills[e].

[e] Adeò morte ſocii ſolvitur ſocietas, ut nec ab initio paſciſci poſcimus, ut hæres etiam ſuccedat ſocietati. *l. 59. ff. pro ſoc.* Nemo poteſt ſocietatem hæredi ſuo ſic parere, ut ipſe hæres ſocius ſit. *l. 35. eod.* (Papinianus) reſpondit ſocietatem non poſſe ultrà mortem porrigi. *l. 52. §. 9. eod.*

V.

5. The Partner of one of the Partners, is not in Partnerſhip with the others. If one of the Partners takes another perſon into Partnerſhip with him, this third perſon will not be Partner with the others, but only with the Partner who has aſſociated him[f]. And this will make among them a ſecond Partnerſhip, diſtinct from the firſt, and limited to the Share of that Partner who has aſſociated to himſelf another.

[f] Qui admittitur ſocius, ei tantùm ſocius eſt qui admiſit, & rectè. Cùm enim ſocietas conſenſu contrahatur, ſocius mihi eſſe non poteſt, quem ego ſocium eſſe nolui. Quid ergo ſi ſocius meus eum admiſit, ei ſoli ſocius eſt. *l. 19. ff. pro ſoc.* Nam ſocii mei ſocius, meus ſocius non eſt. *l. 20. eod. l. 47. §. 1. ff. de reg. jur.*

VI.

6. Partnerſhip may be contracted without Writing, and which way. As conſent may be given either in Writing, or without writing, and even among perſons that are abſent, by Letter, Proxy, or any other Mediator; ſo Partnerſhip may be contracted all theſe ways. And alſo by a tacit conſent, and by acts which make proof of it. As if perſons carry on a Joint Trade, and ſhare the Profit and the Loſs[g]. And the Partnerſhip laſts as long as the Partners are willing to continue in their Union[h].

[g] Societatem coïre, & re, & verbis, & per nuntium poſſe nos dubium non eſt. *l. 4. ff. pro ſoc.* See the eighth, tenth, and ſixteenth Articles of the firſt Section of Covenants.

[h] Manet ſocietas eo uſque donec in eodem conſenſu perſeveraverint. *§. 4. Inſt. de ſociet.* Tamdiu ſocietas durat, quamdiu conſenſu partium integer perſeverat. *l. 5. C. pro ſoc.* See the fifth Section of this Title.

VII.

7. Of thoſe who buy a Thing together. If two or more perſons having a mind to buy the ſame Thing, agree, in order not to raiſe the Price by bidding againſt one another, to buy it jointly together, either by one of themſelves, or by a third perſon; this Agreement makes the Thing bought to belong to them in common, but it does not join them in Partnerſhip. For they are not linked together by the Choice of the Perſons, but only by the Thing which they have in common[i].

[i] In emptionibus—— qui nolunt inter ſe contendere, ſolent per nuntium rem emere in commune, quod à ſocietate longè remotum eſt. *l. 33. ff. pro ſoc.* Magis ex re—— quàm ex perſona ſocii actio naſcitur. *l. 29. ff. comm. divid.*

VIII.

8. The Partners are at liberty to enter into all manner of lawful Pacts. People may in Partnerſhip, as in all other Contracts, make all manner of lawful Pactions. Thus, they may contract a conditional Partnerſhip, whether it be that they will have their Partnerſhip to commence only after the Condition has happened, or that they will have it to take its effect immediately, and to be diſſolved by the exiſtence of the Condition[l].

[l] Societas coïri poteſt—— ſub conditione. *l. 1. ff. pro ſoc.* De ſocietate apud veteres dubitatum eſt, ſi ſub conditione contrahi poteſt; putà, ſi ille conſul fuerit, ſocietatem eſſe contractam. Sed ne ſimili modo apud poſteritatem, ſicut apud antiquitatem hujuſmodi cauſa ventiletur, ſancimus ſocietatem contrahi poſſe, non ſolum purè, ſed etiam ſub conditione voluntates etenim legitimè contrahentium, omnimodo conſervandæ ſunt. *l. 6. C. eod.*

IX.

9. Pacts concerning the duration of the Partnerſhip. Partnerſhip may be contracted ſo as to begin either immediately, or after a certain time, and to laſt either to the time agreed on, or during the Life of the Partners[m], and in ſuch a manner that if there are many Co-Partners, the death of one of them may not interrupt the Partnerſhip among the others[n].

[m] Societas coïri poteſt vel in perpetuum, id eſt, dum vivunt, vel ad tempus, vel ex tempore. *l. 1. ff. pro ſoc.*

[n] *Without this Agreement, the death of any one of the Partners would diſſolve the Partnerſhip, with reſpect to the others, as ſhall be ſhewn hereafter in the fourteenth Article of the fifth Section.*

X.

10. Penal Clauſes. We may add to the Contract of Partnerſhip, Penal Clauſes againſt him who ſhall contravene what has been agreed on; whether it be by doing what he ought not, or not doing what he ought to have done[o]. But the effect which theſe kinds of Penalties are to have, is to be regulated by the prudence of the Judge, according to the circumſtances[p].

[o] Si quis a ſocio pœnam ſtipulatus ſit, pro ſocio non aget, ſi tantundem in pœnam ſit quantum ejus interfuit. Quod ſi ex ſtipulatu eam conſecutus ſit, poſtea pro ſocio agendo, hoc minus accipiet, pœna ei in ſortem imputata. *l.* 41, & 42. *ff. pro ſocio. V. l.* 71. *eod.*

[p] *By our Practice theſe kinds of Penal Clauſes are only comminatory, being added to Contracts, only that they may ſtand inſtead of a Reparation of Damages, which Reparation ought to be no greater than the Damage. Thus, it is by the circumſtances of the Events, that we judge of the effect, which the penal Clauſes ought to have. And as it is juſt to leſſen the Penalty, if it exceeds the Damage, or if any circumſtances may excuſe the Non-performance of the Articles of the Covenant; ſo it may likewiſe happen that it may be juſt to decree a Reparation of Damages greater than the Penalty; if it is not, for Example, expreſly ſaid that the Penalty ſhall ſtand in lieu of all Damages, or if the Agreement has been contravened thro' ſome Fraud, or ſome Fault of a different nature from thoſe which the Contracters did foreſee, and had a mind to prevent.* See the fifteenth Article of the third Section, and the nineteenth Article of the fourth Section of Covenants.

XI.

11. Pacts for regulating the Shares. The Partners may either regulate themſelves the Shares which every one is to have in the Partnerſhip, or they may refer the matter to the Arbitration of other perſons; and if they have referred it to other perſons, or even to one of themſelves, it will be the ſame thing as if they had referred it to the Arbitration of ſkilful and reaſonable Men; and what is determined herein by the perſons named, will not take place, if any of the Partners has reaſon to complain of the Award[q].

[q] Societatem mecum coiſti ea conditione, ut Nerva amicus communis partem ſocietatis conſtitueret. Nerva conſtituit, ut tu ex triente ſocius eſſes, ego ex beſſe: quæris utrùm ratum id jure ſocietatis ſit, an nihilominus ex æquis partibus ſocii ſimus. Exiſtimo autem meliùs te quæſiturum fuiſſe, utrùm ex his partibus ſocii eſſemus, quas is conſtituiſſet, an ex his quas virum bonum conſtituere oportuiſſet. Arbitrorum enim genera ſunt duo. Unum ejuſmodi ut ſive æquum ſit, ſive iniquum, parere debeamus. Quod obſervatur, cùm in compromiſſo ad arbitrium itum eſt. Alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat, etſi nominatim perſona ſit comprehenſa, cujus arbitratu fiat. Veluti cùm lege locationis comprehenſum eſt, ut opus arbitrio locatoris fiat. In propoſita autem quæſtione, arbitrium viri boni exiſtimo ſequendum eſſe, eo magis quod judicium pro ſocio bonæ fidei eſt. Unde ſi Nervæ arbitrium ita pravum eſt, ut manifeſta iniquitas ejus appareat, corrigi poteſt per judicium bonæ fidei. *l.* 76. 77. 78. 79. & 80. *ff. pro ſoc.*

Si ſocietatem mecum coïeris, ea conditione, ut partes ſocietatis conſtitueres, ad boni viri arbitrium ea res redigenda eſt. Et conveniens eſt viri boni arbitrio, ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, pecuniæ in ſocietatem collaturus ſit. *l.* 6. *ff. eod.* See the eleventh Article of the third Section of Covenants.

XII.

12. A Gift under colour of a Partnerſhip. If a Partnerſhip were contracted only to colour a Deed of Gift from one of the Contracters to the other, ſo that the Profits ſhould belong wholly to one of the Partners; this would not be a Partnerſhip, there being only one perſon who reaps the whole Profit[r]. And if ſuch a Contract were entered into for the behoof of a perſon to whom the other cannot make over any thing by Deed of Gift, the Contract would be null and unlawful, as being made to elude the Law[ſ].

[r] Donationis causâ ſocietas rectè non contrahitur. *l.* 5. §. 2. *ff. pro ſoc.* Si quis ſocietatem per donationem mortis causâ inierit, dicendum eſt nullam ſocietatem eſſe. *l.* 35. §. 3. *ff. de mort. cauſ. donat.*

[ſ] Si inter virum & uxorem ſocietas donationis causâ contracta ſit. Jure vulgato nulla eſt. *l.* 32. §. 24. *ff. de donat. int. vir. & uxor.*

SECT. III.

Of the ſeveral Sorts of Partnerſhips.

The CONTENTS.

1. *Partnerſhips are general, or particular.*
2. *Partnerſhip of Profits, or pure and ſimple.*
3. *The Partnerſhip of Profits does not include Inheritances, Legacies, and Gifts.*
4. *A Partnerſhip of all manner of Eſtate and Goods, excludes nothing.*
5. *A Perſonal Reparation of Damages to one of the Partners, is to be put into the Joint Stock.*
6. *The Perſonal Condemnation of a Partner.*
7. *Unlawful Profits do not come into the Joint Stock.*
8. *Partnerſhips are limited to the Things put into the Community.*
9. *If there is any obſcurity in the Contract of Partnerſhip, to know what it comprehends.*
10. *Debts of the Community, and of the Partners.*

11. *What the Partner may, or may not take out of the Publick Stock.*
12. *Extraordinary Expences of a Partner.*
13. *Unlawful Expences.*

I.

1. Partnerſhips are general, or particular.

PArtnerſhips are either general, of all the Goods of the Partners; or particular, of ſome Goods, ſome Commerce, and of ſome Farm, or other Thing: And the Goods which are put into the Partnerſhip, become common to all the Partners, altho' they are not delivered, and altho' they remain in the poſſeſſion of the Partner who was the Owner of them before the Partnerſhip was contracted. For the intention of the Partners to communicate the Goods, makes a tacit Delivery of them, and each of the Partners poſſeſſes for all the others, the Thing belonging to them in common, which is in his cuſtody[a].

[a] Societates contrahuntur, ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius. *l. 5. ff. pro ſoc.* Societatem coïre ſolemus aut totorum bonorum, quàm Græci ſpecialiter κοινωνίαν appellant, aut unius alicujus negotiationis, veluti mancipiorum vendendorum emendorumque, aut olei, aut vini, aut frumenti emendi vendendique. *inſt. de ſociet. in princ.* In ſocietate omnium bonorum, omnes res quæ coëuntium ſunt, continuò communicantur. Quia licèt ſpecialiter traditio non interveniat, tacita tamen creditur intervenire. *l. 1. §. 1. & l. 2. ff. pro ſoc.*

II.

2. Partnerſhip of Profits, or pure and ſimple.

If in a Contract of Partnerſhip, the Parties had omitted to expreſs of what Goods, what Buſineſs, or what Commerce the Partnerſhip was to conſiſt; and that it was barely ſaid, that they joined in Partnerſhip, or that the Partnerſhip ſhould be of the Gain and Profit which the Partners ſhould make, without naming any thing in particular; the Partnerſhip would extend only to the Profits which the Partners might make, by the Trade and Buſineſs which they ſhould carry on jointly together[b].

[b] Coïri ſocietatem & ſimpliciter licet. Et ſi non fuerit diſtinctum videtur coïta eſſe univerſorum, quæ ex quæſtu veniunt. Hoc eſt, ſi quod lucrum ex emptione, venditione, locatione, conductione deſcendit. Quæſtus enim intelligitur qui ex opera cujuſque deſcendit. *l. 7. & l. 8. ff. pro ſoc.* Cùm quæſtûs & compendii ſocietas initur, quidquid ex operis ſuis ſocius acquiſierit, in medium conferet. *l. 45. §. 1. ff. de acq. vel omit. hæred.*

III.

3. The Partnerſhip of Profits does not include Inheritances, Legacies, and Gifts.

A Partnerſhip of Gains and Profits, does not comprehend Inheritances, Legacies, Gifts, whether they be Gifts that are to have their effect before, or after the death of the Giver; nor that which the Partners may have acquired any other way than by their Induſtry, or from the Effects which they have put into the Joint Stock. For theſe ſorts of Acquiſitions have their Cauſes, and their Motives, in the Perſons of thoſe to whom they happen; ſuch as ſome Merit, ſome Tie of Friendſhip or Relation, or the Natural Right of Inheriting; which are Advantages that the Partners did not mean to communicate to one another, unleſs the ſame be particularly expreſſed, becauſe they are not the ſame in every one of the Partners. Neither does this kind of Partnerſhip take in the Debts owing to the Partners, except they be ſuch as may have ariſen from the Affairs or Commerce of the Partnerſhip[c].

[c] Sed & ſi adjiciatur, ut quæſtus, & lucri ſocii ſint, verum eſt non ad aliud lucrum quàm quod ex quæſtu venit, hanc quoque adjectionem pertinere. *l. 13. ff. pro ſoc.* Duo colliberti ſocietatem coïerunt lucri, quæſtus compendii. Poſteà unus ex his à patrono hæres inſtitutus eſt: alteri legatum datum eſt. Neutrum horum in medium referre debere reſpondit. *l. 71. §. 1. eod.* Quæſtus intelligitur qui ex opera cujuſque deſcendit. Nec adjecit Sabinus hæreditatem, vel legatum, vel donationem mortis cauſa, ſive non mortis cauſa. Fortaſſis hoc ideo quia non ſine cauſa conveniunt, ſed ob meritum aliquod accedunt. Et quia plerumque vel à parente, vel à liberto, quaſi debitum nobis hæreditas obvenit. Et ita de hæreditate, legato, donatione, Quintus Mutius ſcribit. *l. 8. 9. 10. & 11. ff. eod.* Quidquid ex operis ſuis ſocius acquiſierit, in medium conferet: ſibi autem quiſque hæreditatem acquirit. *l. 45. §. 2. ff. de acq. vel omitt. hæred.* Sed nec æs alienum, niſi quod ex quæſtu pendebit, veniet in rationem ſocietatis. *l. 12. ff. pro ſocio.*

IV.

4. A Partnerſhip of all manner of Eſtate and Goods, exclude nothing.

A general Partnerſhip of all manner of Eſtate and Goods, includes every thing that may belong to the Partners, or be acquired by them, by any cauſe whatſoever. For the general expreſſion of *all manner of Eſtate and Goods*, leaves nothing out. And Succeſſions, Legacies, Donations, and all other ſorts of Acquiſitions and Profits, are comprehended under it, unleſs they are ſpecially reſerved[d].

[d] In ſocietate omnium bonorum omnes res quæ coëuntium ſunt, continuò communicantur. *l. 1. §. 1. ff. pro ſoc.* Cùm ſpecialiter omnium bonorum ſocietas coïta eſt, tunc & hæreditas, & legatum, & quod donatum eſt, aut quaqua ratione acquiſitum, communioni acquiretur. *l. 3. §. 2. eod.* Si ſocietatem univerſarum fortunarum coïerint, id eſt, earum quoque rerum quæ poſteà cuique acquirentur, hæreditatem cuivis eorum delatam, in communem redigendam. *l. 73. ff. eod.*

V.

5. A Perſonal Reparation of Da-

In an univerſal Partnerſhip of all manner of Eſtate and Goods, each Partner *mages to one of the Partners, is to be put into the Joint Stock.* ner ought to communicate not only all his Eſtate, Real and Perſonal, and all that may accrue from his Induſtry; but likewiſe if it happens that in his particular he has been injured, or damaged in his perſon, or otherwiſe, he ought to put into the Joint Stock, whatever he receives in ſatisfaction of the Injury or Damage done him. And if the Co-Partner receives a Reparation of Damages on the account of another perſon, ſuch as his Son, or otherwiſe, he will alſo be bound to communicate it[e]. For a Partnerſhip of all manner of Eſtate and Goods, leaves nothing proper or peculiar to the Partner.

[e] Socium univerſa in ſocietatem conferre debere, Neratius ait, ſi omnium bonorum ſocius ſit. Et ideo ſive ob injuriam ſibi factam, vel ex lege Aquilia, ſive ipſius ſive filii corpori nocitum ſit, conferre debere reſpondit. *l. 52. §. 16. ff. pro ſocio.*

VI.

6. The Perſonal Condemnation of a Partner. If on the contrary, one of the Partners is condemned on an Accuſation which he has drawn upon himſelf by his own folly, he alone ſhall bear the Puniſhment which he has merited. But if he is unjuſtly condemned, the Injuſtice ought to fall upon all the Partners, and not on him alone. And the ſame diſtinction is to be made in the other kinds of Condemnations in Civil Cauſes, according as the Co-Partner has been well or ill grounded in his Claim, or has defended himſelf ill or well[f]. Thus, in both theſe caſes, it will depend on the Equity of the Partners, or Prudence of their Arbitrators, to diſcern aright between the Loſſes which the Co-Partner ought to bear alone, and thoſe which ought to fall on the whole Partnerſhip.

[f] Per contrarium quoque apud veteres tractatur, an ſocius omnium bonorum, ſi quid ob injuriarum actionem damnatus præſtiterit, ex communi conſequatur, ut præſtet. Et Attilicinus, Sabinus, Caſſius, reſponderunt, ſi injuria judicis damnatus ſit; conſecuturum. Si ob maleficium ſuum, ipſum tantùm, damnum ſentire debere. Cui congruit, quod Servium reſpondiſſe, Aufidius, refert, ſi ſocii bonorum fuerint, deinde unus cùm ad judicium non adeſſet, damnatus ſit, non debere eum de communi id conſequi: ſi verò præſens injuriam judicis paſſus ſit, de communi ſarciendum. *l. 52. §. ult. ff. pro ſoc.*

VII.

7. Unlawful Profits do not come into the Joint Stock. The unlawful and diſhoneſt Gains which a Co-Partner may make, do not enter into the Partnerſhip: and he who makes them ought alone to be chargeable with making Reſtitution of what he has ill got. But if the other Partners ſhare with him in his unlawful Gains, they will become his Accomplices; and be liable to the ſame Puniſhments which he may have deſerved[g].

[g] Neratius ait, ſocium omnium bonorum, non cogi conferre quæ ex prohibitis cauſis acquiſierit. *l. 52. §. 17. ff. pro ſoc.* Quod autem ex furto, vel ex alio maleficio quæſitum eſt, in ſocietatem non oportere conferri, palam eſt. Quia delictorum turpis atque fœda communio eſt. *l. 53. eod.* Si igitur ex hoc conventus fuerit, qui maleficium admiſit: id, quod contulit, aut ſolum, aut cum pœna auferre. Solum auferret, ſi mihi proponas, inſciente ſocio eum in ſocietatis rationem hoc contuliſſe. Quod ſi ſciente, etiam pœnam ſocium agnoſcere oportet. Æquum eſt enim, ut cujus participavit lucrum, participet & damnum. *l. 55. in f. eod.*

VIII.

Partnerſhips are limited to the kinds of Goods, Commerce, or other Things which the Partners are willing to join in common: and do not extend to thoſe Things which they have no mind to put into the Community. Thus, for Inſtance, if two Brothers enjoy in common the Inheritance of their Father, and continue in a Partnerſhip of the Profits and Loſſes which accrue from thence; they may for all this poſſeſs each of them in particular whatever they may acquire any other way[h]. *8. Partnerſhips are limited to the Things put into the Community.*

[h] Si fratres, parentum indiviſas hæreditates ideò retinuerunt, ut emolumentum ac damnum in his commune ſentirent: quod aliunde quæſierint, in commune non redigetur. *l. 52. §. 6. ff. pro ſocio.*

IX.

If the Partnerſhip happens to be contracted in terms which give occaſion to doubt whether all the Eſtate preſent and to come is comprehended in it, or only the preſent Eſtate in poſſeſſion, or that there are other ſuch like doubts; they are to be interpreted by the ways in which the Partners themſelves ſhall have executed their Contract, and by the circumſtances which may be able to ſhew their intention, according to the foregoing Rules, and the general Rules of the Interpretation of Covenants[i]. *9. If there is any obſcurity in the Contract of Partnerſhip, to know what it comprehends.*

[i] Semper in ſtipulationibus, & in cæteris contractibus id ſequimur quod actum eſt. *l. 34. ff. de reg. jur.* Quod factum eſt cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l. 168. eod.*

See the eighth and the following Articles of the ſecond Section of Covenants.

X.

The Debts owing by the Community, and its other Charges, are to be paid out of the Common Stock: and the Partnerſhip being ended, each Partner owes his Share of them, in proportion to the Share he has in the Joint Stock. But the Monies borrowed by a Partner, which have not been put into the *10. Debts of the Community, and of the Partners.*

the Common Caſh, or have not been laid out to the Uſe of the Community, are the peculiar Debt of him who borrowed them[l].

[l] Omne æs alienum quod manente ſocietate contractum eſt, de communi ſolvendum eſt, licet poſteaquàm ſocietas diſtracta eſt: ſolutum ſit. Igitur, & ſi ſub conditione promiſerat, & diſtractâ ſocietate conditio extitit, ex communi ſolvendum eſt. Ideoque, ſi interim ſocietas dirimatur, cautiones interponendæ ſunt. *l.* 27. *ff. pro ſoc.* ſed nec æs alienum, niſi quod ex quæſtu pendebit, veniet in rationem ſocietatis. *l.* 12. *eod.* Jure ſocietatis, per ſocium ære alieno, ſocius non obligatur: niſi in communem arcam pecuniæ verſæ ſunt. *l.* 82. *ff. eod.*

XI.

11. *What the Partner may, or may not take out of the Publick Stock.*

In an Univerſal Partnerſhip of the whole Eſtate and Goods, of all Profits, and of all other Expences, each Partner can only diſpoſe of his own Share, and he ought not to take out of the Common Stock for his particular Expences, more than what is neceſſary for the maintenance of himſelf, and Family. Thus, Partners of their whole Eſtate and Goods, who have Children, educate and maintain them out of the Joint Stock, but they cannot take Marriage Portions out of it, for their Daughters. For a Marriage Portion is a Capital which the Partner ought to take out of his own Share, unleſs it be otherways regulated by Contract, or Cuſtom[m].

[m] Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint. *l.* 68. *ff. pro ſoc.* Idem Maximinæ reſpondit, ſi ſocietatem univerſarum fortunarum ita coïerint, ut quidquid erogetur, vel quæreretur communis lucri, atque impendii eſſet: ea quoque, quæ in honorem alterius liberorum erogata ſunt, utrimque imputanda. *l.* 73. §. 2. *eod.* Si fortè conveniſſet inter ſocios, ut de communi dos conſtitueretur, dixi pactum non eſſe iniquum. Utique ſi non de alterius tantùm filia convenit. *l.* 81. *eod.*

XII.

12. *Extraordinary Expences of a Partner.*

If in an Univerſal Partnerſhip, it had been agreed, that the Daughters Portions ſhould be taken out of the Joint Stock, and it happen that one of the Partners hath a Daughter to marry, and that the others have none; this Daughter will nevertheleſs have her Portion out of the Joint Stock[n]. And this Partner will have this advantage over the others, without any Injuſtice; for each of them might have had it. And the State in which they were all of them, under the ſame uncertainty of the Event, and with the ſame Right, having rendred their Condition equal, it made alſo their Agreement juſt.

[n] Si commune hoc pactum fuit, non intereſſe, quod alter ſolus filiam habuit. *d. l.* 81. *ff. pro ſoc.*

XIII.

13. *Unlawful Expences.*

The Expences which the Partners are at in Gaming, Debauchery, or other unlawful Practices, are not to be taken out of the Common Stock[o].

[o] Quod in alea, aut adulterio perdiderit ſocius, ex medio non eſt laturus. *l.* 59. §. 1. *ff. pro ſoc.*

As to the Expences which are laid out on account of the Partnerſhip. See the eleventh Article of the following Section.

SECT. IV.

Of the Engagements of Partners.

The CONTENTS.

1. *Unity and Fidelity among the Partners.*
2. *Care and Vigilance of the Partners.*
3. *Partners accountable for Fraud, and groſs Faults.*
4. *Accidents.*
5. *If a Partner appropriates to himſelf, or converts to his own uſe, any Thing belonging to the Community.*
6. *Uſe of the common Thing without Fraud.*
7. *Loſs or Damage cauſed by a Partner.*
8. *The Service which a Partner does, is not compenſated with the Loſs which he occaſions.*
9. *The Partner is anſwerable for the deed of the perſon whom he has taken into Partnerſhip, for his Share.*
10. *Loſs and Gain occaſioned by the Under-Partner.*
11. *The Expences of the Partners.*
12. *The particular Loſs of a Partner, occaſioned by the Affairs of the Community.*
13. *Particular Gains or Loſſes, on account of the Partnerſhip.*
14. *Loſs of Things deſigned to be put into the Common Stock.*
15. *Inſolvency of a Partner.*
16. *One Partner cannot engage the others, unleſs they have impowered him ſo to do.*
17. *A Partner cannot take out his Capital out of the common Stock.*
18. *Of him who propoſes a Partner, and anſwers for him.*
19. *Benefit of Partners, as to the payment of what they owe to one another.*
20. *If the Partner renders himſelf unworthy of this benefit.*

21. *This benefit does not extend to the Sureties, nor to the Heirs, or Executors of the Partners.*

22. *One Partner can do nothing in the Affairs of the Community, againſt the will of the other Partners.*

I.

1. Unity and Fidelity among the Partners. PArtners being united by a General Engagement[a], in a ſort of Fraternity[b], to act the one for the other as every one would do for himſelf, they owe reciprocally to one another an upright Fidelity and Integrity, ſuch as may engage every one of them to ſhare with the others whatever they have belonging to the Community, with all the Profits, Fruits, and other Revenues which they may reap from it: and not to keep any thing to themſelves, but what they may lawfully do by their Contract[c].

[a] *See the twelfth Article of the firſt Section.*

[b] *See the firſt Article of the ſecond Section.*

[c] Venit autem in hoc judicium pro ſocio bona fides. *l.* 52. §. 1. *ff. pro ſoc.* In ſocietatis contractibus, fides exuberet. *l.* 3. *C. eod.* Quæ coëuntium ſunt communicantur. *l.* 1. *in f. ff. eod.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes—— quoſve fructus ex his rebus cœperis——me conſecuturum. *l.* 38. §. 1. *eod.*

II.

2. Care and Vigilance of the Partners. Beſides the Fidelity which the Partners owe to one another, they likewiſe owe their Care for the Affairs and Effects of the Community. But whereas their Fidelity admits of no bounds; they are obliged, with reſpect to the Care which they owe, to uſe only the ſame Application and Vigilance in the Common Affairs, as they uſe in their own[d].

[d] In ſocietatis contractibus fides exuberet. *l.* 3. *C. pro ſocio.* Sufficit talem diligentiam communibus rebus adhibere ſocium, qualem ſuis rebus adhibere ſolet. §. *ult. inſt. de ſocietate.*

III.

3. Partners accountable for Fraud, and groſs Faults. This duty of Care and Vigilance which the Partners owe to one another, being regulated by the Care which they have of what is their own, it does not extend to the greateſt Exactneſs that the moſt careful and diligent perſons are capable of; but it is limited to make them reſponſible for all Deceit, and for all groſs Faults. And if a Partner who takes the ſame care of the common Affairs, as he does of his own, falls into ſome ſlight Fault without any evil intention, he is not accountable for it: and the other Partners ought to blame themſelves for not having made choice of a more careful Partner[e].

[e] Utrum ergo tantùm dolum, an etiam culpam præſtare ſocium oporteat, quæritur. Et Celſus, libro ſeptimo digeſtorum ita ſcripſit, ſocios inter ſe dolum & culpam præſtare oportet. *l.* 52. §. 3. *ff. pro ſoc.* Socius ſocio utrum eo nomine tantùm teneatur, pro ſocio actione, ſi quid dolo commiſerit, ſicuti is qui deponi apud ſe paſſus eſt, an etiam culpæ, id eſt deſidiæ, atque negligentiæ nomine quæſitum eſt. Prævaluit tamen etiam culpæ nomine teneri eum. Culpa autem non ad exactiſſimam diligentiam diligenda eſt. Sufficit enim talem diligentiam communibus rebus adhibere ſocium, qualem ſuis rebus adhibere ſolet. Nam qui parum diligentem ſocium ſibi adſumit, de ſe queri, ſibique hoc imputare debet. §. *ult. inſt de ſociet. l.* 72. *ff. pro ſoc.*

IV.

Partners are never reſponſible for any Accident; unleſs they have given occaſion to it by ſome Fault for which they ought to anſwer. As if a Partner has ſuffer'd a Thing which he had in his cuſtody to be ſtolen[f]. *4. Accidents.*

[f] Damna quæ imprudentibus accidunt, hoc eſt, damna fatalia, ſocii non cogentur præſtare: ideoque, ſi pecus eſtimatum datum ſit, & id latrocinio, aut incendio perierit, commune damnum eſt: ſi nihil dolo aut culpa acciderit, ejus qui æſtimatum pecus acceperit. Quod ſi à furibus ſubreptum ſit, proprium ejus detrimentum eſt. Quia cuſtodiam præſtare debuit, qui æſtimatum accepit. Hæc vera ſunt, & pro ſocio erit actio, ſi modò ſocietatis contrahendæ cauſa, paſcenda data ſunt, quamvis æſtimata. *l,* 52. §. 3. *ff. pro ſocio. See the twelfth Article of this Section.*

V.

If one of the Partners appropriates to himſelf, or conceals any Thing belonging to the Community, or if he puts it to his own uſe contrary to the intention of the Co-Partners, he commits a Theft[g]: and will be liable to make good their Damages. And if having in his hands ſome of the Money belonging to the Joint Stock, he lays it out on his own particular Affairs, he will be obliged to pay Intereſt for it, as a Reparation of Damages to his Co-Partners, and as a Puniſhment of his own Infidelity[h]. *5. If a Partner appropriates to himſelf, or converts to his own uſe, any Thing belonging to the Community.*

[g] Rei communis nomine cum ſocio furti agi poteſt, ſi per fallaciam dolove malo amovit: vel rem communem celandi animo, contractet. *l.* 45. *ff. pro ſoc.*

[h] Socium qui in eo quod ex ſocietate lucrifaceret, reddendo moram adhibuit, cùm ea pecunia ipſe uſus ſit, uſuras quoque eum præſtare debere Labeo ait. *l.* 60. *ff. pro ſoc. l.* 1. §. 1. *ff. de uſur.*

VI.

If a Partner happens to have in his cuſtody, without any Fraud, a Thing belonging to the Community, ſuch as any Moveable Thing which he has made ſome uſe of; it will not be preſumed, that becauſe he had the Thing in his cuſtody, and made uſe of it, that therefore he is guilty of Theft; but that he *6. Uſe of the common Thing without Fraud.*

being the Owner of it in ſome part, did make uſe of his own Right, being confident of having the conſent of his Co-Partners.

[k] Meritò autem adjectum eſt, ita demùm furti actionem eſſe, ſi per fallaciam, & dolo malo amovit: quia cùm ſine dolo malo fecit, furti non tenetur: & ſanè plerumque credendum eſt, eum qui partis dominus eſt, jure potius ſuo, re uti, quàm furti conſilium inire. *l. 51. ff. pro ſoc.*

VII.

7. Loſs or Damage cauſed by a Partner.

If by ſome Fault, Violence, or other unlawful means, a Partner occaſions Damage to the Community, he ſhall be bound to make it good[l].

[l] Si damnum in re communi ſocius dedit, Aquilia teneri eum, & Celſus, & Julianus, & Pomponius ſcribunt. Sed nihilominus, & pro ſocio tenetur, ſi hoc facto ſocietatem læſit. Si verbi gratia negotiatorem ſervum vulneraverit, vel occidit. *l.* 47. §. 1. *l.* 48. *l.* 49. *ff. pro ſocio.*

VIII.

8. The Service which a Partner does, is not compenſated with the Loſs which he occaſions.

If the ſame Partner who has cauſed any Damage, or who thro' his Fault and Negligence has given occaſion to ſome Loſs, which may be imputed to him, happens in other reſpects to have procured ſome Profit to the Community, the Profit which he has procured will not be compenſated with the Loſs which he has occaſioned. For he was bound to procure this Profit, and conſequently cannot compenſate it with the Loſs[m].

[m] Non ob eam rem minus ad periculum ſocii pertinet, quod negligentia ejus periſſet, quod in pleriſque aliis induſtria ejus ſocietas aucta fuiſſet. Et hoc ex appellatione Imperator pronuntiavit. Et ideo ſi ſocius quædam negligenter in ſocietatem egiſſet, in pleriſque ſocietatem auxiſſet, non compenſatur compendium cum negligentia, ut Marcellus, libro ſexto Digeſtorum ſcripſit. *l.* 25 *&* 26. *ff. pro ſoc. l.* 23. §. 1. *eod.*

If this loſs were not occaſioned by ſome Fraud, or other unfair way, if it were ſmall, and the Profit were conſiderable, and wholly owing to the Induſtry of that Partner, would this Compenſation be unjuſt?

IX.

9. The Partner is anſwerable for the deed of the perſon whom he has taken into Partnerſhip for his Share.

If one of the Partners has taken another perſon into Partnerſhip with him for his particular Share, and has ſuffer'd him to meddle in any Affair of the Community, he ſhall be accountable for the deed of the ſaid perſon: and muſt make good to his Co-Partners the Loſs which this third perſon ſhall have occaſioned to the Community. For it is his fault that he has made a bad choice, and that he did it without the knowledge and conſent of the other Partners[n].

[n] Puto omni modo eum teneri ejus nomine quem ipſe ſolus admiſit, quia difficile eſt negare, culpæ ipſius admiſſum. *l.* 23. *ff. pro ſoc.*

X.

10. Loſs and Gain occaſioned by the Under-Partner.

If this Under-Partner happens to have been the Author of Loſs in one reſpect, and of Profit in another, the Loſs and Profit will not be compenſated together in this caſe[o]; no more than in the caſe of the Loſs occaſioned by the Partner who had procured Profit, as has been already mentioned in the eighth Article, becauſe the act of this Under-Partner is the act of the Partner himſelf.

[o] Idem quærit an commodum, quod propter admiſſum ſocium acceſſit compenſari cum damno quod culpa præbuit debeat, & ait compenſandum, quod non eſt verum. Nam & Marcellus, libro ſexto Digeſtorum ſcribit, ſi ſervus unius ex ſociis ſocietati à domino præpoſitus, negligenter verſatus ſit: dominum ſocietati, qui præpoſuerit, præſtaturum: nec compenſandum commodum quod per ſervum ſocietati acceſſit, cum damno: & ita divum Marcum pronuntiaſſe. Nec poſſe dici ſocio, abſtine commodo, quod per ſervum acceſſit, ſi damnum petis. *l.* 23. §. 1. *ff. pro ſoc. See the remark on the eighth Article.*

XI.

11. The Expences of the Partners.

The Partners recover out of the Joint Stock, all their neceſſary, uſeful, and reaſonable Expences which regard the Community, and which they have been at on account of the Common Affairs. Such as Travelling Expences, whatever they have laid out on the Carriage of Perſons or Goods, Workmens Wages, neceſſary Repairs, and other the like Charges. And if the Partner who has been at theſe Expences had borrowed the Money upon Intereſt, or that he having advanced the Money himſelf, his Co-Partners have been backward in reimburſing him, he will likewiſe recover the Intereſt of the Money from the time that he advanced it, although he has not made any Legal Demand of it. But the Partners do not recover the Expences which they have laid out unneceſſarily, or for their own pleaſure[p].

[p] Si quis ex ſociis propter ſocietatem profectus ſit, veluti ad merces emendas: eos dumtaxat ſumptus ſocietati imputabit, qui in eam penſi ſunt. Viatica igitur & meritoriorum, & ſtabulorum, jumentorum, carrulorum vecturas, vel ſui, vel ſarcinarum ſuarum gratiâ, vel mercium rectè imputabit. *l.* 52. §. 15. *ff. pro ſoc.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes: quam impenſam in eas fecero——me conſecuturum. *l.* 38. §. 1. *eod.* Si in communem rivum impenſa facta ſit, pro ſocio eſſe actionem, ad recuperandum ſumptum Caſſius ſcripſit. *l.* 52. §. 12. *eod.* Herennius Modeſtinus reſpondit, ob ſumptus nullâ re urgente, ſed voluptatis causâ factos, eum de quo quæritur actionem non habere. *l.* 27. *ff. de neg. geſt.* Si quid unus ex ſociis neceſſariò de ſuo impendit in communi negotio, judicio ſocietatis ſervabit, & uſuras, ſi fortè mutuatus ſub uſuris, dedit. Sed etſi ſuam pecuniam dedit, non ſine cauſa dicetur, quod uſuras quoque percipere debeat. *l.* 67. §. 2. *ff. pro ſoc. l.* 52. §. 10. *eod. V. l.* 18. §. 3. *ff. fam. erciſc.*

XII.

12. *The particular Loſs of a Partner, occaſioned by the Affairs of the Community.*

If a Partner ſuffers any particular Loſs in doing the Buſineſs of the Community, as if he expoſes himſelf to any danger, and, for Inſtance, in a Journey which he makes for the common Affairs, he is robbed of his Cloaths, and of the Money which he carries with him for an Affair of the Community, or for the Expences of his Journey, or that he himſelf is wounded, or any one of his Servants; theſe kinds of loſſes will be made good to him out of the Joint Stock; for it was the Affair of the Community that brought them upon him; and nothing on his part gave occaſion to them[q].

[q] Quidam ſagariam negotiationem coïerunt. Alter ex iis ad merces comparandas profectus, in latrones incidit, ſuamque pecuniam perdidit: ſervi ejus vulnerati ſunt, reſque proprias perdidit. Dicit Julianus, damnum eſſe commune: ideoque actione pro ſocio damni partem dimidiam agnoſcere debere tam pecuniæ, quàm rerum cæterarum, quas ſecum non tuliſſet ſocius, niſi ad merces communi nomine comparandas proficiſceretur. Sed & ſi quid in medicos impenſum eſt, pro parte ſocium agnoſcere debere, rectiſſimè Julianus probat. Proinde, & ſi naufragio quid periit, cùm non alias merces quàm navi ſolerent advehi, damnum ambo ſentient. Non ſicuti lucrum, ita damnum quoque commune eſſe oportet, quod non culpâ ſocii contingit. *l.* 52. §. 4. *ff. pro ſoc.* Et quod medicis pro ſe datum eſt, recipere poteſt. *l.* 61. *eod.* See the Article that follows, and the laſt Article of the ſecond Section of Proxies.

The ſequel of this fifty ſecond Law, §. 4. ſhews, that it is to be underſtood of Money that the Partner takes along with him for the Expences of his Journey, or for the Affair of the Community: for if the Partner were robbed of his own Money which he carried with him for his own particular Affairs; the Loſs of it would fall upon himſelf; becauſe it was for his own Affairs that he carried it. And the occaſion of the conveniency which the Affair of the Community gave him to do his own Buſineſs, ought not to be prejudicial to his Co-Partners.

It is neceſſary to remark on the fourth Section of this fifty ſecond Law, and on the ſixty firſt Law quoted on this Article, that their diſpoſition corrects the hardſhip of the laſt Section of the ſixtieth Law, which ſays, that a Partner who is wounded on occaſion of an Affair belonging to the Community, bears the charges of his own Cure; and that for this reaſon, becauſe that altho' he ſuffers this Expence on account of the Community, yet it is not for the Community that the Expence is laid out.

XIII.

13. *Particular Gains or Loſſes on account of the Partnerſhip.*

If it happens that a Partner by the occaſion of ſome Affair of the Community, reaps ſome Profit; as if the Affairs of the Community give him acceſs to a Perſon from whom he receives a Favour, or if they give him Light into ſome particular Affair in which the Community is no ways concerned, and he makes advantage of it: or if, on the contrary, the Partnerſhip is to him an occaſion of Loſs, as if the Care of the Common Affairs makes him neglect his own: or if any one out of ſpite to the Society forbears to do him the good Offices they were wont to do; theſe kinds of Gains, and Loſſes, will concern him alone[r]. Becauſe theſe Events have for their Cauſes, either the particular Conduct of the ſaid Partner, or his Merit, or his Negligence; or ſome other Fault, or ſome Chance: and becauſe the Conjuncture which links together theſe Cauſes with the Occaſion of the Affairs of the Community, is as it were an Accident, which does not affect the Community, but only the Partner to whom theſe things may have happened.

[r] Si propter ſocietatem eum hæredem quis inſtituere deſiſſet, aut legatum prætermiſiſſet, aut patrimonium ſuum negligentiùs adminiſtraſſet, non conſecuturum. Nam nec compendium quod propter ſocietatem ei contigiſſet, veniret in medium. Veluti, ſi propter ſocietatem hæres fuiſſet inſtitutus, aut quid ei donatum eſſet. *l.* 60. §. 1. *ff. pro ſocio.*

XIV.

14. *Loſs of Things deſigned to be put into the Common Stock.*

All the Loſſes of the Joint Stock are common to the Partners. But in order to judge whether the Money, or other Thing which is loſt, ought to be conſidered as part of the Common Stock, it is not enough that it was deſigned to be put into it, but we muſt conſider the circumſtances in which the things are when the Loſs happens. Thus, for Example, if the Money which a Partner was to furniſh for buying of Merchandize, periſhes in his own hands, before he has put it into the common Caſh, or laid it out on the common Concern, the Loſs is his own. But if this Money was to be carried a Journey, in order to buy ſomething for the Publick Account, and it happens to be robbed on the way, the Community bears the Loſs of it, altho' it was not yet laid out on their account; becauſe it was on the Community's account that it was carried, and the Partner's deſtination of it to the Publick Uſe was accompliſhed on his part. So that the Money was tranſported at the peril of the whole Community. And in other ſuch like Events, the Loſs falls, or falls not upon the Community, according to the ſtate of things. And we muſt diſcern whether the Partnerſhip is already formed; what is the deſtination of the Money, or other Thing, that is to be put into the Joint Stock; what ſteps have been taken towards putting it in, and the other circumſtances by which we may be able to judge if the Thing which periſhes ought to be conſidered as being already in the Common Stock, or as belonging ſtill to the Perſon who was to put it in[s].

[s] Item

[r] Item Celſus tractat, ſi pecuniam contuliſſemus ad mercem emendam & mea pecunia periſſet, cui perierit ea. Et ait, ſi poſt collationem evenit ut pecunia periret, quod non fieret niſi ſocietas coïta eſſet, utrique perire. Ut putà ſi pecunia cùm peregrè portaretur ad mercem emendam, periit. Si verò ante collationem: poſteaquàm eam deſtinaſſes, tunc perierit, nihil eo nomine conſequeris, inquit, quia non ſocietati periit. *l.* 58. §. 1. *ff. pro ſoc.*

XV.

15. Inſolvency of a Partner. If one of the Partners has advanced Money, or has entred into ſome Engagement, againſt which the Community ought to indemnify him; every one of the Partners muſt reimburſe, or indemnify him in proportion to their Shares. And if he is not able to recover the Share of one of the Partners who is inſolvent, or cannot for other reaſons get Payment of him; this Share of the deficient Partner muſt be paid by all the other Partners. For it was on the Community's account that this Partner advanced the Money, or entred into the Engagement; And the Loſſes as well as the Gains ought to be ſhared[t].

[t] An, ſi non omnes ſocii ſolvendo ſint, quod à quibuſdam ſervari non poteſt à cæteris debeat ferre (ſocius.) Sed Proculus putat hoc ad cæterorum onus pertinere, quod ab aliquibus ſervari non poteſt. Rationeque defendi poſſe: quoniam ſocietas cùm contrahitur, tam lucri quàm damni communio initur. *l.* 67. *ff. pro ſoc.*

XVI.

16. One Partner cannot engage the others, unleſs they have impower'd him ſo to do. Partners, even thoſe who are in Partnerſhip of their whole Eſtate and Goods, can alienate only their own Share of the Common Stock, and cannot by their deed bind the Community, except in ſo far as it has impowered them; or that the Engagement into which they are entred has been uſeful, or approved of by the other Partners[u]. But if one of the Partners is choſen for directing the Affairs of the Society, and is intruſted with the chief Care of them, or if he is ſet over any particular Commerce, or any other Affair, the Engagements which he enters into will be common to all the Partners, in ſo far as they concern the Buſineſs with which he is intruſted[x].

[u] Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint. *l.* 68. *ff. pro ſoc. l.* 17. *eod.* Si ſocius propriam pecuniam mutuam dedit, omnimodò creditam pecuniam facit: licèt cæteri diſſenſerint. Quod ſi communem numeravit, non aliàs creditam efficit, niſi cæteri quoque conſentiant. Quia ſuæ partis tantùm alienationem habuit. *l.* 16. *ff. de reb. cred. v. l. unic.* C. *Si communis res pign. data ſit.* Jure ſocietatis per ſocium ære alieno ſocius non obligatur, niſi in communem arcam pecuniæ verſæ ſunt. *l.* 82. *ff pro ſoc.*

[x] Magiſtri ſocietatum pactum prodeſſe, & obeſſe conſtat. *l.* 14. *ff. de pact.* Cui præcipua cura rerum incumbit, & qui magis quàm cæteri diligentiam & ſollicitudinem rebus quibus præſunt, debent, hi magiſtri appellantur. *l.* 57. *ff. de verb. ſignif. See the* 357th *and* 358th *Articles of the Ordinance of* Blois, *and theſe words of the Declaration of the ſeventh of* September 1581, *on the Regiſtring the Partnerſhips of Bankers*, that every one may know who the perſons are that are to be bound. See the fifth Article of the ſecond Section of Covenants, and likewiſe the Title of Partnerſhips in the Ordinance of 1673.

XVII.

17. A Partner cannot take out his Capital out of the Common Stock. The Partners cannot take out of the Common Stock that which they have put into it, becauſe the whole Stock belongs to the Community, and cannot be diverted nor diminiſhed but with the conſent of all the Partners while the Partnerſhip laſts[y]. And it is no more lawful for a Partner to diminiſh the Common Stock, than it is to break off from the Partnerſhip unfairly and with a ſiniſter view[z].

[y] *See the fifth Article of this Section.*

[z] *See the third and the following Articles of the fifth Section.*

XVIII.

18. Of him who propoſes a Partner, and anſwers for him. If one is received into a Partnerſhip by order and upon the recommendation of a third perſon who propoſed him to the Partners, and who anſwers for him; this third perſon will be accountable for the deed of the Partner whom he recommended, in the ſame manner as he would be for his own proper deed, if he himſelf were a Partner[a].

[a] Quoties juſſu alicujus, vel cum filio ejus, vel cum extraneo, ſocietas coïtur: directo cum illius perſona agi poſſe, cujus perſona in contrahenda ſocietate ſpectata ſit. *l. ult. ff. pro ſoc.*

XIX.

19. Benefit of Partners as to the payment of what they owe to one another. If a Partner happens to be indebted to his Fellow-Partners on account of the Partnerſhip, without being chargeable with any Miſdemeanour, or Knavery; and that he is not able to pay all he owes, without being reduced to great neceſſity; his Co-Partners are obliged not only out of Humanity, but alſo becauſe of the Brotherly Tie that is between Partners, to have compaſſion on him, whether their Partnerſhip be univerſal of all their Eſtate and Goods, or only particular of certain Things. And they ought not to exact rigorouſly all that he owes them, if he is not able to pay it without being reduced to great extremity. But they ought to make the Payment eaſie to him, whether by taking Lands or Houſes, Moveables and other Effects at a reaſonable Price, or dividing the Payments, granting Delays, or other Favours and Eaſes, according to the circumſtances. And whatever conſtraints they ſhould make uſe of beyond theſe Limits, and contrary to this Temperament, they may be mitigated by the Intervention of the Judge, according to the quality of the Partners, the nature and quantity of the Debt, the Goods of the Debtor, thoſe of the Creditor, and other views of the ſtate of things[b].

[b] Verum eſt, quod Sabino videtur, etiamſi non univerſorum bonorum ſocii ſunt, ſed unius rei, attamen in id quod facere poſſunt, quodve dolo malo fecerint, quominus poſſint, condemnari oportere. Hoc enim ſummam rationem habet, cùm ſocietas jus quodammodò fraternitatis in ſe habeat. *l.* 63. *ff. pro ſoc.* In condemnatione perſonarum, quæ in id quod facere poſſunt damnantur, non totum quod habent extorquendum eſt, ſed & ipſarum ratio habenda eſt ne egeant. *l.* 173. *ff. de reg. jur.* See the ninth and the following Articles of the Title of Partnerſhips in the Ordinance of 1673.

XX.

20. *If the Partner renders himſelf unworthy of this benefit.*

This Humanity which Co-Partners owe to one another, is not due to him who has knaviſhly made away his Effects that he might avoid Payment, or who to prevent Sentence being given againſt him diſowned the Quality of a Partner, or has in any other manner of way rendred himſelf unworthy of ſuch a favour[c].

[c] Hoc quoque facere quis poſſe videtur, quod dolo fecit quominus poſſit. Nec enim æquum eſt dolum ſuum quemquam relevare. *l.* 63. §. 7. *ff. pro ſoc.* Non aliàs ſocius in id quod facere poteſt condemnatur, quàm ſi confitetur ſe ſocium fuiſſe. *l.* 67. §. *ult. eod.*

XXI.

21. *This benefit does not extend to the Sureties, nor to the Heirs, or Executors of the Partners.*

The Sureties of a Partner, thoſe who are bound to anſwer for what he does, his Heirs or Executors, and other Succeſſors cannot claim this benefit; becauſe their Obligation is quite of another nature; the Sureties, and thoſe who are accountable for the deed of a Partner, being bound, with this view of the Partner's proving Inſolvent, to make good whatever he ſhall happen to owe; and the Heirs, or Executors and Adminiſtrators, having accepted of the Succeſſion, cannot leſſen the Charges of it[d].

[d] Videndum eſt, an & fidejuſſori ſocii id præſtare debeat, an verò perſonale beneficium ſit, quod magis verum eſt. *l.* 63. §. 1. *ff. pro ſoc.* Patri autem, vel domino ſocii, ſi juſſu eorum ſocietas contracta ſit, non eſſe hanc exceptionem dandam, quia nec hæredi ſocii, cæteriſque ſucceſſoribus hoc præſtabitur. *d. l.* 63. §. 2.

XXII.

22. *One Partner can do nothing in the Affairs of the Community, against the will of the other Partners.*

The Partners cannot do any thing in the Common Concerns, but what belongs to their Charge, or is agreed to by all the Partners. And if one Partner attempts to make any change, every one of his Fellow-Partners may hinder him. For among perſons that have the ſame Right, thoſe who refuſe to admit of any Innovation are better founded to oppoſe it, than they are to innovate, who make the attempt. But if the change which a Co-Partner has made, has been made in the preſence of the others, and they ſuffered it, they cannot afterwards complain of it, even altho' it ſhould be to their diſadvantage[e].

[e] Sabinus, in re communi neminem dominorum jure facere quicquam invito altero poſſe. Unde manifeſtum eſt, prohibendi jus eſſe. In re enim pari, potiorem cauſam eſſe prohibentis, conſtat. Sed & ſi in communi prohiberi ſocius à ſocio, ne quid faciat, poteſt, ut tamen factum opus tollat, cogi non poteſt, ſi cùm prohibere poterat, hoc prætermiſit. *l.* 28. *comm. divid.* Sin autem facienti conſenſit, nec pro damno habet actionem. *d. l.*

SECT. V.

Of the Diſſolution of the Partnerſhip.

The CONTENTS.

1. *The Partnerſhip is diſſolved by the conſent of the Partners.*
2. *Each Partner may break off Partnerſhip when he pleaſes.*
3. *A fraudulent Renunciation of Partnerſhip does not free the perſon who ſo renounces from his Engagements.*
4. *An unſeaſonable Renunciation.*
5. *We are to judge of the unſeaſonableneſs of the Renunciation by the intereſt of the whole Community.*
6. *Profit after the Renunciation.*
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8. *The Renunciation is of no uſe till it is known; but is in the mean while prejudicial to him who has made it.*
9. *The term of the Partnerſhip being expired, every one withdraws himſelf with impunity.*
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12. *If a Partner becomes incapable of contributing, either in Money, or Induſtry.*
13. *The Guardian of the Prodigal and Madman may break off the Partnerſhip.*

14. *The Death of a Partner.*
15. *The Civil Death of a Partner.*
16. *Sharing of Profits, Loſſes and Charges.*

I.

1. The Partnerſhip is diſſolved by the conſent of the Partners.

AS Partnerſhip is formed by conſent, ſo is it in the ſame manner diſſolved, and it is free for the Partners to break off their Partnerſhip, and to give it over whenever they pleaſe, even before the end of the term which it was to have laſted, if they all agree to it[a].

[a] Diximus diſſenſu ſolvi ſocietatem; hoc ita eſt, ſi omnes diſſentiunt. *l. 65. §. 3. ff. pro ſocio.* Tamdiu ſocietas durat quamdiu conſenſus partium integer perſeverat. *l. 5. C. eod.*

II.

2. Each Partner may break off Partnerſhip when he pleaſes.

The Tie which is among Partners, being founded on the reciprocal Choice which they make of one another, and on the hopes of ſome Profit; it is free for every one of the Partners to break off Partnerſhip whenever he pleaſes; whether it be becauſe there is no good agreement among the Partners, or that ſome neceſſary Abſence, or other Affairs make the Partnerſhip burdenſome to him who is deſirous to leave it: or that he does not like a Commerce which the Partners are about to undertake; or that he does not find his account in the Partnerſhip, or for other reaſons. And he may give over Partnerſhip without the conſent of the other Partners, and that even before the time at which it was to have ceaſed, and altho' it have been agreed, that none of the Partners ſhould break off the Partnerſhip till the time agreed on were expired. Provided that the Partner does not break off with ſome ſiniſter view; as if he quits the Partnerſhip, that he may buy for himſelf alone what the whole Community had a mind to purchaſe, or that he may make ſome other Profit, to the prejudice of the other Partners, by his leaving them: or provided he does not quit after ſome Buſineſs is begun, or at an unſeaſonable time, which may occaſion ſome Loſs or Damage to the Community[b].

[b] Voluntate diſtrahitur ſocietas renuntiatione. *l. 63. in fine ff. pro ſoc.* Sed & ſi convenit ne intra certum tempus, ſocietate abeatur, & ante tempus renuntietur, poſt rationem habere renuntiatio, nec tenebitur pro ſocio, qui ideo renuntiavit, quia conditio quædam qua ſocietas erat coïta, ei non præſtatur. Aut quid, ſi ita injurioſus, & damnoſus ſocius ſit, ut non expediat eum pati: vel quòd ea re frui non liceat, cujus gratiâ negotiatio ſuſcepta ſit. Idemque erit dicendum, ſi ſocius renuntiaverit ſocietati, qui reipublicæ causâ diu & invitus ſit abſuturus. *l. 14. l. 15. & 16. eod.* Item ſi ſocietatem ineamus ad aliquam rem emendam, deinde ſolus volueris eam emere: ideoque renuntiaveris ſocietati, ut ſolus emeres, teneberis quanti intereſt mea. Sed ſi ideò renuntiaveris, quia emptio tibi diſplicebat: non teneberis, quamvis ego emero, quia hîc nulla fraus eſt. *l. 65. §. 4. eod.* Niſi renuntiatio ex neceſſitate quadam facta ſit. *d. l. 65. §. 6.* Tamdiu ſocietas durat, quamdiu conſenſus partium integer perſeverat. *l. 5. C. eod. §. 4. inſt. eod.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l. 14. ff. eod.* See the following Articles.

III.

3. A fraudulent Renunciation of Partnerſhip does not free the perſon who ſo renounces from his Engagements.

The Partner who breaks off Partnerſhip with an unfair deſign, diſengages his Co-Partners from all Engagements to him, but does not diſengage himſelf from his Obligations to them. Thus, he who ſhould withdraw himſelf from an Univerſal Partnerſhip of their whole Eſtate, preſent and to come, that he alone might inherit a Succeſſion fallen to him, would bear the whole Loſs, if the Succeſſion which he alone inherits ſhould prove burdenſome; but he would not deprive his Co-Partners of the Profit, if the Succeſſion ſhould prove advantageous, and they have a mind to ſhare in it. And in general, if a Partner breaks off at an unſeaſonable time, which occaſions the loſs of ſome Profit to the Community, which otherwiſe it might have made, or which cauſes any other Damage, he will be bound to make it good. As if he quits before the time to which the Partnerſhip was to have laſted, abandoning a Buſineſs with which he was charged. And he who breaks off the Partnerſhip in this manner, ſhall have no Share in the Profits which ſhall happen to be made afterwards; but he ſhall bear his part of what Loſſes ſhall afterwards happen, in the ſame manner as he would have been bound to do if he had not quitted the Partnerſhip[c].

[c] Diximus diſſenſu ſolvi ſocietatem: hoc ita eſt, ſi omnes diſſentiunt. Quid ergo ſi unus renuntiet? Caſſius ſcripſit, eum qui renuntiavit ſocietati, à ſe quidem liberare ſocios ſuos, ſe autem ab illis non liberare. Quod utique obſervandum eſt, ſi dolo malo renuntiatio facta ſit. Veluti ſi cum omnium bonorum ſocietatem iniſſemus, deinde cùm obveniſſet uni hæreditas, propter hoc renuntiavit. Ideoque ſi quidem damnum attulerit hæreditas, hoc ad eum qui renuntiavit pertinebit: commodum autem communicare cogetur actione pro ſocio. *l. 65. §. 3. ff. pro ſoc.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l. 14. eod.* Item qui ſocietatem in tempus coït, eam ante tempus renuntiando, ſocium à ſe, non ſe à ſocio liberat. Itaque ſi quid compendii poſtea factum erit, ejus partem non fert, at ſi diſpendium, æquè præſtabit portionem. *l. 65. §. 6. eod.* See the following Articles.

IV.

4. An unſeaſonable Renunciation.

The Partner who renounces the partnerſhip at an unſeaſonable time, not only does not free himſelf from his Engagements to his Co-Partners, but is anſwerable for all the Loſſes and Damages which his unſeaſonable Renunciation may have cauſed to the Society. Thus, if a Partner quits whilſt he is on a Journey, or engaged in any other Buſineſs for the Community; or if his quitting obliges the Partners to ſell any Merchandize before the time; he ſhall be bound to make good the Loſſes and Damages which his leaving the Partnerſhip under theſe circumſtances ſhall have occaſioned[d].

[d] Labeo poſteriorum libris ſcripſit, ſi renuntiaverit ſocietati unus ex ſociis, eo tempore, quo interfuit ſocii non dirimi ſocietatem, committere eum in pro ſocio actione. Nam ſi emimus mancipia inita ſocietate, deinde renunties mihi eo tempore, quo vendere mancipia non expedit: hoc caſu, quia deteriorem cauſam meam facis, teneri te pro ſocio judicio. *l. 65. §. 5. ff. pro ſocio.* Si intempeſtivè renuntietur ſocietati, eſſe pro ſocio actionem. *l. 14. eod.*

V.

5. We are to judge of the unſeaſonableneſs of the Renunciation, by the intereſt of the whole Community. In order to judge whether the Partner withdraws himſelf at an unſeaſonable time, it is neceſſary to conſider what is moſt profitable for the whole Community, and not for any one of the Partners in particular[e].

[e] Proculus hoc ita verum eſſe, ſi ſocietatis non interſit dirimi ſocietatem. Semper enim, non id quod privatim intereſt unius ex ſociis ſervari ſolet, ſed quod ſocietati expedit, *l. 65. §. 5. ff. pro ſoc.*

VI.

6. Profit after the Renunciation. If after a fair and lawful Renunciation, the Partner who has quitted the Partnerſhip, begins anew to carry on any Commerce from which he reaps ſome Profit, he will not be bound to ſhare it with his former Partners[f].

[f] Quod ſi quid poſt renuntiationem acquiſierit, non erit communicandum, quia nec dolus admiſſus eſt in eo. *l. 65. §. 3. ff. pro ſoc.*

VII.

7. A fraudulent and unſeaſonable Renunciation is never permitted. A fraudulent and unſeaſonable Renunciation, is never permitted, whether the Contract of Partnerſhip has provided againſt it, or not. For this would be repugnant to Fidelity, which being eſſential to the Contract of Partnerſhip, is always underſtood to be comprehended in it[g].

[g] In ſocietate coëunda nihil attinet de renuntiatione cavere: quia ipſo jure, ſocietatis intempeſtiva renuntiatio, in æſtimationem venit. *l. 17. §. 2. ff. pro ſocio.*

VIII.

8. The Renunciation is of no uſe till it is known; but in the mean while prejudicial to him who has made it. The Renunciation is of no uſe to the perſon who has made it, till it be made known to the other Partners: and if in the Interval after the Renunciation, and before it is known to the other Partners, he who has renounced makes any Profit, he will be obliged to ſhare it with his Co-Partners; but if he ſuffers any Loſs, it will all fall upon himſelf. And if in this ſpace of time the other Partners reap any Gain, he will have no ſhare in it: and if they ſuffer any Loſs, he muſt bear his part of it[h].

[h] Si abſenti renuntiata ſocietas ſit, quoad is ſcierit, quod is acquiſivit qui renuntiavit, in commune redigi. Detrimentum autem ſolius ejus eſſe, qui renuntiaverit. Sed quod abſens acquiſiit, ad ſolum eum pertinere: detrimentum ab eo factum commune eſſe. *l. 17. §. 1. ff. pro ſoc.*

IX.

9. The term of the Partnerſhip being expired, every one withdraws himſelf with impunity. The time which the Partnerſhip was to laſt being expired, each Partner may withdraw himſelf without the imputation of having quitted fraudulently, or unſeaſonably[i]. Unleſs his withdrawing himſelf ſhould chance to prejudice ſome Affair which were not then quite finiſhed.

[i] Quod ſi tempus finitum eſt, liberum eſt recedere, quia ſine dolo malo id fiat. *l. 65. §. 6. in f. ff. pro ſoc.*

X.

10. Partnerſhip is diſſolved by conſent. Partnerſhip, whether Univerſal or Particular, may be diſſolved in the ſame manner as it is contracted, as well among perſons abſent, as preſent, not only by the expreſs conſent of all the Partners, but tacitly, by acts which ſhew that they break off their Partnerſhip. As if every one of them drives ſeparately the ſame Trade and Buſineſs which they had before carried on in company together: if the Commerce in which they dealt happens to be prohibited: if they engage in a Law-Suit, with which it is impoſſible the Partnerſhip can ſubſiſt; or if they ſhew by any other ſigns and tokens that they break off their Partnerſhip[l].

[l] Itaque cùm ſeparatim ſocii agere cœperint, & unuſquiſque eorum ſibi negotietur: ſine dubio jus ſocietatis diſſolvitur. *l. 64. ff. pro ſoc.* Hoc ipſo quòd judicium ideo dictatum eſt, ut ſocietas diſtrahatur, renuntiatam ſocietatem, ſive totorum bonorum, ſive unius rei ſocietas coïta ſit. *l. 65. eod.* Renuntiare ſocietati etiam per alios poſſumus, & ideò dictum eſt procuratorem quoque poſſe renuntiare ſocietati. *d. l. 65. §. 7.* See the ſixth Article of the ſecond Section.

XI.

11. The Partnerſhip ceaſes when the Thing for which it If the Partnerſhip was only for a certain Commerce, or ſome particular Affair, it is at an end whenever that Commerce, or that Affair is finiſhed. And *was contracted ceaſes to be.* it would be the ſame thing if the Partnerſhip had relation to a Thing that happens to periſh, or of which the Commerce ceaſes to be free; as if the Partnerſhip was for the Farm of ſome Lands taken by the Enemy in a time of War[m].

[m] Item ſi alicujus rei ſocietas ſit, & finis negotio impoſitus, finitur ſocietas. *l. 65. §. 10. ff. pro ſoc.* Neque enim ejus rei quæ jam nulla ſit, quiſquam ſocius eſt: neque ejus quæ conſecrata publicatave ſit. *l. 63. §. ult. eod.*

XII.

12. If a Partner becomes incapable of contributing, either in Money, or Induſtry. If one of the Partners is reduced to ſuch a condition, that he cannot contribute to the Community what he is obliged to furniſh, whether in Money, or in Labour; the other Partners may exclude him from the Society; as if his Goods are ſeized on, if he has relinquiſhed them to his Creditors, if he labours under any Infirmity, or any other inconvenience, that hinders him from acting; if he is excluded from the Management of his Concerns, as being a Prodigal, if he falls into a Frenzy. For in all theſe caſes, the Partners may juſtly exclude from the Partnerſhip, him who ceaſing to contribute to it, ceaſes to have a right to it[n]. But this is to be underſtood only for the time to come, and the Partner who may chance to be excluded for any one of theſe cauſes, ought to loſe nothing of the Profits which may come to his Share in proportion to the Contributions which he had already made.

[n] Diſſociamur—— egeſtate. *l. 4. in f. pro ſocio.* Item bonis a creditoribus venditis unius ſocii diſtrahi ſocietatem, Labeo ait. *l. 65. §. 1.* Item ſi quis ex ſociis mole debiti prægravatus, bonis ſuis ceſſerit, & ideo propter publica, aut privata debita ſubſtantia ejus veneat, ſolvitur ſocietas. Sed hoc caſu, ſi adhuc conſentiant in ſocietatem, nova videtur incipere ſocietas, *§. 8. inſt. de ſociet.*

We have not put down in this Article, what is ſaid in the texts here quoted, that the Partnerſhip is broke off by the Poverty and Diſorder in the Affairs of one of the Partners. For according to our Uſage, Covenants are not thus annulled, without the deed of the Parties, and whilſt the Partners ſuffer him to continue in the Partnerſhip whoſe goods have been ſeized on, and even ſold, he is ſtill conſidered as a Partner, and has his Share in the Profits, till he is excluded by the other Partners; which they cannot do without reſerving to him the Rights which he has acquired, or which he cannot be deprived of by the ſaid excluſion.

XIII.

13. The Guardian of the Prodigal, and Madman may break off the Partnerſhip. As the Partners may break off Partnerſhip with a Prodigal, and a Madman; ſo likewiſe the Guardian of the Prodigal, and of the Madman, may renounce the Partnerſhip in their names[o].

[o] Sancimus veterum dubitatione remota, licentiam habere furioſi curatorem, diſſolvere, ſi maluerit, ſocietatem furioſi, & ſociis licere ei renuntiare. *l. ult. C. pro ſoc.*

XIV.

14. The death of a Partner. Since the Partnerſhip cannot ſubſiſt, but by the Union of the Perſons who have reciprocally choſen one another, and that it is ſometimes ſupported by the Induſtry of one Perſon alone; the death of one of the Partners naturally diſſolves the Partnerſhip with regard to them all. Unleſs it be that they have agreed that it ſhall ſubſiſt among the Survivors: or that, without any ſuch previous Agreement, the Survivors are willing to continue together in Partnerſhip[p].

[p] Morte unius ſocietas diſſolvitur, etſi conſenſu omnium coïta ſit, plures verò ſuperſint, niſi in coëunda ſocietate aliter convenerit. *l. 65. §. 9. ff. pro ſoc.*

Quid enim ſi is mortuus ſit, propter cujus operam maximè ſocietas coïta ſit? aut ſine quo ſocietas adminiſtrari non poſſit? *l. 59. eod.* See the laſt Article of the following Section.

Planè ſi hi qui ſociis hæredes extiterint, animum inierint ſocietatis in ea hæreditate novo conſenſu, quod poſtea geſſerint, efficitur ut in pro ſocio actionem deducatur. *l. 37. ff. pro ſoc.*

XV.

15. The Civil Death of a Partner. The Civil Death of a Partner has the ſame effect with regard to the Partnerſhip, as the Natural Death. For the perſon being out of a condition of acting, and his Goods being confiſcated, he is with regard to the Partnerſhip as if he were really dead[q].

[q] Publicatione quoque diſtrahi ſocietatem diximus, quod videtur ſpectare ad univerſorum bonorum publicationem, ſi ſocii bona publicantur. Nam cùm in ejus locum alius ſuccedat, pro mortuo habetur. *l. 65. §. 12. ff. pro ſoc. §. 7. inſt. eod.* Maxima, aut media capitis deminutione. *l. 63. §. ult. eod.*

XVI.

16. Sharing of Profits, Loſſes, and Charges. The Partnerſhip being ended, the Partners reciprocally reimburſe themſelves of what they have advanced, and ſhare their Profits; and if there remain any Debts to be paid off by the Society, any Expences to be laid out, and any future Profits or Loſſes, they take their reſpective Sureties for all theſe conſequences[r].

[r] *See before the eleventh Article of the fourth Section.* Si ſocietas dirimatur, cautiones interponendæ ſunt. *l. 27. ff. pro ſoc.* Pro ſocio arbiter proſpicere debet cautionibus in furto damno, vel lucro pendente ex ea ſocietate. *l. 38. eod.* Nam etſi diſtracta eſſet ſocietas, nihilominus diviſio rerum ſupereſt. *l. 65. §. 13. eod.*

SECT. VI.

Of the effect of the Partnerſhip, with regard to the Heirs and Executors of the Partners.

The CONTENTS.

1. *Rights and Engagements of the Heir, or Executor of a Partner.*
2. *In what manner the Heir, or Executor ſhares the Profits, and bears the Loſs.*
3. *The Heir, or Executor, bound to finiſh, what the deceaſed was under obligation to do.*
4. *The Heir, or Executor, bound for the Faults of the deceaſed.*
5. *The Partnerſhip is not interrupted by the death of a Partner, if the ſaid death is not known.*
6. *Of Partnerſhip in a Farm, with reſpect to the Heirs, or Executors of the Partners.*

I.

1. *Rights and Engagements of the Heir or Executor of a Partner.*

Altho' the Heir, or Executor enters into all the Rights of the perſon to whom he ſucceeds[a], yet the Heir, or Executor of a Partner, not being a Partner himſelf, has no right to intermeddle in the Affairs of the Community, in the quality of a Partner. Thus he who ſucceeds to a Partner who was Book-Keeper to the Company, or who was imployed in buying Things, or doing other Buſineſs for the ſervice of the Company, cannot take upon him any of theſe Functions. But altho' this Heir, or Executor, has not the quality of Partner, yet he is with reſpect to the other Partners, what thoſe Perſons are to one another, who have any thing in common together without a Covenant. And this gives him a right to enquire into what paſſes in the Community, and to call the other Partners to account for the preſervation of his own Intereſt. And in fine, he enters into the Rights and Engagements which are annexed to the bare quality of Heir, or Executor, as ſhall be explained by the following Rules[b].

[a] Hæredem ejuſdem poteſtatis, juriſque eſſe, cujus fuit defunctus, conſtat. *l.* 59. *ff. de reg. jur. l.* 9. §. 12. *ff. de hær. inſt.* Nihil eſt aliud hæreditas, quàm ſucceſſio in univerſum jus, quod defunctus habuit. *l.* 24. *ff. de verb. ſign. l.* 62. *ff. de reg. jur.*

[b] Licèt enim (hæres) ſocius non ſit, attamen emolumenti ſucceſſor eſt. *l.* 63. §. 8. *ff. pro ſocio.* See the third Article of the ſecond Section.

II.

2. *In what manner the Heir, or Executor ſhares the Profits, and bears the Loſſes.*

The Heir or Executor of the Partner partakes of the Profits which would have fallen to the perſon to whom he ſucceeds. Whether it be that he had already acquired them by any Commerce or Affair that was ended, or that they were to ariſe from ſome Affairs not yet finiſhed: And he ought likewiſe to bear his Share of the Charges and Loſſes accruing from the ſame Affairs[c].

[c] Nec hæres ſocii ſuccedit, ſed quod ex re communi poſteà quæſitum eſt, item dolus & culpa in eo quod ex ante geſto pendet, tam ab hærede, quàm hæredi præſtandum eſt. *l.* 65. §. 9. *ff. pro ſoc. l.* 3. C. *eod.* In hæredem quoque ſocii, pro ſocio actio competit, quamvis hæres ſocius non ſit. Licèt enim ſocius non ſit, attamen emolumenti ſucceſſor eſt. *l.* 63. §. 8. *ff. pro ſoc.* Si in rem certam emendam, conducendamve coïta ſit ſocietas: tunc, etiam poſt alicujus mortem, quidquid lucri, detrimentive factum ſit, commune eſſe Labeo ait. *l.* 65. §. 2. *eod.*

III.

3. *The Heir, or Executor, bound to finiſh, what the deceaſed was under obligation to do.*

Altho' the Heir, or Executor, be not a Partner, yet he is nevertheleſs obliged to make good the Engagements of the deceaſed that paſs to him: and he ought not only to pay in the Contributions, but alſo to ſatisfy what other demands may be made on account of the Partnerſhip. Thus, if the deceaſed had in his hands any Affair, or any Buſineſs of which the Management might be tranſmitted to his Heir, or Executor, he ought to finiſh what remains to be done, with the ſame Care, and the ſame Fidelity, that the deceaſed himſelf would have been obliged to[d].

[d] Hæres ſocii, quamvis ſocius non eſt, tamen ea quæ per defunctum inchoata ſunt, per hæredem explicari debent, in quibus dolus ejus admitti poteſt. *l.* 40. *ff. pro ſoc.* Si vivo Titio, negotia ejus adminiſtrare cœpi, intermittere mortuo eo, non debeo. Nova tamen inchoare neceſſe mihi non eſt. Vetera explicare, ac conſervare neceſſarium eſt, ut accidit, cùm alter ex ſociis mortuus eſt. Nam quæcunque prioris negotii explicandi cauſa geruntur, nihilum refert, quo tempore conſummentur, ſed quo tempore inchoarentur. *l.* 21. §. 2. *ff. de neg. geſt.* In hæredem ſocii proponitur actio, ut bonam fidem præſtet. *l.* 35. *ff. pro ſoc.*

IV.

4. *The Heir, or Executor, bound for the Faults of the deceaſed.*

The Heir, or Executor of the Partner is likewiſe bound to the Community for the act of the deceaſed, and for all the Loſs or Damage which the deceaſed may have occaſioned, either by Knavery, or by Faults which he was to anſwer for.

[e] In hæredem ſocii proponitur actio ut bonam fidem præſtet. Et acti etiam culpam, quam is

præſtaret, in cujus locum ſucceſſit, licet ſocius non ſit. *l. 35. in fine & 36. ff. pro ſoc.*

V.

5. The Partnerſhip is not interrupted by the death of a Partner, if the ſaid death is not known.

If the death of a Partner happens before they have begun the Buſineſs for which they entred into Partnerſhip; and the ſaid Death is known to the other Partners, the Partnerſhip is at an end, at leaſt with reſpect to the perſon deceaſed, and his Heir, or Executor; and it is free for the Partners to exclude the ſaid Heir, or Executor, out of the Partnerſhip, as it is for him not to engage in it. But if the ſaid Death being unknown to the other Partners, they begin the Buſineſs, the Heir, or Executor of the deceaſed ſhall have his Share in it, and ſhall ſucceed to the Charges of it, and to the Profits, or Loſſes, which ſhall ariſe from it[f]. For the Contract of Partnerſhip has had this effect, that the Ignorance of the death of the Partner, and the upright Intention of the Partners, has made the Engagement of the deceaſed, upon which they had treated, to ſubſiſt; and has formed out of it a new Engagement, which is reciprocal between the ſurviving Partners and the Heir, or Executor, of the deceaſed Partner.

[f] Item ſi alicujus rei ſocietas ſit, & finis negotio impoſitus, finitur ſocietas. Quod ſi integris omnibus manentibus, alter deceſſerit: deinde tunc ſequatur res de qua ſocietatem coïerunt, tunc eadem diſtinctione utemur, qua in mandato, ut ſiquidem ignota fuerit mors alterius, valeat ſocietas: ſi nota, non valeat. *l. 65. §. 10. ff. pro ſoc.* See the ſeventh Article of the fourth Section of Proxies.

VI.

6. Of Partnerſhip in a Farm, with reſpect to the Heirs, or Executors of the Partners.

All that has been ſaid in divers places of this Title concerning the Diſſolution of Partnerſhip, whether by the death of one of the Partners, or by the will and conſent of them all: and touching the manner in which the Engagements of the Partners deſcend, or do not deſcend, to their Heirs, and Executors, is not to be underſtood indifferently of Partnerſhips in which other perſons are intereſted; ſuch as the Partnerſhips of Farmers, or Undertakers of any Work. For in theſe kinds of Partnerſhips we muſt diſtinguiſh two Engagements; one of the Partners among themſelves, and the other of all the Partners to the Perſon of whom they take either a Farm, or any Thing to do. And ſince this laſt Engagement deſcends to the Heirs, or Executors of the Partners[g]; it is a conſequence of it, that they being under a common Engagement to others, they be mutually engaged to one another. And if this Tie does not make them Partners, as thoſe are who have voluntarily choſen one another; yet it has this effect; that, for Example, the Executor, or Adminiſtrator of a Farmer being bound to perform the conditions of the Leaſe to the Leſſor, and having the Right to manage the Farm, or to cauſe it to be managed for his behoof, this Right, and this Engagement diſtinguiſhes his condition from that of the Executors or Adminiſtrators of other kinds of Partners, in that he cannot be excluded from the Farm, even altho' the Partners had not begun to manage it before the death of the Partner to whom he ſucceeds[h].

[g] *See the tenth Article of the firſt Section of Letting and Hiring.*

[h] In ſocietate vectigalium nihilominus manet ſocietas, & poſt mortem alicujus. *l. 59. ff. pro ſocio.* Licet (hæres) ſocius non ſit, attamen emolumenti ſucceſſor eſt. Et circa ſocietates vectigalium, cæterorumque idem obſervamus, ut hæres ſocius non ſit, niſi fuerit adſcitus: verumtamen omne emolumentum ſocietatis ad eum pertineat, ſimili modo & damnum agnoſcat, quod contingit, ſive adhuc vivo ſocio vectigalis, ſive poſtea. Quod non ſimiliter in voluntaria ſocietate obſervatur. *l. 63. §. 8. eod.*

TITLE IX.

Of DOWRIES, or Marriage Portions.

Two Engagements in Marriage.

Marriage makes two ſorts of Engagements; one whereof is formed by the Divine Inſtitution of the Sacrament, which unites the Huſband and the Wife; the other is made by the Contract of Marriage, which contains the Covenant relating to their Goods[a].

[a] *Theſe two ſorts of Engagements are expreſſed, and diſtinguiſhed in the Marriage of* Tobias.

Raguel called his daughter *Sarah*, and ſhe came to her father, and he took her by the hand, and gave her to be wife to *Tobias*, ſaying, Behold, take her after the Law of *Moſes*, and lead her away to thy father: and he bleſſed them; And called *Edna* his wife, and took paper, and did write an inſtrument *of Covenants*, and ſealed it. *Tobit*. vii. 13, 14.

The Engagement of the perſons.

The Engagement of Marriage, in what relates to the Union of the Perſons, the manner in which it ought to be celebrated, the cauſes which render it indiſſolvable except in ſome ſingular caſes, and other the like matters, are not within the Deſign of this Book, as has been obſerved in the Plan of Matters in the fourteenth Chapter of the Treatiſe of Laws.

The Covenants concerning the Goods.

As to the Covenants about the Goods, ſome of them come within the Deſign of this Book, and others not: and in order to diſtinguiſh them, we muſt divide them into three ſorts. The firſt is of thoſe Covenants which are not agreeable to the *Roman* Law, altho' they are in uſe with us in *France*, whether it be throughout the whole Kingdom, ſuch as the Renunciations made by Daughters of Succeſſions that may happen to fall to them[b]; Inſtitutions of Heirs or Executors by way of Contract, and which are irrevocable[c]; or which are peculiar only to ſome Provinces, ſuch as the Community of Goods between Huſband and Wife. The ſecond is of thoſe which are conformable to the *Roman* Law, but which are only receiv'd in ſome Provinces, ſuch as the Augmentation of Dowries after Marriage. And the third ſort is of ſuch Covenants as are agreeable both to the *Roman* Law, and to the general Uſage of this Kingdom, ſuch as thoſe which concern the Dowry, or the Goods which the Wife may have beſides her Dowry; which the *Romans* called by the name of *Paraphernalia*.

It is only this laſt ſort of Covenants, which being both agreeable to the *Roman* Law, and in uſe with us, that is of the number of the Matters which come within the Deſign of this Work. But as to the Community of Goods between Man and Wife, Jointures, the Augmentation of Marriage Portions, and other matters which are peculiar to ſome Cuſtoms, or to ſome Provinces, they have their proper Rules in the Cuſtoms of the Places where they are received, and which we are not to meddle with here. We ſhall only obſerve, that theſe Matters, as alſo thoſe of the Inſtitutions of Heirs or Executors by way of Contract, and of the Renunciations of Daughters, have many Rules taken out of the *Roman* Law, which will be found in this Book in their proper places, in the Matters to which they have relation. Thus many Rules of Partnerſhip, and of other Contracts, may be rightly applied to the Community of Goods between Man and Wife, wherever it is in uſe: and many of the Rules of Succeſſions, as alſo of Covenants, may be applied to the Contracts of Marriage which ſettle Inheritances as by Will.

The ſubject matters of this Title.

There remains then, for the ſubject matter of this Title, only the Rules of the *Roman* Law, which concern the Dowry, or Marriage Portion, and the Goods which the Wife has beſides her Portion; among which we ſhall only ſet down thoſe Rules which are of common uſe. But we ſhall not inſert among them ſome particular Cuſtoms of the *Roman* Law, altho' obſerved in ſome Countries; as, for Inſtance, the Privilege of the Dowry before the Creditors of the Huſband who were prior to the Contract of Marriage.

The foundation of the Rules of Dowries.

The Rules of Dowries have their foundation in the Natural Principles of the Band of Matrimony, by which the Huſband and Wife make one Body, of which the Huſband is the Head. For it is an effect of this Union, that the Wife putting her ſelf under the Power of the Huſband, ſubjects likewiſe to his Dominion her Goods, and which go to the Uſe of the Society, or Partnerſhip, which they form together[d].

Diſtinction of the Goods which are part of the Dowry, and thoſe which are called Paraphernal Goods.

According to this Principle, it would be natural for all the Goods of the Wife to be comprehended in her Dowry, and that ſhe ſhould have none but what enter into this Partnerſhip, and of which the Huſband, who bears the Charges of it, ſhould have the full enjoyment. But Cuſtom has determined, that the Huſband ſhall have for his Wife's Portion only the Goods which are ſpecified to be given on this account; and if the Wife does not give as a Marriage Portion all her Goods preſent and to come, but only certain Goods, the Dowry will be limited to the Goods which are expreſly given under this Name; and the other Goods, which are not ſpecified, will be reckoned Paraphernal Goods.

A tacit condition in Contracts of Marriage.

We muſt obſerve this difference between the Covenants in a Contract of Marriage, and thoſe of other Contracts; that whereas all other Covenants bind the contracting Parties irrevocably, and from the moment that the Contract is formed; the Covenants of the Contract of Marriage are in ſuſpenſe till the Marriage is ſolemnized; and imply this condition, that they ſhall not take place, but in caſe the Marriage be accompliſhed, and that they ſhall remain void, if it is not accompliſhed[e]. But when the Celebration of the Marriage follows the Contract, it gives the Contract a retroactive effect, and it has its effect from the day of its date. Thus, the Mortgage for the Security of the Dowry is acquired from the date of the Contract, and before the celebration of the Marriage.

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[b] *L. 3. C. de collat.*

[c] *L. 15. C. de pact. l. 5. C. de pact. conv.*

[d] Bonum erat mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari. *l. 8. C. de pact. conv.*

Remarks on the Privileges of Dowries.

Some may perhaps take notice and find fault in reading this Title, that nothing is ſaid in it of ſome Maxims of the *Roman* Law in favour of Dowries; ſuch as thoſe which ſay in general, that the Cauſes relating to Dowries are favourable, and that it is for the Publick Intereſt that Dowries be preſerved[f]; that in doubtful Caſes Judgment ought to be given for the Dowry[g]: and in particular thoſe Maxims which give to Dowries certain Privileges, ſuch as the Privilege among Creditors, and the Preference even to thoſe that have prior Mortgages[h]; and that Privilege which, in favour of Dowries, validated the Obligation of a Woman who had bound her ſelf for the Dowry of another[i], altho' by the *Roman* Law Women could not be bound for other perſons. But as to theſe Privileges, that of the Preference of the Dowry to the Huſband's Creditors, even to thoſe that have prior Mortgages, is received only in ſome Places, and every where elſe it is looked upon as an Injuſtice. And the Law which validates the Obligation of a Woman for another's Dowry, is uſeleſs after the Edict of the Month of *Auguſt*, 1606, which permits Women to bind themſelves for others, as has been remarked on the firſt Article of the firſt Section of the Title of Perſons.

And as for theſe General Maxims, that the Cauſes of Dowries are favourable, that the Publick is intereſted in their preſervation, and that in doubtful Caſes Judgment ought to be given in favour of the Dowry; ſince they do not terminate in any thing particular, except to ſhew that they are Privileges of the *Roman* Law, and ſeeing they may be very readily miſapplied, it was not thought proper to ſet them down here as Rules.

It is likewiſe neceſſary to obſerve, that in the *Roman* Law there are other Regulations in relation to the matter of Dowries, which, altho' they be founded on Natural Equity, yet we have not thought fit to inſert under this Title. Thus, we have not put down this Rule, that the Huſband being ſued by the Wife for the Reſtitution of her Marriage Portion, or for other matters, or the Wife ſued by the Huſband for what ſhe may be indebted to him; they ought not to be conſtrained with the ſame ſeverity, as Debtors for other cauſes, and cannot be obliged to pay more than what they are able to do, without being reduced to Want[l]. And the reaſon why we have not made an Article for this Rule, is, that in the *Roman* Law it was a conſequence of Divorce which was allowed among the *Romans*, and which is unlawful; and that according to our Uſage the Wife having no Action againſt her Huſband, nor the Huſband againſt the Wife, except in the caſe of a Separation from Bed and Board, or a Separation only as to their Goods, this Rule has no relation either to the one or other of theſe two caſes; And that in fine, in all the caſes where Equity requires that the rigour of Proſecutions at the inſtance of Creditors ſhould be mitigated, it is cuſtomary with us to leave the mitigation of this ſeverity to the diſcretion of the Judge, according to the circumſtances. As to which it will be proper to ſee the twentieth Article of the fourth Section of Partnerſhip.

We have alſo omitted to ſet down under this Title that other Rule of the *Roman* Law, and which is likewiſe founded on a Principle of Equity, that the Fruits of the Dowry which are reaped the laſt year of the Marriage, ought to be divided between the Huſband and the Wife, in proportion to the time that the Marriage has laſted

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* Omnis dotis promiſſio, futuri matrimonii, tacitam conditionem accipit. *l. 68. ff. de jur. dot. l. 10. §. 4. eod.*

[f] Dotium cauſa ſemper & ubique præcipua eſt. Nam & publicè intereſt dotes mulieribus conſervari. *l. 1. ff. ſol. matr. l. 2. ff. de jur. dot.*

[g] In ambiguis pro dotibus reſpondere melius eſt, *l. 70. ff. de jur. dot. l. 85. ff. de reg. jur.*

Scimus favore dotium, & antiquos juris conditores ſeveritatem legis ſæpius mollire. *l. ult. C. de Senat. Vell.*

[h] *L. 18. §. 1. ff. de rebus auct. jud. poſſid. l. ult. C. qui potiores.*

[i] *L. ult. C. ad Senatus Vell.*

[l] Non tantùm dotis nomine maritus in quantum facere poſſit condemnatur, ſed ex aliis quoque contractibus, ab uxore judicio conventus, in quantum facere poteſt condemnandus eſt, ex Divi Pii conſtitutione. Quod & in perſona mulieris, æqua lance, ſervari æquitatis ſuggerit ratio. *l. 20. ff. de re jud. §. 37. inſt. de act.* Reverentiæ debitum maritali. *l. un. §. 7. C. de rei ux. act. l. 14. in f. ff. ſol. matr.* Maritum, in id quod facere poteſt, condemnari exploratum eſt. *l. 12. ff. ſol. matr.* In condemnatione perſonarum, quæ in id quod facere poſſunt, damnantur, non totum quod habent extorquendum eſt: ſed & ipſarum ratio habenda eſt, ne egeant. *l. 173. ff. de reg. jur.*

this laſt year[m]. By this Rule, if a Marriage had been contracted the firſt of *July*, before Harveſt, and had been diſſolved by a Divorce the firſt of *November*; the Huſband, who had gathered all the Fruits of the year, for four Months only that the Marriage had laſted, was obliged to reſtore to the Wife two Thirds of the Fruits. And this laſt year was reckoned to begin on the day of the year that the Marriage was ſolemnized: or if the Huſband did not enter into poſſeſſion of the Lands which he had in Marriage with his Wife till after the Solemnization of the Marriage, this laſt year was reckoned to begin from the ſame day of the year that the Huſband entred into Poſſeſſion of his Wife's Lands[n]. But this Rule, which in the caſe of Divorce was neceſſary for the doing of Juſtice both to the Wife and to the Huſband, is not ſo neceſſary in the caſe of the Diſſolution of the Marriage by the death of one or other of the Parties. For whereas in the caſe of Divorce it would have been very unjuſt that a Woman married juſt before the beginning of Harveſt, and divorced as ſoon as Harveſt was over, ſhould be ſtript of the Revenue of her Eſtate for the whole year; in the caſe of the Diſſolution of the Marriage by the death of the Huſband or Wife, the Juſtice which may be due to either the one or other of them, or to their Heirs, or Executors, is not limited preciſely to this Rule. And beſides this way of dividing the Fruits of the Wife's Dowry between the Survivor of the married Couple, and the Heirs, or Executors, of the deceaſed, our Cuſtoms have eſtabliſhed other ways altogether different. Thus in ſome Cuſtoms, the Fruits of the Wife's Dowry for the laſt year go to the Huſband, ſubject to the burdens which the ſaid Cuſtoms make him liable to; and in others, the Survivor gathers all the Fruits that are hanging by the Roots in the Eſtate that is reſtored, with the burden of paying half the charge of Tillage and Seed: and in others again, the Fruits are divided into two equal Shares. And theſe different Uſages have in general their Equity founded in this, that thoſe who marry do contract on the conditions of theſe Cuſtoms, unleſs they derogate from them by expreſs Clauſes. And in particular each Uſage is founded either upon the uncertainty of the Event which may give ſome advantage to the perſon who ſhall ſurvive, or upon other Motives which render theſe Partitions juſt and equitable.

[m] *L. 7. §. 1. ff. ſol. matr. d. l. §. 9. l. 11. eod. l. 78. §. 2. ff. de jur. dot. l. un. §. 9. C. de rei ux. act.*

[n] *L. 5. & l. 6. ff. ſol. matr.*

[*It may not be improper to obſerve here, that by the Law of* England *Marriage hath this effect as to the Eſtate of the Wife, that all her Moveable Goods, which are termed Chattels Perſonal, which ſhe brings with her, do preſently paſs into the Husband's Patrimony, nor can any part of them be reaſſumed by the Wife ſurviving her Husband, but her Woman's Apparel. And it is the ſame as to the Wife's Immoveables, or Chattels Real, if aliened by the Husband in his Life-time; but for thoſe which are not alienated, the Husband being dead, they ſhall return to the Wife. But if a Wife being Executrix, or Adminiſtratrix to a former Husband, marries a ſecond and ſurvives him, ſhe ſhall have all thoſe Goods, both Perſonal and Real, which ſhe brought unto him as poſſeſſed of by reaſon of that Relation and Office, and which are not alienated by her ſecond Husband, reſtored unto her without diminution.* Cowel's Inſtit. of the Law of *England*, lib. 1. tit. 10. §. 18. *Coke* 1 Inſtit. fol. 351. b]

[*As to the Real Eſtate which the Wife is ſeiſed of, if the Husband hath iſſue by the ſame Wife, Male or Female, born alive, if the Wife dies before the Husband, he ſhall hold the Lands during his Life by the Law of* England. *And he is called Tenant by the Courteſie of* England. *But this Courteſie is likewiſe granted to Husbands in* Scotland, *where it is called* Curialitas Scotiæ. *And it is likewiſe received in* Ireland. *Coke* 1 Inſtit. fol. 29. a. Regiam Majeſt. Scotiæ. lib. 2. cap. 58.]

SECT. I.

Of the Nature of Dowries, or Marriage Portions.

The CONTENTS.

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7. *The Dowry may be of all the Woman's Eſtate, or of a part of it.*
8. *Profits of the Dowry, which are not Revenues.*
9. *Stones taken out of Quarries, and other matters.*
10. *Lands purchaſed with the Wife's Portion.*
11. *The Gains of the ſurviving Huſband, or Wife.*
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15. *Exception for the alienating of the Dowry.*
16. *The Settlement of the Dowry implys the Condition, that the Marriage ſhall be accompliſhed.*

I.

1. The Definition of a Dowry. A Dowry is the Goods which a woman brings in Marriage to her Huſband, that he may enjoy them, and have the Adminiſtration of them during their Marriage [a].

[a] Dotis cauſa perpetua eſt, & cum voto ejus qui dat ita contrahitur, ut ſemper apud maritum ſit. *l.* 1. *ff. de jur. dot.* Fructus dotis ad (maritum) pertinent. *l.* 10. §. 3. *eod.*

II.

2. The Huſband enjoys the Dowry, for the Charges of the Marriage. The Revenues of the Dowry are deſtinated to be a help towards the Maintenance of the Huſband, the Wife, and their Family, and towards defraying the other Charges of the Marriage. And it is on the account of theſe Charges that the Huſband has a right to the enjoyment of it [b].

[b] Dotis fructum ad maritum pertinere debere, æquitas ſuggerit. Cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l.* 7. *ff. de jur. dot.*

Apud (maritum) dos eſſe debet, qui onera ſuſtinet. *l.* 65. §. *ult. ff. pro ſocio.* Pro oneribus matrimonii, mariti lucro fructus totius dotis eſſe. *l.* 20. C. *de jur. dot.*

III.

3. In what manner the Husband is Maſter of the Dowry. The Right which the Huſband has to the Dowry of his Wife, is a conſequence of their Union, and of the Power which the Huſband has over the Wife her ſelf. And this Right conſiſts in this, that he has the Adminiſtration and Enjoyment of the Goods of the Dowry, which the Wife cannot take from him; that he may ſue at Law, in his own Name as Huſband, for the Recovery of the Goods of the Dowry out of the hands of third perſons who detain them wrongfully, or are Debtors of them [c]: and that thus he exerciſes, in his own Name as Huſband, the Rights, and proſecutes the Actions which relate to the Dowry, in ſuch a manner as makes him to be conſidered as if he were Maſter of the Goods; but which does not hinder the Wife from retaining the Property of them [d]. And it is theſe ſeveral effects of the Rights of the Huſband, and of thoſe of the Wife, to the Dowry, which makes the Laws to conſider the Dowry, both as being the Goods of the Wife, and likewiſe the Goods of the Huſband.

[c] Dos ipſius filiæ proprium patrimonium eſt. *l.* 3. §. 5. *ff. de minor.*

Si res in dotem dentur, puto in bonis mariti fieri. *l.* 7. §. 3. *ff. de jur. dot.* Idem reſpondit, conſtante matrimonio, dotem in bonis mariti eſſe. *l.* 21. §. 4. *ff. ad municip.*

De his quæ in dotem data ac direpta commemoras, mariti tui eſſe actionem, nulla eſt dubitatio. *l.* 11. *C. de jure dot.* Rei dotalis nomine, quæ periculo mulieris eſt, non mulier furti actionem habet, ſed maritus. *l.* 49. *in fine ff. de furt.* Doce ancillam de qua ſupplicas dotalem fuiſſe, in notione præſidis, quo patefacto, dubium non erit vindicari ab uxore tua nequiviſſe. *l.* 9. *C. de rei vind.*

[d] Cùm eædem res ab initio uxoris fuerint, & naturaliter in ejus permanſerint dominio: non enim, quod legum ſubtilitate tranſitus earum in patrimonium mariti videatur fieri, ideò rei veritas deleta vel confuſa eſt. *l.* 30. *C. de jur. dot.* Quamvis in bonis mariti dos ſit, mulieris tamen eſt. *l.* 75. *ff. eod.*

We have not put down in this article, what is ſaid in the texts here quoted, that the Wife her ſelf cannot bring an Action at Law for Recovery of the Goods which are part of her Marriage Portion; becauſe that by our Cuſtom, altho' the Husband may ſue in his own Name alone, yet the Wife may likewiſe ſue, not only when ſhe is ſeparated from her Husband, but even altho' ſhe be not ſeparated, provided that the Husband agree to it, and that he impower her to do it, or that, upon his Refuſal, the Judge authorizes her to do it.

IV.

The Dowry conſiſting of Money, or other Things, whether Moveable or Immoveable, which have been eſtimated in the Contract of Marriage at a certain Price, is the Property of the Huſband: and he becomes Debtor for the Money given in Dowry, or for the Price of the Things eſtimated. For this Eſtimation makes it a Sale of the Things to him: and the Dowry conſiſts in the Price agreed on [e], *4. Of the Dowry in Money, or in Things eſtimated.*

[e] Si ante matrimonium æſtimatæ res dotales ſunt, hæc æſtimatio quaſi ſub conditione eſt. Namque hanc habet conditionem, ſi matrimonium fuerit ſecutum. Secutis igitur nuptiis, æſtimatio rerum perficitur, & fit vera venditio. *l.* 10. §. 4. *ff. de jur. dot.* Quoties res æſtimatæ in dotem dantur, maritus dominium conſecutus, ſummæ, velut pretii, debitor efficitur. *l.* 5. *C. de jur. dot.*

V.

If the Things thus eſtimated happen to be damaged, or to periſh during the Marriage; it is the Huſband who, being Proprietor of the Things, bears the Loſs of them, as he would reap the Profit, if there were any. But the Profit and the Loſs of the Things which have not been eſtimated belong to the Wife, who has always retained the Property of them [f]. *5. The Eſtimation makes the Thing to be at the Huſband's peril.*

[f] Plerumque intereſt viri, res non eſſe æſtimatas, ne periculum rerum ad eum pertineat. *l.* 10. *ff. de jur. dot. l.* 10. *C. eod.* Quoties igitur non æſtimatæ res in dotem dantur, & meliores, & deteriores mulieri fiunt. *d. l.* 10. *ff. de jur. dot.* Æſtimatarum rerum maritus quaſi emptor, & commodum ſentiat, &

& diſpendium ſubeat, & periculum expectet. *l. un.* §. 9. *in f. C. de rei ux. act.*

VI.

6. Conſequences of this Eſtimation. In the caſe where the Things which are part of the Dowry are eſtimated, the Rules concerning them are the ſame with thoſe which have been explained in the Contract of Sale. For this Eſtimation is a true Sale[g].

[g] Quia æſtimatio venditio eſt. *l.* 10. §. 5. *in f. ff. de jur. dot. l.* 1. & *l.* 10. *C. eod.*

VII.

7. The Dowry may be of all the Woman's Eſtate, or of a part of it. The Dowry may comprehend either all the Eſtate of the Wife preſent and to come, or only all the Eſtate ſhe has at preſent, or a part of it, according as it has been agreed between them[h]. And the Goods of the Wife which are no part of the Dowry, are called Paraphernal Goods, of which we ſhall ſpeak in the fifth Section.

[h] Nulla lege prohibitum eſt univerſa bona in dotem marito fœminam dare. *l.* 4. *C. de jur. dot. l.* 72. *ff. eod. Toto tit. ff. de jur. dot.*

VIII.

8. Profits of the Dowry which are not Revenues. If the Huſband reaps from the Portion which he had in Marriage with his Wife any Profit which may be reckoned a Revenue, it belongs to him. But if the ſaid Profit is not of the nature of Fruits and Revenues, it is a Capital, which augments the Dowry. Thus, the Cuttings of Coppice Woods, the Trees which are taken out of Nurſeries, are Revenues. But if the Huſband ſells great Trees which the Wind has thrown down in a Wood, in a Warren, or an Orchard; if he ſells the Materials of an Edifice gone to decay, which it is neither uſeful nor neceſſary to rebuild; all the Profits which ariſe from theſe kinds of Things, the Expences being deducted, are Capital Stocks which go to the augmentation of the Dowry. And it would be the ſame thing if there ſhould happen any Addition to the Lands which are part of the Dowry, whether it be in their Extent, as if a Piece of Ground lying near a River happens to receive any Accretion from it: or in their Value, as if a Right of Service, or ſuch like, be diſcovered to belong to them[i].

[i] Si arbores cæduæ fuerunt, vel gremiales, dici oportet in fructus cedere, Si minus, quaſi deteriorem fundum fecerit maritus, tenebitur. Sed etſi vi tempeſtatis ceciderunt, dici oportet pretium earum reſtituendum mulieri: nec in fructum cedere, non magis quàm ſi theſaurus fuerit inventus. In fructum enim non computabitur, ſed pars ejus dimidia reſtituetur, quaſi in alieno inventi. *l.* 7. §. 12. *ff. ſolut. matr. l.* 8. *ff. de fundo dot.* Sive ſuperficiem ædificii dotalis, voluntate mulieris vendiderit, nummi ex ea venditione recepti ſunt dotis. *l.* 32. *ff. de jur. dot.*

Si grandes arbores eſſent, non poſſe eas cedere. *l.* 11. *ff. de uſufr.* Incrementum videtur dotis, non alia dos, quemadmodum ſi quid alluvione acceſſiſſet. *l.* 4. *ff. de jure dot.*

IX.

9. Stones taken out of Quarries, and other matters. The Stones of Quarries, and the other matters which are taken out of a Ground, ſuch as Chalk, Plaiſter, Sand, and the like, are Revenues which belong to the Huſband. Whether it be that the ſaid matters appeared at the time of the Marriage: or that the Huſband made the firſt diſcovery of them[l]; in which caſe he recovers the Expences he has been at in putting the Ground in a condition of yielding this new Revenue[m]. But if theſe matters are ſuch, that they cannot be reckoned among the Fruits, and that they do not make a yearly Revenue; but a Profit to be made only for once; the ſaid Profit will be a Capital Stock, and the Dowry will be encreaſed by the Profit made out of theſe matters, the charges being firſt deducted[n].

[l] Sed ſi cretifodinæ—vel cujus alterius materiæ ſint, vel arenæ, utique in fructu habebuntur. *l.* 7. §. 14. *ff. ſol. matr. l.* 8. *eod.*

[m] Vir in fundo dotali lapidicinas marmoreas aperuerat: divortio facto, quæritur, marmor quod cæſum, neque exportatum eſſet, cujus eſſet: & impenſam in lapidicinas factam mulier an vir præſtare deberet? Labeo, marmor, viri eſſe, ait, cæterùm viro negat quidquam præſtandum eſſe à muliere, quia nec neceſſaria ea impenſa eſſet, & fundus deterior eſſet factus. Ego non tantùm neceſſarias, ſed etiam utiles impenſas præſtandas à muliere exiſtimo, nec puto fundum deteriorem eſſe, ſi tales ſunt lapidicinæ in quibus lapis creſcere poſſit. *l. ult. ff. de fundo dot.*

[n] Si ex lapidicinis dotalis fundi, lapidem, vel arbores quæ fructus non eſſent, vendiderit, nummi ex ea venditione recepti, ſunt dotis. *l.* 32. *ff. de jure dot.* Nec in fructu eſt marmor, niſi talis ſit, ut lapis ibi renaſcatur quales ſunt in Gallia, ſunt & in Aſia. *l.* 7. §. 13. *ff. ſol. mat.*

As to theſe Expences, ſee the eleventh and the following Articles of the third Section, and the ſeventeenth Article of the tenth Section of the Contract of Sale.

X.

10. Lands purchaſed with the Wife's Portion. The Lands which the Huſband purchaſes with the Money he got in Marriage with his Wife, are not part of the Dowry; but the Property of the Huſband[o].

[o] Ex pecunia dotali fundus à marito tuo comparatus, non tibi quæritur. *l.* 12. *C. de jur. dot.* Sive cùm nupſiſſes mancipia in dotem dediſti, ſive poſt datam dotem, de pecunia dotis, maritus tuus quædam comparavit, juſtis rationibus dominia eorum ad eum pervenerunt. *l. ult. C. de ſervo pig. dat. man.*

The fifty fourth Law, and the twenty sixth and twenty seventh Laws, ff. de jure dot. *are to be underſtood of the Purchaſe made for the Wife, as appears by theſe two laſt mentioned Laws.*

XI.

11. The Gains of the ſurviving Husband, or Wife. It may be agreed, that the Huſband ſurviving the Wife ſhall have a certain Profit out of the Wife's Eſtate. And this Profit may be ſtipulated, either in caſe there be Children of the Marriage, or even in caſe there happen to be none[p]. And they may likewiſe regulate ſome Profit for the Wife, out of the Huſband's Eſtate, in caſe ſhe outlives him.

[p] Si deceſſerit mulier conſtante matrimonio, dos non in lucrum mariti cedat, niſi ex quibuſdam pactionibus. *l. un.* §. 6. *C. de rei ux. act.* Diminutio dotis. *l.* 19. *C. de donat. ante nupt.* Si pater dotem dederit, & pactus ſit ut mortuâ in matrimonio filiâ, dos apud virum remaneret, puto, pactum ſervandum, etiam ſi liberi non interveniant. *l.* 12. *ff. de pact. dot.* Si convenerit, ut quoquo modo diſſolutum ſit matrimonium, liberis intervenientibus, dos apud virum remaneret, &c. *l.* 2. *ff. de pact. dot. l.* 26. *eod. l.* 1. *ff. de dote præleg. v. l.* 9. *C. de pact. convent. & Nov.* 97. *c.* 1. *de æqual. dot. & propt. nupt. don. & augm. dot.*

It is to be remarked on this Article, that the Cuſtoms of Places regulate differently the Gains as well of the Huſband as of the Wife: and theſe Gains regulated by the Cuſtoms are acquired of right, altho' there were no expreſs agreement about them.

[*At the end of the Preamble to this Title, we have already mentioned what Profit the ſurviving Husband has out of his Wife's Eſtate by the Law of* England, *which is, that if there be a Child born alive of the Marriage, the Husband is entitled to hold the Lands during his Life. Which Privilege is called the Courteſie of* England. *So likewiſe by the Law of* England, *the Wife, if ſhe ſurvives her Husband, has a Right by Marriage, without any ſpecial Contract, to a Third part of all ſuch Lands and Tenements which her Husband was ſeiſed of in Fee, for her Life.* Cowel's Inſtit. lib. 1. tit. 10. §. ult. *Coke* 1 Inſt. fol. 30. b. *And as to the Perſonal Eſtate of the Husband, if he dies Inteſtate, leaving Children behind him, his Widow is entitled to one Third Part of his Perſonal Eſtate; and if there be no Children, to one Half.* Stat. 22 & 23. Car. II. cap. 10. *The Widows of Freemen of the City of* London *have this farther Privilege, that their Husbands, even by Will, cannot deprive them of their Right to a third Part of his Eſtate, without their own conſent. And if their Husbands die Inteſtate, they have not only a Right to their own Third Part by the Cuſtom, but likewiſe another Third Part is to be divided between the Widow and the Children, and the remaining Third Part goes wholly to the Children.* Privilegia Londini, pag. 279.]

XII.

12. Liberty of all lawful and honeſt Pacts. In Contracts of Marriage, as in all others, the Parties contracting may make all manner of Agreements, whether relating to the Dowry, or otherwiſe; provided that the Agreement have nothing in it that is unlawful, diſhoneſt, or that is forbidden by any Law or Cuſtom[q].

[q] Si qua pacta interceſſerint, pro reſtitutione dotis, vel pro tempore vel pro uſuris, vel pro alia quacumque cauſa, quæ nec contra leges, nec contra conſtitutiones ſunt, ea obſerventur. *l.* 1. §. *ult. C. de rei ux. act.* See the twentieth Article of the firſt Section of the Rules of Law.

XIII.

The Lands which the Huſband got in Marriage with his Wife, can neither be alienated, nor mortgaged by the Huſband, even altho' the Wife ſhould conſent to it[r]. *13. The Husband cannot alienate the Lands he got in Marriage with his Wife.*

[r] Fundum dotalem non ſolùm hypothecæ titulo dare, ne conſentiente muliere maritus poſſit, ſed nec alienare, ne fragilitate naturæ ſuæ in repentinam deducatur inopiam. *l. un.* §. 15. *Cod. de rei ux. act.*

This Article is to be underſtood according to the Uſage of the Countries where the Wife cannot alienate her Dowry. But ſhe may alienate it in ſome Countries, with the Husband's conſent. It is neceſſary likewiſe to obſerve, that in ſome Countries, the Wife cannot ſo much as bind her ſelf, even with the conſent of her Husband; which preſerves her whole Dowry entire to her, whether it conſiſt in Moveables, or Immoveables.

[*In* England, *the Dowry of the Wife may be alienated by the joint conſent of the Husband and Wife; for they may join in levying a Fine for that purpoſe.* Vid. Stat. 4 H. VII. cap. 24.]

XIV.

The Prohibition of alienating the Lands, which are the Wife's Portion, includes that of ſubjecting them to Services, or ſuffering thoſe due to them to be loſt, and of making their condition worſe any other way[ſ]. *14. Neither can he ſubject them to Services, or other Burdens.*

[ſ] Julianus, libro ſexto decimo digeſtorum ſcripſit, neque ſervitutes fundo debitas poſſe maritum amittere, neque alias imponere. *l.* 5. *ff. de fund. dot.*

XV.

If during the Marriage there happens any extraordinary caſe, which may require the Alienation of the Wife's Dowry, ſuch as that of Redeeming out of Captivity, or out of Priſon, the Huſband, the Wife, or their Children, or other neceſſary Cauſes; in which caſe the Alienation may be permitted by a Decree of Court, the Judge enquiring into the merits of the Cauſe, and into the circumſtances[t]. *15. Exception for the alienating of the Dowry.*

[t] Manente matrimonio non perdituræ uxori ob has cauſas dos reddi poteſt: ut ſeſe ſuoſque alat—— ut in exilium, ut in inſulam relegato parenti præſtet alimonia, aut ut egentem virum, fratrem, ſororemve, ſuſtineat. *l.* 73. §. 1. *ff. de jur. dot. v. l.* 20. *ff. ſol. matr.* Sed etſi ideo maritus ex dote expendit, ut à latronibus redimerit neceſſarias mulieri perſonas: velut mulier vinculis vindicet de neceſſariis ſuis aliquem, reputatur ei quod expenſum eſt, ſive pars dotis ſit, pro ea parte: ſive tota dos ſit, actio dotis evaneſcit. *l.* 21. *ff. ſolut. matr.*

We do not expreſs in this Article all the caſes wherein theſe Laws permit the imploying a part of the Marriage Portion, and even the whole Portion. For our Uſage in this particular is more reſerved: and ſome Cuſtoms have reſtrained the permiſſion of Alienating the Dowry, to the *neceſſity of providing Suſtenance for the Family, or to deliver the Husband out of Priſon. So that we thought it proper to add to this Rule, the Temperament of this Judicial Permiſſion, after full Cognizance of the matter; as is the Uſage with us.*

XVI.

16. The Settlement of the Dowry implys the Condition that the Marriage ſhall be accompliſhed.

All Settlements of Dowries imply the Condition, that the Marriage ſhall be accompliſhed. And the Covenants relating to the Dowry, as all the other Covenants in a Contract of Marriage, are annulled, if the Marriage is not ſolemnized, or if for ſome cauſe it be declared null and void[u].

[u] Omnis dotis promiſſio futuri matrimonii tacitam conditionem accipit. *l.* 68. *ff. de jur. dot. l.* 10. §. 4. *eod.* Dotis appellatio non refertur ad ea matrimonia, quæ conſiſtere non poſſunt. Neque enim dos ſine matrimonio eſſe poteſt. Ubicunque igitur matrimonii nomen non eſt, nec dos eſt. *l.* 3. *ff. de jur. dot.*

SECT. II.

Of the Perſons who give the Dowry, and of their Engagements.

The CONTENTS.

1. *The Father endows his Daughter.*
2. *The Maid, or Widow, that is from under her Father's Juriſdiction, ſettles her own Dowry.*
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5. *The Dowry given by the Father is called* Dos Profectitia.
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10. *The Dowry coming from the Grandfather, and other Aſcendants on the Father's ſide.*
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13. *Dowry ſettled by the Mother.*
14. *Warranty of the Dowry.*

I.

1. The Father endows his Daughter.

THE Daughter who marries, ought to be endowed by her Father, if he be alive. For the duty of the Father to take care of his Children, and to provide for them, implies that of giving the Daughter a Marriage Portion[a].

[a] Neque enim leges incognitæ ſunt, quibus cautum eſt omnino paternum eſſe officium, dotem pro ſua dare progenie. *l.* 7. *C. de dot. prom.* Capite trigeſimo quinto legis Juliæ, qui liberos, quos habent in poteſtate, injuria prohibuerint ducere uxores, vel nubere, vel qui dotem dare non volunt, ex conſtitutione divorum Severi & Antonini, per proconſules præſideſque Provinciarum, coguntur in matrimonium collocare, & dotare. *l.* 19. *ff. de ritu nup. v. Nov.* 115. *c.* 3. §. 11.

What is ſaid in this laſt Text concerning the Marriage of Daughters againſt the will of their Fathers, makes it neceſſary to obſerve the diſpoſition of the Edict of 1556, *and of the other Ordinances, which forbid the Marriages of Children without the conſent of their Parents; of Sons, till they attain the age of thirty years, and of Daughters till the age of twenty five.* See *Exod.* xxii. 17. xxxiv. 15. *Deut.* vii. 3.

II.

2. The Maid, or Widow, that is from under her Father's Juriſdiction, ſettles her own Dowry.

When a Maid, or Widow, that is no longer under the Juriſdiction of her Father, marries, ſhe ſettles her own Dowry, and ſtipulates the Conditions of it[b].

[b] *Tot. tit. ff. de jur. dot.*

III.

3. The Settlement of the Dowry of a Maid that is a Minor.

When a Young Woman under Age marries after the death of her Father, ſeeing ſhe is Miſtreſs of her own Eſtate, altho' under the care of a Tutor, or Guardian, yet it is ſhe her ſelf that ſettles her Dowry, with the conſent and approbation of her Tutor, or Guardian[c].

[c] Mulier in minori ætate conſtituta, dotem marito, conſentiente generali vel ſpeciali curatore, dare poteſt. *l.* 28. *C. de jur. dot.*

IV.

4. If the Father endows his Daughter, it is preſumed to be out of his own Eſtate, and not out of what the Daughter may have of her own beſides.

If a Father, whoſe Daughter has an Eſtate of her own, which ſhe inherited of her Mother, or ſome other Perſon, and of which the Father has the Management, as being his Daughter's Tutor, or Guardian, ſettles on her a Marriage Portion, without ſpecifying whether it is out of the Daughter's proper Eſtate, or his own; he is reputed to give it, not as Tutor, or Guardian, to his Daughter, but as her Father, and becauſe of the duty incumbent on him to endow his Daughter, and that out of his own Eſtate. And it would be the ſame thing, altho' this Daughter were already emancipated[d].

d Cum

[d] Cùm pater curator ſuæ filiæ, juris ſui effectæ, dotem pro ea conſtituiſſet, magis eum quaſi patrem id, quam quaſi curatorem feciſſe videri. *l. 5. §. 12. ff. de jur. dot.* Si pater dotem pro filia ſimpliciter dederit—— ſancimus ſiquidem nihil addendum exiſtimaverit, ſed ſimpliciter dotem dederit, vel promiſerit, ex ſua liberalitate hoc feciſſe intelligi, debito in ſua figura remanente. *l. ult. C. de dotis promiſſ.*

V.

5. The Dowry given by the Father is called Dos Profectitia.

The Dowry which the Father gives his Daughter out of his own Eſtate, is, with reſpect to him, diſtinguiſhed in the *Roman* Law by the Name of *Dos Profectitia*, becauſe it is from the Father that it proceeds[e].

[e] Profectitia dos eſt, quæ à patre vel parente profecta eſt, de bonis vel facto ejus. *l. 5. ff. de jur. dot.* Si pater pro filia emancipata dotem dederit, profectitiam nihilominus dotem eſſe nemini dubium eſt. *d. l. 5. §. 11. ff. de jur. dot.*

VI.

6. Reverſion of the Dowry which proceeds from the Father.

The Dowry which proceeds from the Father returns to him, if he ſurvives his Daughter, and ſhe dies without Children[f].

[f] Jure ſuccurſum eſt patri, ut filia amiſſa, ſolatii loco cederet, ſi redderetur ei dos ab ipſo profecta: ne & filiæ amiſſæ, & pecuniæ damnum ſentiret. *l. 6. ff. de jur. dot.* Dos à patre profecta, ſi in matrimonio deceſſerit mulier filia familiâs, ad patrem redire debet. *l. 4. C. ſoluto matr. l. 2. C. de bon. quæ lib.* Si conditio ſtipulationis impleatur, & poſtea filia ſine liberis deceſſerit, non erit impediendus pater, quominus ex ſtipulatu agat. *l. 40. ff. ſol. matr.*

If the Daughter who is endowed by her Father, dies without Children, and makes a Teſtament, will the Right of Reverſion hinder the effect of the Daughter's Diſpoſition, ſo as that the Father may take back the whole Portion? V. l. 59. ff. ſol. matr. *It would ſeem by this Law, that the Daughter might diſpoſe of it by Will. Which muſt be underſtood, of that proportion of it which ſhe may give away without encroaching on the Legitime, or Legal Portion due to the Father.*

VII.

7. The Foundation and Uſe of this Right.

This Right of Reverſion of the Dowry is preſerved to the Father, altho' the Daughter had been ſet at Liberty from under the Father's Juriſdiction by Emancipation. For this Right is not annexed to that kind of Paternal Authority, which is loſt by Emancipation, but to the Natural Right which is inſeparable from the Name of Father[g]: and that it may be as a Comfort to him under the Loſs he ſuſtains by his Daughter's death[h].

[g] Non jus poteſtatis, ſed parentis nomen dotem profectitiam facit. *l. 5. §. 11. ff. de jur. dot.* Etiamſi in poteſtate non fuerit patris, dos ab eo profecta reverti ad eum debet. *l. 10. ff. ſol. matr.*

[h] Filia amiſſa, ſolatii loco. *l. 6. ff. de jur. dot.*

We inſert this Article to ſhew, by the Reaſon of the Law from whence it is taken, that the Mother, and the Aſcendants on the Mother's ſide, ought not to be diſtinguiſhed from the Father, as to this Right of Reverſion. See the eleventh Article of this Section, and the Remark on it. As to Emancipation, which is mentioned in this Article, ſee the fifth and ſixth Articles of the ſecond Section of Perſons.

VIII.

8. The Dowry which comes from the Father is ſubject to the Profits due to the Husband.

This Right of Reverſion does not hinder the Huſband from retaining out of the Dowry which came from the Father, that which belongs to him as his Profit, according as it has been agreed on[i]: or as the matter is regulated by the Cuſtoms of the Places.

[i] Si pater dotem dederit & pactus ſit, ut mortuâ in matrimonio filiâ, dos apud virum remaneret, puto pactum ſervandum: etiamſi liberi non interveniant. *l. 12. ff. de pact. dotal.*

IX.

9. If the Father is mad, or a Prodigal.

If the Father were put under the care of a Guardian, as being out of his Senſes, or as being a Prodigal, or for other Cauſes; or if he were abſent, or in any other condition which ſhould oblige the Magiſtrate to take care of the Marriage and Endowment of his Daughter; the Marriage Portion which ſhe receives out of her Father's Eſtate, will be conſidered as a Dowry proceeding from the Father, and ſettled by him on his Daughter[l].

[l] Si curator furioſi, vel prodigi, vel cujuſvis alterius, dotem dederit, ſimiliter dicemus dotem profectitiam eſſe. *l. 5. §. 3. ff. de jur. dot.* Sed etſi proponas prætorem vel præſidem decreviſſe, quantum ex bonis patris vel ab hoſtibus capti, aut à latronibus oppreſſi, filiæ in dotem detur: hæc quoque profectitia videtur. *d. l. 5. §. 4.*

X.

10. The Dowry coming from the Grandfather, and other Aſcendants on the Father's ſide.

All that has been ſaid of the Father, with reſpect to the Dowry coming from him, and reverting to him, is likewiſe to be underſtood of the Grandfather, and other Aſcendants on the Father's ſide[m].

[m] Profectitia dos eſt quæ à patre, vel parente profecta eſt. *l. 5. ff. de jur. dot.* See the Remark on the following Article.

XI.

11. Reverſion to Strangers.

All perſons, Parents, or Strangers, may give a Marriage Portion[n]. But they have not the Right of Reverſion, unleſs they have ſtipulated it. For it is a free and irrevocable Gift which they have been pleaſed to make[o].

[n] Promittendo dotem omnes obligantur, cujuſcunque ſexûs conditioniſque ſint. *l. 41. ff. de jure dot.*

[o] Si dotem marito libertæ veſtræ dediſtis, nec eam reddi ſoluto matrimonio vobis incontinenti pacto, vel ſtipulatione proſpexiſtis: hanc culpâ uxoris diſſoluto matrimonio penes maritum remanſiſſe conſtitit, licèt eam ingratam circa vos fuiſſe oſtenderitis. *l. 24. C. de jur. dot.* Accedit ei & alia

ſpecies ab rei uxoriæ actione, ſi quando etenim extraneus dotem dabat nulla ſtipulatione, vel pacto pro reſtitutione ejus in ſuam perſonam facto—— niſi expreſſim extraneus ſibi dotem reddi pactus fuerit, vel ſtipulatus, cùm donaſſe magis mulieri, quàm ſibi aliquod jus ſervaſſe extraneus non ſtipul[illegible] videtur. Extraneum autem intelligimus omnem citra parentem per virilem ſexum aſcendentem. *l. un. §. 13. C. de rei ux. act.*

Why ſhould not the Mother, and the Aſcendants by the Mother's ſide, have the Right of Reverſion, which they ſeem to be excluded from by this thirteenth Section, which ranks them in the number of Strangers? Have not they the ſame Reaſons as the Father, Ne filiæ amiſſæ, & pecuniæ damnum ſentiret. *l. 6. ff. de jure dot. Our Cuſtoms deprive the Aſcendants of the Succeſſions of their Children in Eſtates of Inheritance, which they do not ſuffer to aſcend, for fear they ſhould paſs from one Line to another. But they preſerve to the Mother, and the other Aſcendants on her ſide, the Right of Reverſion in the ſame manner as to the Father.* See the ſeventh Article of this Section.

XII.

12. What the Father owes to the Daughter, is not conſidered as a Dowry coming from him.

If the Father endows his Daughter only out of what he has of hers, or was obliged to give her, as if a Stranger had given a Sum of Money to the Father, on condition that he ſhould lay it out as a Portion for his Daughter, this Dowry will not be conſidered as coming from the Father[p]; but it will be reckoned a Portion proceeding from another perſon, and the Daughter's own Patrimony. And it would be the ſame thing, if the Father was indebted to the Daughter on any other account[q].

[p] Si quis certam quantitatem patri donaverit, ita ut hanc pro filia daret, non eſſe dotem profectitiam Julianus, libro ſeptimo decimo digeſtorum ſcripſit. Obſtrictus eſt enim ut det. *l. 5. §. 9. ff. de jur. dot.*

[q] Parentis nomen dotem profectitiam facit, ſed ita demùm ſi ut parens dederit. Cæterùm ſi cùm deberet filiæ, voluntate ejus dedit, adventitia dos eſt. *d. l. 5. §. 11.*

XIII.

13. Dowry ſettled by the Mother.

Altho' it be a duty properly incumbent on the Father to endow his Daughter, and that he cannot endow her out of the Mother's Eſtate[r]; yet if the Mother has Goods which are no part of her own Dowry, ſhe may endow her Daughter out of them. And if the Father is not able to give a Portion to his Daughter, the Mother may in that caſe endow her out of her own Dowry, obſerving the Temperaments which the Cuſtoms preſcribe in the like caſes[s].

[r] Neque mater pro filia dotem dare cogitur, niſi ex magna & probabili cauſa, vel lege ſpecialiter expreſſa: neque pater de bonis uxoris ſuæ invitæ ullam dandi habet facultatem. *l. 14. C. de jur. dot.* Cùm uxor virum ſuum, quam pecuniam ſibi deberet, in dotem filiæ communis dare juſſerit: & id feciſſe dicatur: puto, animadvertendum eſſe, utrùm eam dotem ſuo, an uxoris nomine dedit. Si ſuo, nihilominus uxori eum debere pecuniam: ſi uxoris nomine dederit, ipſum ab uxore liberatum eſſe. *l. 2. ff. de jure dot.*

[s] Niſi pater aut non ſit ſuperſtes, aut egens eſt. *l. pen. ff. de agn. & alend. lib. Altho' theſe laſt words do not properly belong to the preſent ſubject, yet they may be applied to it. There are ſome Cuſtoms which altho' they do not allow a married Woman to alienate her Dowry, nor to bind her ſelf by an Obligation, yet they ſuffer her to lay out a certain part of her own Dowry in the Endowment of her Daughter, if the Father hath not wherewithal to endow her.*

XIV.

14. Warranty of the Dowry.

The perſons who give a Dowry, or Marriage Portion, whether it be in Money, Land, or Things of another Nature, can no more diſpoſe of what they have once given away, or promiſed; and they are obliged to warrant the Lands that are given, the Debts that are transferred, and the other Things, according to the Agreement made, or according to the Rules of Warranty which thoſe perſons are bound to who ſell or transfer any Thing[t].

[t] Rem quam pater in dotem genero pro filia dedit, nec recepit, alienare non poteſt. *l. 22. C. de jur. dot. l. 17. eod.* Evictâ re quæ fuerat in dotem data, ſi pollicitatio, vel promiſſio fuerit interpoſita, gener contra ſocerum, vel mulierem, ſeu hæredes eorum, condictione, vel ex ſtipulatione agere poteſt. *l. 1. C. de jur. dot. l. un. §. 1. C. de rei ux. act. §. 29. inſt. de act.*

SECT. III.

Of the Engagements of the Husband with reſpect to the Dowry, and of the Reſtitution of the Dowry.

The CONTENTS.

1. *The Huſband's Engagement to bear the charges of the Marriage.*
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4. *If the Huſband innovates the Obligation, it is at his own peril.*
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6. *How Preſcription may be imputed to the Huſband.*
7. *The caſe of Reſtitution of the Dowry.*
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10. *The Huſband's Gains diminiſh the Reſtitution of the Dowry.*
11. *Repairs and other Expences leſſen the Dowry.*
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16. *Uſeful Expences, how they are recovered.*
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18. *If the Repairs periſh by accident.*
19. *Expences for pleaſure.*
20. *Repairs for pleaſure.*

I.

1. The Huſband's Engagement to bear the charges of the Marriage.

THE Huſband having the Dowry in his Power, with a Right to enjoy it, that he may bear the charges of the Marriage, in maintaining himſelf, his Wife, and Family; the firſt of his Engagements, with relation to the Dowry, is to bear theſe charges[a].

II.

2. Of the care which the Huſband ought to take of the Effects pertaining to the Dowry.

Seeing the Huſband enjoys the Dowry, and has it in his Poſſeſſion, as much for his own Intereſt, as his Wife's; he ought to take the ſame care of it, as he does of his own Affairs, and his own proper Goods. Thus he ought to ſue the Debtors, repair and cultivate the Lands and Tenements, and in general have a watchful eye over every thing that relates to the preſervation of the Effects pertaining to the Dowry. And if thro' his Fault, or Negligence, there happen Loſſes and Diminutions, or that he commits Waſte on the Eſtate, he ſhall be bound to make them good[b]. As likewiſe to make good the Accidents, which may be occaſioned thro' Faults for which he is accountable[c].

III.

3. Diligence againſt the Debtors.

Altho' the Huſband be obliged to ſue the Debtors who have in their hands any part of his Wife's Portion, and that if he neglects to enter his Action, when it is free for him to do it, he is bound to make good all that ſhall happen to be loſt thro' his Negligence; yet nevertheleſs if the Debtor of the Dowry is the Father, or a Donor; we ought not to require of the Huſband, that he ſhould uſe the ſame diligence againſt them which he ought to uſe againſt a Stranger. But it is reaſonable in this caſe to give ſome grains of allowance, according as the circumſtances may require[d].

IV.

4. If the Huſband innovates the Obligation, it is at his own peril.

If a Huſband changes the nature of a Debt pertaining to the Dowry, by innovating the Obligation; this change will be at his own peril, and he will remain charged with the Debt, as if he had received it[e].

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[a] Dotis fructum ad maritum pertinere debere, æquitas ſuggerit. Cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l. 7. ff. de jur. dot. l. 20. C. eod.*

[b] Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, *ut in dote*, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l. 5. §. 2. ff. commod. l. 23. ff. de reg. jur.* In rebus dotalibus, virum præſtare oportet tam dolum quàm culpam, quia cauſa ſua dotem accipit. Sed etiam diligentiam præſtabit, quam in ſuis rebus exhibet. *l. 17. ff. de jur. dot. l. ult. C. de pact. conv.* Si extraneus ſit qui dotem promiſit, iſque defectus ſit facultatibus, imputabitur marito cur eum non convenerit. *l. 33. ff. de jur. dot.* See the following Article. Si fundum viro uxor in dotem dederit, iſque inde arbores deciderit, ſi hæ fructus intelliguntur, pro portione anni debent reſtitui. Puto autem: ſi arbores ceduæ fuerunt, vel gremiales, dici oportet in fructus cedere. Si minùs, quaſi deteriorem fundum fecerit maritus tenebitur. *l. 7. §. 12. ff. ſolut. matrim.*

[c] In his rebus quas præter numeratam pecuniam doti vir habet, dolum malum, & culpam eum præſtare oportere. Servius ait, ea ſententia Publii Mutii eſt. Nam is in Licinnia Gracchi uxore ſtatuit, quod res dotales in ea ſeditione qua Gracchus occiſus erat periſſent, ait, quia Gracchi culpa ea ſeditio facta eſſet, Licinniæ præſtari oportere. *l. 66. ff. ſolut. matrim.*

[d] Si non petierit maritus, tenebitur hujus culpæ nomine, ſi dos exigi potuerit. *l. 20. §. 2. ff. de pact. dot.* Si extraneus ſit, qui dotem promiſit, iſque defectus ſit facultatibus, imputabitur marito, cur eum non convenerit, maximè ſi ex neceſſitate, non ex voluntate dotem promiſerat. Nam ſi donavit, utcumque parcendum marito qui eum non præcipitavit ad ſolutionem qui donaverat, quemque in id quod facere poſſet, ſi conveniſſet, condemnaverat. Hoc enim Divus Pius reſcripſit, eos qui ex liberalitate conveniuntur, in id quod facere poſſunt condemnandos. Sed ſi vel pater, vel ipſa promiſerunt: Julianus quidem libro ſexto decimo Digeſtorum ſcribit, etiamſi pater promiſit, periculum reſpicere ad maritum: quod ferendum non eſt. Debebit igitur mulieris eſſe periculum. Nec enim quicquam judex propriis auribus audiet mulierem dicentem, cur patrem qui de ſuo dotem promiſit, non urſerit ad exſolutionem. Multò minus, cur ipſam non convenerit. Rectè itaque Sabinus diſpoſuit, ut diceret quod pater, vel ipſa mulier promiſit, viri periculo non eſſe: quod debitor, id viri eſſe: quod alius, ſcilicet donaturus, ejus periculo, ait, cui adquiritur. Adquiri autem mulieri accipiemus ad quam rei commodum reſpicit. *l. 33. ff. de jur. dot.*

We have thought proper to qualify this Rule in the manner that it is ſet down in this Article. For our Uſage is not in this particular ſo indulgent to the Huſband, as this thirty third Law, ff. de jure dot. *ſeems to be. And if on one hand it would be too hard to oblige the Huſband to uſe againſt a Father in Law, or againſt a Donor, the moſt rigid ſeverity for recovering the Debt; ſo on the other hand it would not be juſt that he ſhould be abſolutely excuſed from uſing any manner of diligence at all. So that it is neceſſary to apply ſome Temperament, which may regulate his Conduct according to the circumſtances.* See the twentieth Article of the fourth Section of Partnerſhip.

[e] Dotem à patre vel à quovis alio promiſſam, ſi vir novandi cauſâ ſtipuletur, cœpit viri eſſe periculum, cùm antè mulieris fuiſſet. *l. 35. ff. de jur. dot.* See the Title of Novations, in order to know what is meant by innovating a Debt; and notice has been already taken of it in the Plan of Matters.

V.

5. If the Husband receives Intereſt from a Debtor of the Dowry.

The Huſband who receives Intereſt from a Debtor of the Dowry, delaying on that account to call in the Principal Sum which he might have demanded, will be anſwerable for the Debt, if the ſaid Debtor becomes inſolvent [f].

[f] Cùm dotem mulieris nomine extraneus promiſit, mulieris periculum eſt: ſed ſi maritus, nomen ſecutus, uſuras exegerit, periculum ejus futurum, reſpondetur. *l. 71. ff. de jur. dot.*

VI.

6. How Preſcription may be imputed to the Huſband.

If the Lands or Tenements which are part of the Dowry be poſſeſſed by a third perſon, and the Huſband ſuffers the whole time limited for Preſcription to run out, he ſhall be anſwerable for it. Unleſs it be that at the time of the Marriage the Preſcription was very near being accompliſhed, and that there remained ſo little time to run, that the Huſband could not be blamed for not interrupting a Preſcription which was acquired without his knowledge [g].

[g] Si fundum, quem Titius poſſidebat bona fide, longi temporis poſſeſſione poterat ſibi quærere, mulier ut ſuum marito dedit in dotem, eumque petere neglexerit vir, cùm id facere poſſet, rem periculi ſui fecit. *l. 16. ff. de fundo dot.* Planè ſi pauciſſimi dies ad perficiendam longi temporis poſſeſſionem ſuperfuerunt, nihil erit quod imputabitur marito. *d. l.*

VII.

7. The caſe of Reſtitution of the Dowry.

The laſt Engagement of the Huſband is to reſtore the Dowry, whenever the caſe happens that it ought to be reſtored. As if the Wife dies without Children before the Huſband; if the Marriage is declared null and void; if they are divorced, or ſeparated from Bed and Board; or if the Wife obtains a Separation of Goods only becauſe of the Huſband's Poverty: if the Dowry was given to the Huſband at the time of Eſpouſals, and the Marriage was not accompliſhed. And when the Huſband dies, his Engagement to reſtore the Dowry paſſes to his Heirs, Executors, or Adminiſtrators [h].

[h] Cùm quærebatur an verbum, ſoluto matrimonio dotem reddi, non tantùm divortium, ſed & mortem contineret, hoc eſt, an de hoc quoque caſu contrahentes ſentirent. Et multi putabant, hoc ſenſiſſe, & quibuſdam aliis contra videbatur: ſecundùm hoc motus Imperator pronuntiavit, id actum eo pacto, ut nullo caſu remaneret dos apud maritum. *l. 240. ff. de verb. ſign.* Soluto matrimonio ſolvi mulieri dos debet. *l. 2. ff. ſol. matr.* Si conſtante matrimonio, propter inopiam mariti, mulier agere volet, unde exactionem dotis initium accipere ponamus? Et conſtat exinde dotis exactionem competere, ex quo evidentiſſimè apparuerit mariti facultates ad dotis exactionem non ſufficere. *l. 24. ff. ſol. matr. l. 29. C. de jur. dot.* See the fifth Section of the Separation of Goods.

VIII.

8. Acceſſions of the Dowry.

The Reſtitution of the Dowry extends not only to what has been delivered to the Huſband as the Dowry, but likewiſe to all the Acceſſions which may have augmented the Capital of the Dowry, and which ought not to belong to the Huſband. Thus the Augmentations of the nature of thoſe which have been mentioned in the eighth and ninth Articles of the firſt Section are to be reſtored with the Dowry [i].

[i] Quia ipſe fundus eſt in dote, quodcumque propter eum conſecutus fuerit à muliere maritus, quandoque reſtituet mulieri de dote agenti. *l. 52. ff. de jur. dot.*

IX.

9. To whom the Dowry ought to be reſtored.

When the caſe of reſtoring the Dowry happens, it ought to be reſtored either to the Wife, if ſhe has ſurvived her Huſband, and be of age to receive it; or to her Heirs, Executors, or Adminiſtrators, or to her Father, if it was he that ſettled it, or to the other perſons to whom the Dowry may appertain [l].

[l] Soluto matrimonio, ſolvi mulieri dos debet. *l. 2. ff. ſol. matr.* Hæc, ſi ſui juris mulier eſt. *d. l.* Dos ab eo (patre) profecta reverti ad eum debet. *l. 10. eod. l. 6. ff. de jure dot. l. un. §. 13. C. de rei ux. act. l. 2. C. de jure dot.*

X.

10. The Huſband's Gains diminiſh the Reſtitution of the Dowry.

If it has been agreed in the Contract of Marriage, or if it be regulated by Cuſtom, that the ſurviving Huſband ſhould retain a part of the Dowry, the Reſtitution will be diminiſhed in ſo much [m].

[m] *See the eleventh Article of the firſt Section.*

XI.

11. Repairs and other Expences leſſen the Dowry.

The Reſtitution of the Dowry is alſo leſſened by the Repairs, and other Charges which the Huſband, or his Heirs, Executors, or Adminiſtrators, have been at in preſerving the Effects of the Dowry, according to the nature of thoſe Diſburſements, and the Rules which follow [n].

[n] *See the following Articles.*

XII.

12. Three ſorts of Expences.

The Expences which the Huſband, or his Heirs, Executors, or Adminiſtrators, may have been at, are of three ſorts. Some are neceſſary, ſuch as thoſe which are laid out in repairing a Building which is ready to fall, and which ought to be preſerved. Others are uſeful, altho' not neceſſary, ſuch as the planting of an Orchard. And there are ſome which are neither neceſſary nor uſeful, and which ſerve only for pleaſure; ſuch as Paintings, or other Ornaments[o].

[o] Impenſarum quædam ſunt neceſſariæ, quædam utiles, quædam verò voluptariæ. *l.* 1. *ff. de imp. in res dot. fact.* Neceſſariæ hæ dicuntur, quæ habent in ſe neceſſitatem impendendi. *d. l.* 1. §. 1. Si ædificium ruens, quod haberi mulieri utile erat, refecerit. *d. l.* 1. §. 3. Utiles autem impenſæ ſunt, quas maritus utiliter fecit, remque meliorem uxoris fecerit, hoc eſt, dotem: veluti ſi novelletum in fundo factum ſit. *l.* 5. §. *ult.* & *l.* 6. *eod.* Voluptariæ autem impenſæ ſunt, quas maritus ad voluptatem fecit, & quæ ſpecies exornant. *l.* 7. *eod.*

XIII.

13. *Neceſſary Expences.* For the neceſſary Expences, the Huſband may retain the Lands or Tenements pertaining to the Dowry, or a part of them, according to their value: and may keep Poſſeſſion of them till he is reimburſed; and this is the reaſon why this ſort of Expences is ſaid to leſſen the Dowry[p]. For it is in effect leſſened by the neceſſity of cutting off from it that which is due to the Huſband, on the account of an Expence, without which the Lands or Tenements might have gone to ruine, or been damaged, or diminiſhed, and which the Huſband was obliged to lay out, that he himſelf might not be made accountable for the Loſs that ſhould happen[q].

[p] Quod dicitur neceſſarias impenſas ipſo jure dotem minuere, non eò pertinet, ut ſi fortè fundus in dote ſit, deſinat aliqua ex parte dotalis eſſe. Sed niſi impenſa reddatur, aut pars fundi, aut totus retineatur. *l.* 56. §. 3. *ff. de jure dot. l.* 1. §. 2. *ff. de imp. l.* 5. *eod.*

[q] Id videtur neceſſariis impenſis contineri, quod ſi à marito omiſſum ſit, judex tanti eum damnabit, quanti mulieris interfuerit, eas impenſas fieri. *l.* 4. *ff. eod. See the ſixteenth Article, and the Remark upon it.*

XIV.

14. *The Husband bears the charges of the Annual, and ordinary Expences.* The Expences which are laid out daily, and of courſe, either on the preſervation of the Lands and Tenements, ſuch as the leſſer Repairs of a Houſe, or for cultivating the Lands, ſuch as tilling, and ſowing, or gathering in the Fruits, are taken out of the Fruits themſelves, and out of the other Revenues, and are a charge on them. For the Fruits and Revenues are underſtood only to be that which remains of clear Profit, after deduction of the Expences that have been neceſſarily laid out in order to be able to enjoy. So that the Huſband does not recover theſe kind of Expences. But he recovers thoſe which paſs the bounds of what is neceſſary for preſerving the Lands and Tenements in good caſe, and for enjoying them[r].

[r] Nos generaliter definimus multum intereſſe ad perpetuam utilitatem agri, vel ad eam quæ non ad præſentis temporis pertineat, an verò ad præſentis anni fructum. Si in præſentis, cum fructibus hoc compenſandum. Si verò non fuit ad præſens tantùm apta erogatio, neceſſariis impenſis computandum. *l.* 3. §. 1. *ff. de imp.*

Impendi autem fructuum percipiendorum causâ, Pomponius, ait, quod in arando ferendoque agro impenſum eſt, quodque in tutelam ædificiorum, agrumve curandum, ſcilicet, ſi ex ædificio fructus aliqui percipiebantur. Sed hæ impenſæ non petentur, cùm maritus fructum totum anni retinet, quia ex fructibus priùs impenſis ſatisfaciendum eſt. *l.* 7. §. *ult. ff. ſol. matr.* Et ante omnia quæcumque impenſæ quærendorum fructuum causâ factæ erunt, quamquam eædem etiam colendi causâ fiant, ideoque non ſolum ad percipiendos fructus, ſed etiam ad conſervandam ipſam rem, ſpeciemque ejus neceſſariæ ſint: eas vir ex ſuo facit: nec ullam habet eo nomine ex dote deductionem. *l. ult. ff. de imp.* Quod dicitur impenſas, quæ in res dotales neceſſariò factæ ſunt, dotem diminuere, ita interpretandum eſt, ut ſi quid extra tutelam neceſſariam in res dotales impenſum eſt, id in ea cauſa ſit. Nam tueri res dotales vir ſuo ſumptu debet, alioqui tam cibaria dotalibus mancipiis data, & quævis modica ædificiorum dotalium refectio, & agrorum quoque cultura, dotem minuent. Omnia enim hæc in ſpecie neceſſariarum impenſarum ſunt. Sed ipſæ res ita præſtari intelliguntur, ut non tam impendas in eas, quàm deducto eo, minus ex his percepiſſe videaris. *l.* 15. *ff. eod.* Modicas impenſas non debet arbiter curare. *l.* 12. *eod.* Fructus eos eſſe conſtat qui deducta impensâ ſupererunt. *l.* 7. *ff. ſol. matr.*

XV.

15. *The Ground-Charges are taken out of the Fruits.* The Ground-Charges, ſuch as Quit-Rents, Land-Taxes, and other Dues which are Charges on the Fruits, are taken out of the Fruits[ſ].

[ſ] Neque ſtipendium, neque tributum ob dotalem fundum præſtita, exigere vir à muliere poteſt. Onus enim fructuum hæc impendia ſunt. *l.* 13. *ff. de imp. l.* 27. §. 3. *ff. de uſufr.*

XVI.

16. *Uſeful Expences, how they are recovered.* The Expences which are uſeful, altho' not neceſſary, ought to be repaid to the Huſband, or his Heirs, Executors, or Adminiſtrators. And altho' theſe Expences have been laid out without the Wife's conſent, yet they have their Action for recovering them[t].

[t] Cùm neceſſariæ quidem expenſæ dotis minuant quantitatem, utiles autem non aliter in rei uxoriæ ratione detinebantur, niſi ex voluntate mulieris, non abs re eſt, ſi quidem mulieris voluntas intercedat, mandati actionem à noſtra auctoritate marito contra uxorem indulgeri, quatenus poſſit per hanc quod utiliter impenſum eſt aſſervari. Vel ſi non intercedat mulieris voluntas, utiliter tamen res geſta eſt, negotiorum geſtorum adversùs eam ſufficere actionem. *l. un.* §. 5. *C. de rei uxor. act.* Ego non tantùm neceſſarias, ſed etiam utiles impenſas præſtandas à muliere exiſtimo. *l. ult. ff. de fund. dot.*

See the thirteenth Article of this Section. It is to be remarked on the ſaid thirteenth Article, and on the preſent, that what has been ſaid in the thirteenth Article touching the Right which the Husband has to detain the neceſſary Expences, and what is ſaid in the preſent Article *of the Action which the Husband has for recovering the Expences which are only uſeful, ought to be underſtood according to our Uſage; which is ſuch, that of what nature ſoever the Expences be, whether uſeful or neceſſary, the Husband, who in this quality was in Poſſeſſion of the Eſtate pertaining to the Dowry, cannot be diſpoſſeſſed, nor his Heirs, Executors, or Adminiſtrators, againſt their will, but by Authority of Juſtice. And this is likewiſe obſerved altho' there ſhould be no Reimburſement of Expences due; and this was alſo the practice under the* Roman *Law.* Dotis actione ſucceſſores mariti ſuper quod ei dotis nomine fuerat datum, convenire debes. Ingrediendi enim poſſeſſionem rerum dotalium hæredibus mariti non conſentientibus, ſine auctoritate competentis judicis nullam habes facultatem. *l.* 9. *C. ſolut. matr. And this is the Rule for all Poſſeſſors, that they cannot be turned out of Poſſeſſion but by Authority of Juſtice.* See the fifteenth Article of the ſixth Section of Covenants. *But as to what concerns the Reimburſement of the Husband, and the Right he has to detain the Dowry, for the Expences, it depends always on the prudence of the Judge to determine whether the Husband, or his Heirs, Executors, or Adminiſtrators, ought to remain in poſſeſſion till they are reimburſed: And this they are to judge of by the circumſtances; ſuch as the quantity of the Expences, the Value of the Lands and Tenements; the Security which the Huſband, or his Heirs, Executors, or Adminiſtrators may have ſome other way; the Value of the Fruits; and whether the enjoyment of ſome part of the Fruits may not ſuffice for their Reimburſement; the Quality of the Perſons, and of their Eſtates; and other circumſtances of the like nature.*

XVII.

17. *How we are to judge of the neceſſity or uſefulneſs of the Expences.*

Since there may ariſe difficulties about determining what Expences are neceſſary, or not, and what are uſeful, or not, it is to be left to the Prudence of the Judge to decide this matter according to the circumſtances. And this depends on divers Views, and on the regard that is to be had to the Quality of the Lands and Tenements, and other Things on which the Expences have been laid out; as if it is to preſerve, or to better a Houſe, or to recover a Debt: to the Quality of the Repairs, and other Changes; to the Convenience or Inconvenience that may follow from thence; to the proportion that may be between the Expence and the Improvement; and to other conſiderations of the like nature. Thus, for Inſtance, if for the cultivating of a Country Farm, it is neceſſary to build a Barn to it, or ſome other Edifice, this may be reckoned a neceſſary Expence: and if there is in a Houſe a place fit for making a Shop in, this may be reckoned an uſeful Expence[u].

[u] Quæ impendia ſecundùm eam diſtinctionem, ex dote deduci debeant, non tam facilè in univerſum definiri, quàm per ſingula ex genere, & magnitudine impendiorum æſtimari poſſunt. *l.* 15. *in f. ff. de imp. in res dot.* Si novam villam neceſſariò extruxit, vel veterem totam, ſine culpa ſua collapſam, reſtituerit, erit ejus impenſæ petitio. *l.* 7. §. *ult. ff. ſol. matr.* Si in domo piſtrinum, aut tabernam adjecerit. *l.* 6. *ff. de imp. in res dot. f.*

XVIII.

18. *If the Repairs periſh by accident.*

If it ſo fall out that the Repairs periſh thro' ſome accident, the Huſband, or his Heirs, Executors, or Adminiſtrators will nevertheleſs recover the charges they were at in making them. Becauſe the Work entitled them to the Recovery of the Expences which they laid out on it; and the Property of the Repairs belonging to the Wife, it is ſhe that bears the Loſs of them[x].

[x] Si fulſerit inſulam ruentem, eaque exuſta ſit, impenſas conſequitur. *l.* 4. *ff. de imp.*

XIX.

19. *Expences for pleaſure.*

The Expences which are laid out merely for pleaſure, without either neceſſity, or uſefulneſs, are not recovered, even altho' the Wife had engaged the Huſband to lay them out. For he ought to blame himſelf for an Expence which he had a mind to throw away[y].

[y] In voluptariis autem, Ariſto ſcribit, nec ſi voluntate mulieris factæ ſunt, exactionem parere. *l.* 11. *ff. de imp. l. un.* §. 5. *C. de rei uxor. act.*

XX.

20. *Repairs for pleaſure.*

If the Repairs made for pleaſure are ſuch, that they can be taken away without being deſtroyed, the Huſband, or his Heirs, Executors, or Adminiſtrators may take them away, in caſe of a refuſal to reimburſe them of the Charges which they have been at in making them. But if they are of ſuch a nature, that they can be of no uſe when taken away, ſuch as Painting in Freſco, it is not permitted to deface them. For this would be doing harm without reaping any profit[z].

[z] Pro voluptariis impenſis, niſi parata ſit mulier pati maritum tollentem, exactionem patitur. Nam ſi vult habere mulier, reddere ea quæ impenſa ſunt debet marito, aut ſi non vult pati debet tollentem, ſi modo recipiant ſeparationem. Cæterùm ſi non recipiant, relinquendæ ſunt. Ita enim permittendum eſt marito auferre ornatum quem poſuit, ſi futurum eſt ejus, quod abſtulit. *l.* 9. *ff. de imp.* Quod ſi voluptariæ ſint, licet ex voluntate ejus (uxoris) expenſæ, deductio operis quod fecit, ſine læſione tamen prioris ſpeciei, marito relinquatur. *l. un.* §. 5. *C. de rei ux. act.*

SECT. IV.

Of the Paraphernal Goods.

Which are the Paraphernal Goods.

THE Paraphernal Goods are all thoſe which the Wife does not give to her Huſband as part of her Dowry[a]; whether it be that ſhe expreſſes what ſhe reſerves to her ſelf, or that ſhe ſpecifies what ſhe is willing only to give as part of her Dowry. For whatever ſhe has over and above, is Paraphernal.

[a] Quæ Græci παράφερνα dicunt. *l.* 9. §. 3. *ff. de jur. dot.* Id eſt, *præter dotem.*

Thus, when the Wife gives to her Huſband in Marriage only all the Eſtate which ſhe has at preſent, or ſome particular Goods, the Remainder which ſhe either has at preſent, or may afterwards have by Inheritance, or otherwiſe, will be Paraphernal. But if ſhe gives in Marriage all her Eſtate preſent, and to come; in that caſe ſhe can never have any Paraphernal Goods.

Diſtinction between the Paraphernal Goods, and thoſe which are part of the Dowry.

The difference between the Dowry, and the Paraphernal Goods, conſiſts in this, that whereas the Revenues of the Dowry belong to the Huſband, the Revenues of the Paraphernal Goods are the Wife's own: and ſhe may diſpoſe of the ſaid Revenues, and of the Principal it ſelf, without the Authority of her Huſband.

Remarks on the nature of Paraphernal Goods.

This Nature of the Paraphernal Goods, which are no part of the Dowry, together with the Liberty given to the Wife to diſpoſe of the Revenues of the ſaid Eſtate, without conſulting her Huſband, or aſking his conſent, ſeems to have ſomething in it contrary to the Principles of their Union. For as the Huſband is the Head of the Wife, and has the charge of the Family, it would ſeem juſt that he ſhould be Maſter of all the Revenues of his Wife's Eſtate; which, as well as thoſe of the Huſband, ought to be imployed for the common uſe of Man and Wife, and of their Family: And this Liberty which the Wife has of enjoying a ſeparate Eſtate independently of her Huſband, is likewiſe an occaſion ſometimes of troubling the Peace and Tranquillity which the Marriage Union requires. And we ſee likewiſe, that in the ſame Law of the *Romans*, which takes away from the Huſband all right over the Paraphernal Eſtate, it is owned to be juſt, that the Wife putting her ſelf under the Conduct of her Huſband, ſhould likewiſe intruſt him with the Management of her Eſtate [b]. However, both the *Roman* Law and our Cuſtoms have received the Uſage of Paraphernal Goods; ſome of them having only regulated that if in the Contract of Marriage, the Wife does not ſpecify what Goods ſhe intends to allot for her Dowry; all the Eſtate which ſhe is ſeized or poſſeſſed of at the time of the Contract, are to be reputed as her Dowry.

[b] Bonum erat mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari. *l.* 8. *C. de pact. conv.*

There are again others, which have ſo favoured the uſe of Paraphernal Goods, and the Liberty of Wives to diſpoſe of them, that altho' the ſame Cuſtoms do not allow the Wife either to alienate, or to mortgage her Dowry, not even with the conſent and approbation of her Huſband; yet they allow her to enjoy, and to diſpoſe of her Paraphernal Goods, not only without the Authority, but even without the Conſent of her Huſband. And this diſpoſition is favourable in the ſaid Cuſtoms, as well as in the Provinces which are more particularly governed according to the Civil Law, where it is obſerved. Becauſe the Community of Goods between the Huſband and Wife not being received in uſe there, ſeeing the Wife has not the profit either of the Revenues of her own Portion, which belong to the Huſband, nor of the Eſtate which he may acquire during the Marriage; they leave her the liberty to augment her own Eſtate by the Profits which ſhe may be able to make of her Paraphernal Goods.

[*It is proper to obſerve here, that the Law of* England *allows of no Paraphernal Goods, beſides the Woman's Apparel. For by the Marriage, without any ſpecial Contract, the Husband acquires an abſolute Right and Property in all the Wiſe's Chattels Perſonal, in the Wife's poſſeſſion in her own Right. As to the Wife's Chattels Real, ſuch as Leaſes for years, and the like, they are not given to the Husband abſolutely, as all Chattels Perſonal are, by the Inter-marriage; but conditionally, if the Husband happen to ſurvive the Wife; and he hath power to alien them at his pleaſure. But in the mean time the Husband is poſſeſſed of the Chattels Real in her Right. Coke* 1 Inſtit. fol. 300. a. 351. a.]

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7. *What the Wife is poſſeſſed of without an apparent Title, belongs to the Huſband.*

I.

1. *Definition of the Paraphernal Goods.*

THE Paraphernal Goods are all the Goods which a married Woman has, beſides thoſe which have been given with her in Marriage to her Huſband. And theſe Goods are as it were a ſort of *Peculium*, or private Poſſeſſion, which the Wife reſerves to her ſelf over and above her Dowry, which goes to the Huſband[a].

[a] Si res dentur, in ea, quæ Græci παράφερνα dicunt, quæque Galli peculium appellant. *l.* 9. §. 3. *ff. de jur. dot.* Species extra dotem. *l.* 31. §. 1. *ff. de donat.* Res quas extra dotem mulier habet, quas Græci παράφερνα dicunt. *l.* 8. *C. de pact. conv.*

II.

2. *The Wife may diſpoſe of her Paraphernal Goods.*

The Wife may diſpoſe of her Paraphernal Goods, without the Authority and Conſent of her Huſband: and may put them to what uſe ſhe pleaſes, the Huſband having no right to comptrol her, even altho' ſhe had delivered them into his Cuſtody[b].

[b] Hac lege decernimus, ut vir in his rebus, quas extra dotem mulier habet, quas Græci parapherna dicunt, nullam uxore prohibente habeat communionem: nec aliquam ei neceſſitatem imponat. Quamvis enim bonum erit mulierem, quæ ſeipſam marito committit, res etiam ejuſdem pati arbitrio gubernari, attamen, quoniam conditores legum æquitatis convenit eſſe fautores; nullo modo, ut dictum eſt, muliere prohibente, virum in paraphernis ſe volumus immiſcere. *l.* 8. *C. de pact. conv.* Pecunias ſortis quas exegerit (maritus) ſervare mulieri, vel in cauſas ad quas ipſa voluerit, diſtribuere (ſancimus.) *l. ult. eod.*

III.

3. *In what manner the Wife may enjoy her Paraphernal Goods.*

As the Wife may enjoy, and diſpoſe of her Paraphernal Goods, ſo ſhe may either enjoy them her ſelf, or by other perſons, or leave the Enjoyment of them to her Huſband, for their common uſe, and that of their Family. And if the ſaid Goods conſiſt in Rents, or in Debts, ſhe may either her ſelf, or by other perſons, take up the principal Sums, the Rents, and Intereſt, if any is due, or leave it to her Huſband to recover them, ſhe giving him the neceſſary Powers for doing it[c].

[c] Habeat mulier ipſa facultatem, ſi voluerit, ſive per maritum, ſive per alias perſonas, eaſdem movere actiones, & ſuas pecunias percipere. *l. ult. C. de pact. conv.* Et uſuras quidem eorum circa ſe, & uxorem expendit. *d. l.* Si mulier marito ſuo nomina, id eſt fœneratitias cautiones quæ extra dotem ſunt, dederit, ut loco paraphernorum apud maritum maneant. *d. l. ult.*

IV.

4. *If the Paraphernal Eſtate conſiſts in Moveables.*

If the Paraphernal Eſtate, or a part of it, conſiſts in Rents, Debts, or in Moveable Effects; the Wife may either keep them in her own cuſtody, or put them into the hands of her Huſband, getting him to ſign an Inventory of them, as an acknowledgment of the Receipt of the Goods[d].

[d] Plerumque cuſtodiam eorum maritus repromittit, niſi mulieri commiſſæ ſint. *l.* 9. §. 3. *in f. ff. de jur. dot.* Mulier res quas ſolet in uſu habere in domo mariti, neque in dotem dat, in libellum ſolet conferre, eumque libellum marito offerre, ut is ſubſcribat, quaſi res acceperit: & velut chirographum ejus uxor retinet, res quæ libello continentur, in domum ejus intuliſſe. *d.* §. 3. *v. l. ult. C. de pact. conv.*

V.

5. *The Huſband's care of the Paraphernal Goods delivered to him.*

If the Paraphernal Goods are put into the Huſband's cuſtody, he is obliged to take the ſame care of them as of his own Goods, and he will be made accountable for the Faults that are inconſiſtent with this Care[e].

[e] Dum autem apud maritum remanent eædem cautiones, & dolum, & diligentiam maritus circa eas res præſtare debet, qualem & circa ſuas res habere invenitur. Ne ex ejus malignitate, vel deſidia, aliqua mulieri accidat jactura. Quod ſi evenerit, ipſe eadem de proprio reſarcire compelletur. *l. ult. in f. C. de pact. conv. l.* 9. §. 3. *in f. ff. de jur. dot.* See the ſecond Article of the third Section of this Title.

VI.

6. *How theſe Goods are diſtinguiſhed from the Goods of the Dowry.*

The Paraphernal Goods are diſtinguiſhed from the Goods of the Dowry, by the Contract of Marriage which ought to expreſs what goes to the Dowry. And all the Goods which are not comprehended in the Dowry either expreſly, or tacitly, are reckoned to be Paraphernal, even altho' the Wife ſhould deliver them to the Huſband, together with the Goods of her Dowry; unleſs it ſhould appear at the time of the Delivery, that the ſaid Goods were only an Acceſſory with which the Wife intended to augment her Dowry[f].

[f] Dotis autem cauſa data accipere debemus ea quæ in dotem dantur. Cæterum, ſi res dentur in ea quæ Græci παράφερνα dicunt, quæ Galli peculium appellant, videamus an ſtatim efficiuntur mariti? Et putem, ſi ſic dentur ut fiant, effici mariti. *l.* 9. §. 2. *& 3. ff. de jur. dot.*

VII.

7. *What the Wife is poſſeſſed of without an apparent Title, belongs to the Huſband.*

We ought not to reckon in the number of the Paraphernal Goods, nor of the other Goods of the Wife, thoſe which ſhe may chance to have in her Cuſtody, or which ſhe may pretend to belong to her, unleſs it appear that ſhe has a juſt Title to them; as if ſhe has acquired them by Inheritance, or Gift, or that ſhe was poſſeſſed of them at the time of her Marriage. And all the other Goods which ſhe may chance to have, of which the Title does not appear, and it is not known whence ſhe had them, belong to the Huſband. For otherwiſe it muſt be preſumed that the Wife has come by theſe Goods only by cheating her Huſband, or by other unlawful ways[g]. And even the Profits which ſhe may happen to make by her Frugality, her Labour, and Induſtry, belong to the Huſband, as Fruits and Revenues, and as Services or Offices which the Wife owes to the Huſband[h].

SECT. V.

Of the Separation of Goods between the Husband and Wife.

The Connexion between this matter and that of Dowries.

THE Separation of Goods between the Huſband and Wife, is one of the Cauſes of the Reſtitution of the Dowry. And therefore this matter being an Acceſſory to that of Dowries, the Rules concerning it ſhall be explained in this Section.

The Separation of Goods is made in two caſes. The firſt is, when the Wife procures a Separation from her Huſband's Bed, becauſe of his cruel uſage of her; for a Separation from the Huſband's Bed implies a Separation of Goods. And the ſecond is, when the diſorder of the Huſband's Affairs obliges the Wife to take back her own Eſtate.

The Separation from the Huſband's Bed, is a matter which does not come properly within the Deſign of this Book; it being altogether different in our Uſage from that which was the effect of a Divorce under the *Roman* Law. And we ſhall only treat here of the bare Separation of Goods.

[*I muſt here acquaint the Reader, that in* England *we have no ſuch bare Separation of Goods, as is here mentioned by our Author. The Separation in uſe with us, is a Separation from Bed and Board together. And this is granted in the Eccleſiaſtical Courts upon a due proof either of Adultery, or Cruelty, either on the part of the Husband or Wife. The Divorce, as allowed by the* Roman *Law, which is a total Diſſolution of the Marriage, is not permitted in* England *without an Act of Parliament.*]

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7. *As alſo for her Gains.*

I.

1. Definition of the Separation of Goods.

THE Separation of Goods between the Huſband and Wife, is the Right which the Wife has to take her Effects out of the Huſband's hands, that ſhe may manage and enjoy them her ſelf, when the ſtate of the Huſband's Affairs expoſes the Wife's Effects to danger[a].

II.

2. Cauſe of the Separation of Goods.

Seeing the Wife is ſubject to the Huſband, and that her Dowry, and the other Goods which ſhe may have brought to her Huſband, are left with him on condition that he bear the charges of the Marriage; ſhe cannot demand the Separation of Goods, except when the diſorder of the Huſband's Affairs puts him out of a condition of being able to bear the ſaid charges, and that the Goods which he has of his Wife's are in danger. Thus, the Separation ought to be decreed in a Court of Juſtice, after hearing the Cauſe, and upon ſufficient proof that the bad condition of the Huſband's Affairs, and the ſmallneſs of his Eſtate puts the Goods of the Wife in danger[b].

III.

3. Effect of the Separation.

The Separation of Goods being granted to the Wife only becauſe her Goods were in danger, and becauſe the Huſband was not able to bear the charges of the Marriage; the Engagement of the Huſband to manage the Goods of the Wife, and to bear theſe charges, paſſes to the Wife by the Separation of Goods. So that ſhe takes upon her again the Adminiſtration of her own Goods, and bears theſe charges, imploying her Revenues for the Maintenance of her Huſband, her ſelf, and their Children[c].

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[g] Quintus Mucius ait, cum in controverſiam venit unde ad mulierem quid pervenerit, & verius & honeſtius eſt, quod non demonſtratur unde habeat, exiſtimari à viro, aut qui in poteſtate ejus eſſet, ad eam perveniſſe. Evitandi autem turpis quæſtus gratia circa uxorem, hoc videtur Quintus Mutius probaſſe. *l. 51. ff. de donat. inter vir. & ux.* Nec eſt ignotum, quod cum probari non poſſit, unde uxor matrimonii tempore honeſtè quæſierit, de mariti bonis eam habuiſſe veteris juris authores meritò crediderint. *l. 6. C. eod.*

[h] Qui libertæ nuptiis conſenſit, operarum exactionem amittit. Nam hæc cujus matrimonio conſenſit, in officio mariti eſſe debet. *l. 48. ff. de oper. libert.*

[a] *This Definition follows from the ſubſequent Rules.*

[b] Si conſtante matrimonio, propter inopiam mariti mulier agere volet, unde exactionem dotis initium accipere ponamus? Et conſtat, exinde dotis exactionem competere, ex quo evidentiſſimè apparuerit, mariti facultates, ad dotis exactionem non ſufficere. *l. 24. ff. ſolut. matr. v. l. 22. §. 8. eod. l. 30. in f. C. de jure dot.*

[c] Ubi adhuc matrimonio conſtituto, maritus ad inopiam ſit deductus, & mulier ſibi proſpicere velit. *l. 29. C. de jure dot.* Fructibus earum (rerum ſuarum) ad ſuſtentationem tam ſui quàm mariti, filiorumque, ſi quos habet, abutatur. *d. l.*

IV.

4. The Wife who has obtained a Separation of Goods cannot alienate them.

The Separation of Goods gives the Wife only a Right to enjoy her own Goods, and to take care of them; but ſhe cannot alienate them[d], except in ſo far as the Laws, and Cuſtoms of the Country may allow her[e].

[d] Ita tamen, ut eadem mulier nullam habeat licentiam eas res alienandi vivente marito, & matrimonio inter eos conſtituto. *l. 29. C. de jur. dot.*

[e] *See the thirteenth and fifteenth Articles of the firſt Section.*

V.

5. She may diſtrain the Goods of the Husband, and cauſe them to be ſold, for her Dowry.

If the Dowry conſiſts in Money, Debts, or other Effects, which are not in being, the Wife may, by virtue of the Separation, diſtrain and cauſe to be expoſed to Sale the Goods of the Huſband, and others that are mortgaged to her, even altho' they be in the hands of a third Poſſeſſor[f].

[f] Ubi adhuc matrimonio conſtituto, maritus ad inopiam ſit deductus, & mulier ſibi proſpicere velit: reſque ſibi ſuppoſitas pro dote, & ante nuptias donatione, rebuſque extra dotem conſtitutis, tenere: non tantùm mariti res ei teneri, & ſuper his ad judicium vocatæ, exceptionis præſidium ad expellendum ab hypotheca ſecundum creditorem præſtamus: ſed etiam ſi ipſa contra detentatores rerum ad maritum ſuum pertinentium, ſuper iiſdem hypothecis aliquam actionem ſecundum legum diſtinctionem, moveat, non obeſſe ei matrimonium ad conſtitutum ſancimus. *l. 29. C. de jur. dot.*

VI.

6. She may do the ſame for the Recovery of her Paraphernal Goods which ſhe gave her Husband.

If beſides the Goods of the Dowry, the Wife had put into her Huſband's Cuſtody, her Paraphernal Goods, which are not in being, ſhe may recover them in the ſame manner as the Goods of her Dowry[g].

[g] Rebuſque extra dotem conſtitutis. *d. l. 29. C. de jur. dot.*

VII.

7. As alſo for her Gains.

If by the Contract of Marriage there are Gains due to the Wife out of the Huſband's Eſtate, ſhe may recover them in the ſame manner as ſhe recovers her Dowry, whether it be to preſerve her Right of Property in them, if ſhe is not to have the Enjoyment of them till after the Huſband's death, or that ſhe may enter on the actual Enjoyment of them; according as the quality of the ſaid Gains ſhall happen to be regulated, either by the Contract of Marriage, or by the Cuſtoms and Uſage of the Places[h].

[h] Pro dote & ante nuptias donatione. *d. l. 29. C. de jur. dot. Nov. 97. cap. 6.*

TITLE X.

Of DONATIONS that have their effect in the Life-time of the Donor.

Two ſorts of Donations.

THere are two ſorts of Gifts, or Donations. One which takes effect during the Life of the Donor. And the other ſort is of ſuch Donations as are made in proſpect of death, and which have their effect only after the death of the Donor.

Differences between Donations that take effect in the life-time of the Donor, and thoſe which do not take effect till after his death.

There are two eſſential differences between theſe two ſorts of Donations. One is, that the Donations which take effect during the Life of the Donor, are Covenants tranſacted between the Donors and the Donees, which makes them irrevocable; whereas Donations made in proſpect of death are Diſpoſitions of the ſame nature with Legacies, and the Inſtitution of an Executor; which depend on the bare will of thoſe who give, and which for that reaſon may be revoked.

The other difference between Donations that take effect in the Life-time of the Donor, and thoſe which have their effect only after his death, is a conſequence of the former, and conſiſts in this, that he who gives during his Life-time, diveſts himſelf of that which he gives away, and transfers it to the Donee, who becomes Maſter of it: whereas he who gives only in proſpect of death, loves rather to keep than give away, and remains until his death Proprietor of what he gives, having a Right to deprive the Donee of it, and to diſpoſe of it otherwiſe as he pleaſes. Thus, whereas the Donation that takes effect in the Life-time of the Donor, ſtrips the Donor himſelf; the Donation made in proſpect of death, ſtrips only his Heir or Executor[i].

[i] Sed mortis cauſâ donatio longè differt ab illa vera & abſoluta donatione, quæ ita proficiſcitur, ut nullo caſu revocetur. Et ibi qui donat, illum potiùs, quàm ſe habere mavult: at is qui mortis cauſâ donat, ſe cogitat, atque amore vitæ recepiſſe potiùs,

It is becauſe of this laſt difference between the Donations that take effect in the Donor's life-time, and thoſe which take effect only after his death, that the Cuſtoms which do not permit Teſtamentary Diſpoſitions to the prejudice of the next Heirs, except as to a certain Portion of the Goods, reduce to the ſame Portion Donations made in proſpect of death; and that on the contrary they permit Donations that have their effect in the Donor's life-time to the prejudice of the Heirs, becauſe the Donor not only ſtrips his Heirs, but alſo himſelf of what he gives away. And theſe ſorts of Donations which ſtrip the Donor, have no other bounds than thoſe which have been ſet to them by the ſeveral Cuſtoms of particular Places; whether it be for preſerving to the Children their Filial Portions, or for reſtraining Largeſſes between certain Perſons, or for other cauſes.

It follows from this Nature of Donations that take effect in the Donor's life-time, that they being Covenants irrevocable which ſtrip the Donor of what he gives away, every Donation that has not this character, and which leaves the Donor at liberty to revoke it, is a Donation of no force. That is to ſay, that it is not, properly ſpeaking, a Donation that is to take place in the Life-time of the Donor.

It is on this Principle that the common Rule in this matter does depend, viz. *That to Give, and to Retain, avails nothing.* The meaning of which is, that if the Donor keeps what he gives away, he does not diveſt himſelf, and does not give. Which Maxim has this extent, that it annuls not only the Donations in which the Donors reſerve a liberty of diſpoſing of the Things given, but likewiſe all thoſe Donations in which there happens to be circumſtances denoting that the Donor has not diveſted himſelf, and that the Donee has not been made irrevocably Maſter of the Thing that was given him. Thus a Donation, whereof the Deed or Title remains in the cuſtody of the Donor, the Donee having no duplicate of it, or of which the Minute, or Draught, is not put into the hands of a Publick Notary, in order to draw up the Inſtrument, would be a void Donation; becauſe the Donor would retain the liberty of annulling it.

Donations made in proſpect of death, are one of the matters treated of in the ſecond Part of this Work; and the preſent Title relates only to Donations that have their effect in the life-time of the Donors, becauſe they are Covenants. But to avoid the repeating always the expreſſion at large of Donations that take effect in the Life-time of the Donors, we ſhall uſe only the ſimple word of Donations.

Donations are Liberalities which are Natural in the Order of Society, where the Ties of Parentage and Friendſhip, and the ſeveral Engagements lay different obligations on perſons to do good, either out of Gratitude for Favours received, or out of an Eſteem of Merit, or out of a Motive of aſſiſting thoſe that are in want, or upon other conſiderations.

There are divers ſorts of ways of Giving, and doing of good, as well as of Commerce. And as we make a Commerce of Induſtry, Labour, Services, and alſo of Things, we do the ſame likewiſe of Gratuitous Deeds; but we give the Name of Donation only to that kind of Liberality by which we ſtrip our ſelves of the Things; and not to the Services and good Offices which we render to thoſe whom we are willing to oblige[b].

Of Donations between Man and Wife.

We ſhall not inſert under this Title any of the Rules of the *Roman* Law which concern Donations between Man and Wife; becauſe this Matter is ſo differently regulated in the Provinces which are governed by the *Roman* Law, and by the Cuſtoms, that it would be to deviate too far from the Deſign of this Work to ſet down here Rules of which there is ſcarcely one that is univerſally received every where. But to ſupply this want, we have thought proper to obſerve here the General Principles which are the Foundation of the different Laws concerning Donations between Man and Wife, to ſhew in the ſaid Principles the Spirit of the different Rules which are obſerved, either in the Provinces that are governed by the *Roman* Law, or in the Cuſtoms: And they are contained in the following Remarks.

The ſtrict Union between Man and Wife being an occaſion to them to exerciſe their Liberality towards one another,

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tiùs, quàm dediſſe mavult. Et hoc eſt quare vulgò dicatur, ſe potiùs habere vult, quàm eum cui donat: illum deindè potiùs quàm hæredem ſuum. *l.* 35. §. 2. *ff. de mort. cauſ. donat.*

[b] Labeo ſcribit extra cauſam donationum eſſe talium officiorum mercedes, ut putà ſi tibi adfuero, ſi ſatis pro te dedero: ſi qualibet in re opera vel gratia mea uſus fueris. *l.* 19. §. 1. *ff. de donat.*

another, according to their Affection, and their Eſtates; the uſe of theſe ſorts of Donations was attended with ſo great Inconveniences, that it was aboliſhed by the *Roman* Law. For it appeared from Experience, that the eaſy Temper either of the Huſband, or of the Wife, impoveriſhed the one to enrich the other: That the application of the Party that was moſt covetous to procure Largeſſes from the other, engaged them in Cares and Views entirely oppoſite to their Duty of educating their Children, or diverted them wholly from any thoughts of it: That the one Party refuſing to comply with the deſires of the other, in giving what was aſked, it was an occaſion of Strife and Contention: and in fine the *Roman* Lawgivers were of opinion, that the Conjugal Love ought to ſubſiſt and to be nouriſhed by a more honourable Motive than that of Self-Intereſt[c].

But ſeeing the principal conſideration which induced the *Roman* Lawgivers to annul Donations between Man and Wife, was to prevent their impoveriſhing one another in their Life-time, and that the Donor might not be deſtitute of all manner of Subſtance after the Diſſolution of the Marriage, whether it were by Death, or Divorce; the Donations which were to take effect only after the death of the Donor not producing the ſame ill conſequences, were permitted between Man and Wife. And they gave likewiſe this effect to Donations, which were intended to take place in the Life-time of the Donor, that if they were not revoked by the Donor in his Life-time, they ſhould be confirmed by his Death, and be as valid as if they had at firſt been made in proſpect of Death.

The diſpoſitions of the Cuſtoms in relation to Donations between Man and Wife, are different, according to the regard which they have had to the Motives upon which theſe Donations were annulled by the *Roman* Law, or according to the other Views of the Spirit and Principles of the ſaid Cuſtoms. Thus ſome of them have allowed Donations between Man and Wife of the Property of Moveables, and of the Immoveables of their own Acquiſition; and likewiſe of a part of the Eſtate which came to them by Inheritance; but they would have theſe Donations to be revocable. Thus the ſame Cuſtoms, and many others have approved of Donations between Man and Wife that take effect in the Life-time of the Donor, and allow them to be irrevocable, provided they be only of an Enjoyment of the Moveables, and Immoveables of the Donor's own Purchaſe, and that they be reciprocal. And the diſpoſition of theſe Cuſtoms is founded on this Principle, that the Liberality being reciprocal, and both the one and the other Party being uncertain of the Event which would entitle the longeſt Liver to the benefit of the Gift, theſe kinds of Donations are not attended with the ſame Inconveniences, as where the Condition of both Parties is not Equal, and that they have nothing in them which may diſturb the Peace and Tranquillity of the State of Matrimony, or which is contrary to the Honour of Marriage.

But other Cuſtoms under other Views, have forbid all Diſpoſitions made by the Wife in favour of her Huſband, even altho' they were made in proſpect of Death; notwithſtanding the ſame Cuſtoms allow the Huſband to give to his Wife all his Eſtate by a Donation that is to take place in his Life-time, reſerving only to the Children their Filial Portions. And theſe Cuſtoms regulate the matter thus, becauſe they make the Wife's condition leſs advantageous in other reſpects, the Community of Goods not being there received: and becauſe they will ſecure the Wife's Eſtate againſt the Diſpoſitions to which the Huſband's Power and Authority over her might engage her.

[*The Law of* England *conſiders the Huſband and Wife as but one Perſon. And therefore by no Conveyance at the Common Law could the Huſband, during the Coverture, limit an Eſtate to his Wife. But a Man may by his Deed covenant with others to ſtand ſeiſed to the Uſe of his Wife, or make a Feoſſment, or other Conveyance to the Uſe of his Wife. And now the State is executed to ſuch Uſes by the Statute of* 27 Hen. VIII. *For an Uſe is but a Truſt and Confidence, which by ſuch a mean might be limited by the Huſband to the Wife. But a Man cannot covenant with his Wife to ſtand ſeiſed to her Uſe; becauſe he cannot covenant with her, he and ſhe being but one Perſon in the Law. But he may deviſe by his Teſtament Lands and Tenements to his Wife; becauſe ſuch Deviſe taketh no effect till after the death of the Deviſor, when the Union between them is diſſolved. Coke* 1 Inſtit. fol. 112. a.]

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[c] Moribus apud nos receptum eſt, ne inter virum & uxorem donationes valerent. Hoc autem receptum eſt, ne mutuato amore invicem ſpoliarentur, donationibus non temperantes: ſed profusâ erga ſe facilitate. Nec eſſet eis ſtudium liberos potiùs educendi. Sextus Cœcilius & illam cauſam adjiciebat, quia ſæpè futurum eſſet ut diſcuterentur matrimonia, ſi non donaret is qui poſſet: atque ea ratione eventurum ut venalitia eſſent matrimonia. Hæc ratio & oratione Imperatoris noſtri Antonini Auguſti electa eſt. Nam ita ait, majores noſtri inter virum & uxorem donationes prohibuerunt, amorem honeſtum ſolis animis æſtimantes: famæ etiam conjunctorum conſulentes: nec concordia pretio conſiliari videretur, néve melior in paupertatem incideret, deterior ditior fieret. *l.* 1. 2. *&* 3. *ff. de donat. int. vir. & ux.*

SECT. I.

Of the Nature of Donations that take effect in the Life-time of the Donor.

The CONTENTS.

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2. *No Donation without Acceptance.*
3. *If the Donee is incapable of accepting.*
4. *Who gives what he is bound to give, does not make a Donation.*
5. *Remuneratory Donations.*
6. *Donations are irrevocable.*
7. *What Things may be given.*
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13. *Difference between Motives, and Conditions of Donations.*
14. *Reſervation of the Uſufruct.*
15. *Regiſtring of Donations.*
16. *Alimony afforded out of Liberality, or otherwiſe.*

I.

1. *Definition of Donation.*

A Donation which takes effect during the Life of the Donor, is a Contract made by a reciprocal conſent between the Donor, who ſtrips himſelf of the Thing which he gives away, in order to transfer it *gratis* to the Donee, and the Donee, who accepts and acquires the thing that is given him[a].

II.

2. *No Donation without Acceptance.*

There is no Donation without Acceptance. For if the Donee does not accept, the Donor is not diveſted of the Thing which he gives, and his Right remains ſtill with him[b].

III.

3. *If the Donee is incapable of accepting.*

If the Donee is incapable of accepting, as if it be a Child which cannot ſpeak, nor expreſs any deſire of having the Thing given, the Acceptance muſt be made by a perſon that is capable of accepting for him, ſuch as his Father, his Tutor, or Guardian[c].

IV.

4. *Who gives what he is bound to give, does not make a Donation.*

A Donation is a Liberality, and he who gives only what he owes, or what he is obliged to give, does not make a Donation, but acquits himſelf of a Debt, or of ſome other Engagement. Thus, he who gives in order to fulfil a Condition in a Teſtament, or of a Donation which burdens him with it, is not a Donor, even altho' it were out of his own Subſtance that he had been charged to give[d].

V.

5. *Remuneratory Donations.*

The Donations which are called Remuneratory, and which are made in recompence of Services, are not properly Donations, except when that which is given could not be demanded by the Donee: and the Recompence which the Donee could demand is not in effect a Donation[e].

VI.

6. *Donations are irrevocable.*

Altho' a Donation be a Liberality, yet it is irrevocable, as other Covenants are[f]; unleſs it be with the conſent of the Donee, or for ſome one of the

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[a] Aliæ donationes ſunt quæ ſine ulla mortis cogitatione fiunt, quas inter vivos appellamus. §. 2. *inſt. de donat.* Dat aliquis ea mente, ut ſtatim velit accipientis fieri. *l.* 1. *ff. de donat. v. l.* 22. *in f. eod.* in verbo *contractibus.* Donatio eſt contractus. *l.* 7. *C. de his quæ vi metuve, c. g. ſ.*

[b] Non poteſt liberalitas nolenti acquiri. *l.* 19. §. 2. *ff. de donat.* Invitò beneficium non datur. *l.* 69. *ff. de reg. jur. l.* 156. §. *ult. eod.* Abſenti, ſive mittas qui ferat, ſive quod ipſe habeat, ſive habere eum jubeas, donari rectè poteſt. Sed ſi neſcit rem quæ apud ſe eſt, ſibi eſſe donatam, vel miſſam ſibi non acceperit, donatæ rei dominus non fit. *l.* 10. *ff. de don.* Donationis acceptor. *l. ult. C. de revoc. donat.*

[c] Si quis in emancipatum minorem, priuſquam fari poſſit, aut habere rei quæ ſibi donatur affectum, fundum crediderit conferendum, omne jus compleat, inſtrumentis ante præmiſſis. Quod jus per eum ſervum, quem idoneum eſſe conſtiterit, tranſigi placuit. Ut per eum infanti acquiratur. *l.* 26. *C. de donat.*

[d] Donatio dicta eſt à dono, quaſi dono datum. *l.* 35. §. 1. *ff. de mort. cauſ. donat.* Donari videtur, quod nullo jure cogente conceditur. *l.* 82. *ff. de reg. jur. l.* 29. *ff. de donat.* Propter nullam aliam cauſam facit, quàm ut liberalitatem & munificentiam exerceat, hæc propriè donatio appellatur. *l.* 1. *eod.* Quæ liberti impoſita libertatis causâ præſtant, ea non donantur, res enim pro his interceſſit. *l.* 8. *ff. de don.*

[e] Aquilius Regulus juvenis ad Nicoſtratum Rhetorem ita ſcripſit, *Quoniam & cum patre meo ſemper fuiſti, & me eloquentia & diligentia tua meliorem reddidiſti, dono & permitto tibi habitare in illo cœnaculo, eoque uti.* Defuncto Regulo controverſiam habitationis patiebatur Nicoſtratus, & cùm de ea re mecum contuliſſet, dixi poſſe deffendi, non meram donationem eſſe, verum officium magiſtri quadam mercede remuneratum Regulum. Ideoque non videri donationem ſequentis temporis irritam eſſe. *l.* 27. *ff. de donat. v. l.* 34. §. 1. *eod.* Donari videtur, quod nullo jure cogente conceditur. *l.* 82. *ff. de reg. jur.*

Cauſes which ſhall be explained in the fourth Section.

[f] Quæ ſi fuerint perfectæ, temerè revocari non poſſunt. §. 2. *inſt. de donat.* Ut ſtatim velit accipientis fieri, nec ullo caſu ad ſe reverti. *l.* 1. *ff. de don.* Cùm enim in arbitrio cujuſcumque ſit, hoc facere quod inſtituit, oportet eum vel minimè ad hoc proſilire, vel cùm ad hoc venire properaverit, non quibuſdam excogitatis artibus ſuum propoſitum defraudare. *l.* 35. §. *ult. C. de don.*

VII.

7. *What Things may be given.* We may give all Things that are in Commerce, and which we have power to diſpoſe of, Moveables, Immoveables, Debts, Rights, Actions, and even Goods to come, and in general every Thing that may paſs from one Perſon to another, and be acquired by him. And it is alſo a Donation when the Creditor forgives the Debt to his Debtor[g].

[g] Donari non poteſt, niſi quod ejus ſit, cui donatur. *l.* 9. §. *ult. ff. de donat.* Spem futuræ actionis, plenâ intercedente donatoris voluntate, poſſe transferri, non immerito placuit. *l.* 3. *C. eod.* Si quis obligatione liberatus ſit, poteſt videri cœpiſſe. *l.* 115. *ff. de reg. jur.* Si donationis causâ furti actionem tibi remiſſam probetur, ſupervacuam geris ſollicitudinem. *l.* 18. *C. de donat.*

VIII.

8. *Donation of all the Donor's Goods, or of a part of them.* One may give away either all his Goods, or a part of them[h], provided that the Donation be not undutiful[i]; and that if it is of all one's Goods, there be reſerved either the Uſufruct of the Goods given, or ſome other thing which may ſuffice for the Suſtenance of the Donor. For it would be contrary to Good Manners, for the Donee to ſtrip the Donor of his whole Subſtance, both in Principal, and Revenue[l].

[h] Sed & ſi quis univerſitatis faciat donationem, ſive beſſis, ſive dimidiæ partis ſuæ ſubſtantiæ, ſive tertiæ, ſive quartæ, ſive quantæcumque, vel etiam totius, ſi non de inofficioſis donationibus ratio in hoc reclamaverit, coarctari donatorem, legis noſtræ authoritate tantùm quantùm donavit, præſtare. *l.* 35. §. 4. *C. de donat.*

[i] *Undutiful Donations are thoſe which are taken out of the Legitime or Legal Portions of thoſe perſons to whom ſuch Portions are due by Law; and this is a matter which belongs to the Second Part.*

[l] Divus Pius reſcripſit, eos qui ex liberalitate conveniuntur in id quod facere poſſunt condemnandos. *l.* 28. *ff. de reg. jur. l.* 12. *ff. de dòn.*

IX.

9. *The Fruits reaped after the Donation do not augment it.* The Fruits and Revenues which the Donee gathers from the Things given after the Donation, are no part of the Gift, neither do they augment it, but they are Goods belonging to the Donee, in the ſame manner as the Fruits of a Thing which is his own. Thus, in Donations that are ſubject to ſome Reduction, we do not reckon the Fruits that have been reaped after the Donation. Thus, when a Donation comes to be annulled by the exiſtence of ſome Condition, or otherwiſe, the Donee does not reſtore the Fruits and Revenues which he has reaped[m].

[m] Ex rebus donatis fructus perceptus, in rationem donationis non computatur. *l.* 9. §. 1. *ff. de don.* Cùm de modo donationis quæritur, neque partûs nomine, neque fructuum, neque penſionum, neque mercedum ulla donatio facta eſſe videtur. *l.* 11. *eod.*

X.

10. *Donations either pure and ſimple, or conditional.* Donations are either pure and ſimple, or made upon ſome condition, or with ſome charge. And the Donee is obliged to acquit the Charges, and perform the Conditions which the Donor has enjoined him[n].

[n] Legem quam rebus tuis donando dixiſti, ſive ſtipulatione tibi proſpexiſti, ex ſtipulatu, ſive non, incerto judicio, id eſt, præſcriptis verbis, apud Præſidem Provinciæ debes agere, ut hanc impleri providdas, *l.* 9. *C. de donat.*

XI.

11. *Three ſorts of Conditions.* The Conditions in Donations, as in other Covenants, are of three ſorts. Some are ſuch, that the validity of the Donation depends on the exiſtence of the Condition: others make void the Donation which had ſubſiſted: and others make only ſome change, without annulling the Donation[o]. Thus, Donations made in favour of Marriage imply the Condition, that they ſhall not have their effect, till the Marriage be accompliſhed[p]. Thus a Donation being made upon condition, that if the Donee dies before the Donor, the Things given ſhall return to the Donor, this Condition annuls a Donation which had ſubſiſted[q]. And this other Condition, that after a certain time, or in a certain caſe, the Donee ſhall be bound to deliver the Things given, or a part of them, to another perſon, neither annuls nor accompliſhes the Donation; but makes the change in it which has been agreed on, and obliges the Donee to deliver the Things to the perſon to whom the Reſtitution ought to be made[r].

[o] *See the fourth Section of Covenants.*

[p] *See the laſt Article of the firſt Section of the Title of Dowries.*

[q] Si rerum tuarum proprietatem dono dediſti, ita ut poſt mortem ejus qui accepit, ad te rediret, donatio valet. Cùm etiam ad tempus certum, vel incertum ea fieri poteſt. Lege ſcilicet, quæ ei impoſita eſt, conſervanda. *l.* 2. *C. de donat. quæ ſub modo.*

[r] Quoties donatio ita conficitur, ut poſt tempus, id quod donatum eſt, alii reſtituatur: veteris juris

authoritate reſcriptum eſt, ſi is in quem liberalitatis compendium conferebatur, ſtipulatus non ſit, placiti fide non impleta, ei qui liberalitatis author fuit, vel hæredibus ejus, condictitiæ actionis perſecutionem competere. Sed cùm poſteà, benigna juris interpretatione, Divi Principes, ei qui ſtipulatus non ſit, utilem actionem juxta donatoris voluntatem competere admiſerint, actio quæ ſorori tuæ, ſi in rebus humanis ageret competebat, tibi accommodabitur. *l. 3. C. de donat. quæ ſub modo.*

XII.

12. When the Donation is perfected, it admits of no new burdens.

After the Donation has been accompliſhed, it is no longer in the Power of the Donor to impoſe on the Donee any new Condition or Charge, even altho' he were Father to the Donee[r].

[r] Perfecta donatio conditiones poſteà non capit. Quare ſi pater tuus donatione facta quaſdam poſt aliquantulum temporis feciſſe conditiones videatur, officere hoc nepotibus ejus fratris tui filiis minimè poſſe, non dubium eſt. *l. 4. C. de donat. quæ ſub modo.*

XIII.

13. Difference between Motives, and Conditions of Donations.

We are to make a great difference in Donations, between the Motives which the Donors expreſs as the Cauſes of their Liberality, and the Conditions with which they burden them. For whereas the default of a Condition annuls the Conditional Donation; yet it ſubſiſts, altho' the Motives expreſſed in it prove not to be true. Thus if it is ſaid in a Donation, that it is made on account of Services done, or to facilitate to the Donee the making of a Purchaſe which he had a mind to; the Donation will not be annulled, altho' no Services have been rendred, nor the Purchaſe made. For there remains ſtill the abſolute will of the Donor, who may have had other Motives beſides thoſe which he has expreſſed. But if it was ſaid, that the Donation is made only on condition, that what is given be laid out on ſuch a Purchaſe, ſuch as the Buying of an Office, and the Office is not bought; the Donation will have no effect[t].

[t] Titio decem donavi, ea conditione ut inde Stichum ſibi emeret. Quæro, cùm homo antequam emeretur, mortuus ſit, an aliqua actione decem recipiam. Reſpondit, facti magis quàm juris quæſtio eſt. Nam ſi decem Titio in hoc dedi, ut Stichum emeret, aliter non daturus: mortuo Sticho, condictione repetam. Si verò aliàs quoque donaturus Titio decem, quia interim Stichum emere propoſuerat, dixerim in hoc me dare ut Stichum emeret: cauſa magis donationis, quàm conditio dandæ pecuniæ exiſtimari debebit. Et mortuo Sticho pecunia apud Titium remanebit. *l. 2. §. ult. ff. de donat.* Et generaliter hoc in donationibus definiendum eſt, multum intereſſe cauſa donandi fuit, an conditio. Si cauſa fuit ceſſare repetitionem, ſi conditio repetitioni locum fore. *l. 3. ff. eod.*

XIV.

14. Reſervation of the Uſufruct.

In all Donations, whether they be Univerſal of all one's Eſtate, or Particular of certain Things, the Donor may reſerve to himſelf the Uſe and Profits of the Things which he gives[u].

[u] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſum fructum ejus retinuerit, &c. *l. 28. C. de don. l. 35. §. 5. eod.*

XV.

15. Regiſtring of Donations.

Donations ought to be Regiſtred, that every body may know the Engagement, which being unknown might give occaſion to many Frauds[x].

[x] Data jampridem lege ſtatuimus, ut donationes interveniente actorum teſtificatione conficiantur. Quod vel maximè inter neceſſarias conjunctaſque perſonas convenit cuſtodiri. Si quidem clandeſtinis, ac domeſticis fraudibus facilè quidvis pro negotii opportunitate confingi poteſt: vei id quod verè geſtum eſt aboleri. *l. 27. C. de donat. l. 30. & ſeq. eod. V. l. 17. §. 1. ff. quæ in fraud. credit.*

We take notice here only of the General Rule of Regiſtring Donations; and leave out the whole detail of this matter as it is regulated by the Ordinances, and by our Uſage, otherwiſe than it is in the Roman *Law.* See the Ordinance of 1539. Art. 132. and that of *Moulins*, Art. 58.

XVI.

16. Alimony afforded out of Liberality, or otherwiſe.

We may place in the number of Donations the Expences which one perſon is at for another out of a Motive of Liberality, and without hopes of recovering them: As if one is at the charges of maintaining a near Relation: and what has been given in this manner, cannot be afterwards redemanded. But it is by the circumſtances that we are to judge, whether it was the Intention of the Party to give, or not[y].

[y] Titium, ſi pietatis reſpectu ſororis aluit filiam, actionem hoc nomine contra eam non habere, reſpondi. *l. 27. §. 1. ff. de neg. geſt.* Si paterno affectu privignas tuas aluiſti, ſeu mercedes pro his aliquas magiſtris expendiſti, ejus erogationis tibi nulla repetitio eſt. Quòd ſi, ut repetiturus ea quæ in ſumptum miſiſti, aliquid erogaſti, negotiorum geſtorum tibi intentanda eſt actio. *l. 15. C. de neg. geſt.*

SECT. II.

Of the Engagements of the Donor.

The CONTENTS.

1. *Firſt Engagement of the Donor, Not to Revoke.*
2. *Second Engagement; the Delivery.*
3. *Reſervation of the Uſe and Profits, is in lieu of Delivery.*
4. *Third Engagement, Warranty.*
5. *If the knavery of the Donor occaſions any loſs to the Donee.*
6. *The Donor cannot be conſtrained to*

more than what he is able to give, without deing reduced to Want.
7. *Intereſt of the Things given.*

I.

1. Firſt Engagement of the Donor; Not to Revoke.

THE firſt Engagement of the Donor is, that he cannot annul the Donation, when he has once given his conſent to it: and he cannot revoke it [a], except for juſt Reaſons; ſuch as if he was forced to make it, if he was incapable of contracting, or if he was in one of the caſes which ſhall be explained in the third Section.

[a] Si donationem ritè feciſti, hanc authoritate reſcripti noſtri reſcindi non oportet. *l. 5. C. de revoc. don. l. 3. l. 6. eod.* See the ſixth Article of the firſt Section.

II.

2. Second Engagement; the Delivery.

The ſecond Engagement of the Donor, and which is a conſequence of the firſt, is to perform the Donation, and to deliver the Thing given, and he may be conſtrained to it by the Donee, or by his Heirs, Executors, or Adminiſtrators [b].

[b] Ad exemplum venditionis noſtra conſtitutio (donationes) etiam in ſe habere neceſſitatem traditionis voluit. Ut etiamſi non tradantur, habeant pleniſſimum & perfectum robur, & traditionis neceſſitas incumbat donatori. §. 2. *inſt. de donat. l. 35. C. eod.*

III.

3. Reſervation of the Uſe and Profits is in lieu of Delivery.

When there is a Reſervation of the Uſe and Profits in a Donation; that ſerves inſtead of a Delivery [c].

[c] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, etiamſi ſtipulatus non fuerit, eam continuò tradidiſſe credatur. Nec quid amplius requiratur quo magis videatur facta traditio. Sed omnimodò idem ſit, in his cauſis uſumfructum retinere quod tradere. *l. 28. C. de donat. l. 35. §. 5. eod.* See the ſeventh Article of the ſecond Section of the Contract of Sale.

IV.

4. Third Engagement, Warranty.

It is likewiſe a third Engagement of the Donor, that if he is obliged for the Warranty of the Things given, he ought to warrant them. But if he has not engaged himſelf for the Warranty, and it happens that he has given what was not his own, believing honeſtly that he was the right Owner of it, he is diſcharged from the Warranty. For it is preſumed that he meant only to exerciſe his Liberality in Things that were his own [d].

[d] Quoniam avus tuus, cùm prædia tibi donaret, de evictione eorum cavit: potes adverſus cohæredes tuos, ex cauſa ſtipulationis, conſiſtere ob evictionem prædiorum, pro portione ſcilicet hæreditaria. Nudo autem pacto interveniente, minimè donatorem hac actione teneri, certum eſt. *l. 2. C. de evict.* Si quis mihi rem alienam donaverit —— Et evincatur, nullam mihi actionem contra donatorem competere. *l. 18. §. ult. ff. de donat.* See the following Article.

V.

5. If the knavery of the Donor occaſions any loſs to the Donee.

If the Donor was guilty of any knaviſh dealing, as if he gave a Thing which he knew was not his own, he would be bound to make good the Loſſes and Damages which the Donee may chance to ſuſtain thro' his Knavery [e].

[e] Labeo ait, ſi quis mihi rem alienam donaverit, inque eum ſumptus magnos fecero, & ſic evincatur, nullam mihi actionem contra donatorem competere, planè de dolo poſſe me adverſus eum habere actionem, ſi dolo fecit. *l. 18. §. ult. ff. de donat.*

VI.

6. The Donor cannot be conſtrained to more than what he is able to give, without being reduced to Want.

The Donor cannot be obliged to perform what he has promiſed, but in ſo far as he is able, without being reduced to Want. For it would be unjuſt that his Liberality ſhould be an occaſion of Inhumanity to his Donee [f].

[f] Qui ex donatione ſe obligavit, ex reſcripto Divi Pii in quantum facere poteſt convenitur. *l. 12. ff. de donat. l. 28. ff. de reg. jur.* In condemnatione perſonarum, quæ in id quod facere poſſunt, damnantur, non totum quod habent extorquendum eſt: ſed & ipſarum ratio habenda eſt, ne egeant. *l. 173. ff. de reg. jur. V. l. 49. ff. de re jud.*

VII.

7. Intereſt of the Things given.

The Donor owes no Intereſt for the Thing given, even after the delay, unleſs they are expreſly ſtipulated, or unleſs there has been a Condemnation in a Court of Juſtice. And they will not be due but from the time they have been demanded, and according as the circumſtances may require; as if a Sum of Money has been given for a Marriage Portion [g].

[g] Eum qui donationis cauſa pecuniam, vel quid aliud promiſit, de mora ſolutionis pecuniæ, uſuras non debere, ſummæ æquitatis eſt. *l. 22. ff. de donat.* Dotis fructus ad maritum pertinere debere æquitas ſuggerit, cùm enim ipſe onera matrimonii ſubeat, æquum eſt eum etiam fructus percipere. *l. 7. ff. de jur. dot.*

SECT. III.

Of the Engagements of the Donee, and of the Revoking of Donations.

The CONTENTS.

1. *Firſt Engagement of the Donee, to acquit the Charges.*
2. *Second Engagement, Gratitude.*
3. *Ingratitude diſſembled by the Donor.*
4. *Revoca-*

4. *Revocation of the Donation, becauſe of Children being afterwards born to the Donor.*

I.

1. Firſt Engagement of the Donee, to acquit the Charges. THE firſt Engagement of the Donee, is to ſatisfy the Charges and Conditions of the Donation, when there are any: and if he fails in it, the Donation may be revoked, according to the circumſtances[a].

[a] Legem quam rebus tuis donando dixiſti—— apud Præſidem Provinciæ debes agere, ut hanc impleri provideat. *l. 9. C. de donat.* Vel quaſdam conventiones ſive in ſcriptis donationis impoſitas, ſive ſine ſcriptis habitas, quas donationis acceptor ſpoſpondit, minimè implere voluerit. Ex his enim tantummodò cauſis, ſi fuerint in judicium dilucidis argumentis cognitionaliter approbatæ, etiam donationes in eos factas everti concedimus. *l. ult. C. de revoc. donat.*

II.

2. Second Engagement Gratitude. The ſecond Engagement of the Donee, is Thankfulneſs for the Benefit received: and if he is ungrateful to the Donor, the Donation may be revoked, according as the deed of the Donee may have given occaſion for it. Thus, the Donor may revoke the Donation, not only if the Donee makes any attempt upon his Life, or Honour, but likewiſe if he commits any Violence or Outrage upon his Perſon, or does him any Injury; or if he occaſions him any conſiderable Loſs by unfair practices[b].

[b] Generaliter ſancimus omnes donationes lege confectas, firmas illibataſque manere, ſi non donationis acceptor ingratus circa donatorem inveniatur. Ita ut injurias atroces in eum effundat, vel manus impias inferat, vel jacturæ molem ex inſidiis ſuis ingerat, quæ non levem ſenſum ſubſtantiæ donatoris imponat, vel vitæ periculum aliquod ei intulerit. *l. ult. C. de revoc. don.* Donationes circa filium filiamve, nepotem neptemve, pronepotem proneptemve emancipatos celebratas, pater, vel avus, vel proavus, revocare non poterit: niſi edoctis manifeſtiſſimis cauſis, quibus eam perſonam in quam collata donatio eſt, contra ipſam venire pietatem, & ex cauſis quæ legibus continentur fuiſſe conſtabit ingratam. *l. 9. eod.*

Altho' the Cauſes of Ingratitude, which may ſuffice for revoking a Donation, be reſtrained by this laſt Law of the Code de revoc. don. *to theſe which are expreſſed in this Article, yet we put them down only as an Example. For there may be other cauſes which may deſerve that a Donation ſhould be revoked; as for Inſtance, if the Donee ſhould refuſe Alimony to his Donor when he is reduced to great ſtraits.*

III.

3. Ingratitude diſſembled by the Donor. The Right of revoking a Donation becauſe of the Ingratitude of the Donee, does not paſs to the Heir, Executor, or Adminiſtrator of the Donor, if he himſelf having known the Ingratitude did not reſent it[c].

[c] Hoc tamen uſque ad primas perſonas tantummodò ſtare cenſemus: nulla licentia concedenda donatoris ſucceſſoribus hujuſmodi querimoniarum primordium inſtituere. Etenim ſi ipſe qui hoc paſſus eſt, tacuerit, ſilentium ejus maneat ſemper, & non à poſteritate ejus ſuſcitari concedatur, vel adverſus eum qui ingratus eſſe dicitur, vel adverſus ejus ſucceſſores. *l. ult. C. de revoc. donat.* Neque enim fas eſt ullo modo inquietari donationes, quas, is qui donaverat, in diem vitæ ſuæ non retractavit. *l. 1. in f. eod.*

IV.

If after a Donation made by a perſon who had no Children, he happens to have Children born to him, the Donation will be void, upon preſumption that he who gave having no Children, would not have given if he had had any, and that he gave only upon this condition, that if he ſhould happen to have Children, the Donation ſhould be of no force[d]. *4. Revocation of the Donation, becauſe of Children being afterwards born to the Donor.*

[d] Si unquam libertis patronus filios non habens, bona omnia, vel partem aliquam facultatum fuerit donatione largitus: & poſtea ſuſceperit liberos, totum quidquid largitus fuerat, revertatur in ejuſdem donatoris arbitrio, ac ditione manſurum. *l. 8. C. de revoc. don. v. l. 6. §. 1. C. de inſt. & ſubſt. l. 102. ff. de cond. & dem. l. 40. §. ult. ff. de pact.*

Altho' this Law be only in favour of the Patron who had made a Donation to one whom he had ſet free from Slavery, yet we obſerve it indifferently for all perſons. But if the Donation was ſmall, and made by a perſon who had a plentiful Eſtate to a Donee that was in poor circumſtances, and for favourable cauſes, would ſuch a Donation be revoked by the birth of a Child?

If this Child happens to die before the Donor has revoked the Donation, ought it to ſubſiſt, the cauſe of the Revokation having ceaſed by the Child's death? or, is it annulled in ſuch a manner by the Child's birth, that its death cannot make it revive? Theſe words of the Law, revertatur in ejuſdem donatoris arbitrio ac ditione manſurum, *ſeem to ſignify that the Donation is annulled, and that the Donor takes back irrevocably what he had given. Which may be confirmed by the ſixth Law,* §. 1. de inſt. & ſubſt. *where it is ſaid, that if a Father burdens his Son who had no Children with a Subſtitution, the ſaid Subſtitution will vaniſh, whenever the Son comes to have Children,* evaneſcere ſubſtitutionem. *To which we may add, that the Child which is born to the Donor after the Donation, being ſeiſed by its birth of a Right to ſucceed to its Father, this Right annuls the Donation, and which being once annulled, there does not remain to the Donee ſo much as a Right to keep the Donation in ſuſpenſe, under pretext that the Child may come to die before its Father. For it is unlawful to hope for an Event of this nature.* Nec enim fas eſt hujuſmodi caſus expectare. *l. 34. §. 2. ff. de contr. empt.*

⁂

TITLE XI.

Of USUFRUCT.

Reaſons for treating of Uſufruct in this place.

I. IN the foregoing Title mention has been made of the Reſervations of Uſufruct which are made in Donations; and the like Reſervations may alſo be made in Marriage Settlements, in Sales, Exchanges, Tranſactions, and other Covenants[a]. We may likewiſe by expreſs Covenants ſettle on any perſon the Uſufruct of a Thing without the Property[b]. So that ſeeing Uſufruct may be ſettled by Contracts, it is a kind of Covenant. And altho' it be likewiſe acquired by Teſtaments, and other Diſpoſitions made in proſpect of death, or even by the Laws, ſuch as the Uſufruct which the Laws, the Ordinances, and the Cuſtoms give to Parents in the Eſtates of their Children, whether it be under the Name of Uſufruct, or Wardſhip; yet we chuſe to place this Matter here, which ſince it can only be in one place, ought to be put in the firſt where there is occaſion to ſpeak of it, as has been remarked in the Plan of Matters.

[a] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, &c. *l.* 28. *C. de donat.*

[b] Et ſine teſtamento ſi quis velit uſumfructum conſtituere, pactionibus & ſtipulationibus id efficere poteſt. *l.* 3. *f. de uſufr.* §. 1. *inſt. eod.* Sive ex teſtamento, ſive ex voluntario contractu uſusfructus conſtitutus eſt. *l.* 4. *C. eod.*

The practice of ſettling the Uſufruct of a Thing without the Property, is Natural in Society, not only becauſe of the indefinite Liberty of all ſorts of Covenants, but alſo becauſe of the uſefulneſs of ſeparating on many occaſions the Right of Property from that of the preſent Enjoyment. And this Separation, which is made naturally by the Commerce of Letting to Hire and to Farm, is likewiſe made very juſtly upon other views; whether it be in Donations, where the Benefactor is willing only to diveſt himſelf of the Property of his Eſtate, reſerving ſtill the preſent Enjoyment: or whether it be in the Commerce of Contracts, as if two perſons making an Exchange, each reſerves to himſelf the preſent Enjoyment of the Land or Tenement which he gives away: or in Teſtaments, as when a Teſtator deviſes the Uſe and Profits of Lands or Tenements, leaving the Property of them to his Executor, or if he deviſes the Property, and leaves the Uſe and Profits either to the Uſufructuary, or to the Executor, or to another Legatee[c]. In all theſe caſes, whether it be that the Uſufruct be ſettled by Covenant, by Teſtament, by a Law, or by Cuſtom; the nature of it is ſtill the ſame, unleſs the Title by which the Uſufruct is ſettled makes ſome diſtinction: and it is this Matter of Uſufruct in general which is the ſubject matter of this Title.

[c] Uſusfructus à proprietate ſeparationem recipit, idque pluribus modis accidit: Ut ecce ſi quis uſumfructum alicui legaverit. Nam hæres nudam habet proprietatem, legatarius verò uſumfructum. Et contrà ſi fundum legaverit deducto uſufructu, legatarius nudam habet proprietatem, hæres verò uſumfructum. Idem alii uſumfructum, alii deducto eo fundum legare poteſt. Sine teſtamento verò ſi quis velit uſumfructum alii conſtituere, pactionibus & ſtipulationibus id efficere debet. §. 1. *inſt. de uſufr.*

We may likewiſe conſider as a kind of Uſufruct, to which ſeveral Rules of this Title may be applied, the Right which the Incumbents of Church Benefices have to enjoy the Revenues belonging to them. And this kind of Uſufruct has this peculiar property belonging to it, that the Eſtates which are ſubject to it do not belong to any particular Owner, but to the Church.

Thoſe who have read this Matter of Uſufruct in the *Roman* Law, may be apt to find fault that we have omitted to ſet down under this Title the Rule which is to be met with in the eighth Law, *ff. de uſufr. & uſu leg.* and in the fifty ſixth Law, *ff. de uſufr.* Which Laws ſay, that if the Uſufruct of a Thing be given to a Town, or other Corporation, it laſts a Hundred years. But beſides that the caſe of ſuch an Uſufruct is ſo very ſingular and odd, that it does not deſerve a Rule[d]; if one were neceſſary, it would not ſeem juſt to make the Proprietor loſe, by an Uſufruct, the Enjoyment of his Eſtate for three or four Generations; and it would be much more reaſonable to limit it to Thirty years. For which opinion we have the authority of another Law. *V. l.* 68. *in f. ff. ad leg. falc.*

[d] *See the twenty firſt Article of the firſt Section of the Rules of Law.*

* * *

SECT.

SECT. I.

Of the Nature of Uſufruct, and of the Rights of the Uſufructuary.

The CONTENTS.

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I.

1. *Definition of Uſufruct.*

USufruct is a Right to uſe and enjoy a Thing which is not our own, preſerving it whole and entire, without ſpoiling, or diminiſhing it[a].

[a] Uſusfructus eſt jus alienis rebus utendi, fruendi, ſalvâ rerum ſubſtantiâ. *l.* 1. *ff. de uſufr. inſt. eod.* See on theſe laſt words, *without ſpoiling, or diminiſhing it,* that which ſhall be ſaid in the third Section.

II.

2. *Uſufruct of Moveables and Immoveables.*

We may have the Uſefruct not only of Things Immoveable, but alſo of Moveable; ſuch as a Suit of Hangings, a Herd of Cattle, and of other Moveable Things[b], according to the Rules which ſhall be explained in the third Section.

[b] Conſtitit autem uſusfructus non tantùm in fundo, & ædibus: verùm etiam in ſervis & jumentis, cæteriſque rebus. *l.* 3. §. 1. *ff. de uſufr. l.* 7. *eod.* §. 2. *inſt. eod.* See the third Section.

III.

3. *Uſufruct comprehends all ſorts of Revenues.*

The Uſufruct conſiſts in the full and entire Enjoyment of all the kinds of Fruits, Revenues, Conveniencies, and Uſes which may be reaped from the Thing of which one has the Uſufruct. Such are the Fruits of Trees, the Cuttings of Coppice Wood, the young Trees which may be taken out of a Nurſery without ſpoiling it, all Crops, the Honey of Bees, and in general the Uſufructuary enjoys and uſes every thing without reſerve. And we may likewiſe have the Uſufruct of Moveables and Immoveables, from which we reap no other uſe beſides that of bare Recreation[c].

[c] Omnis fructus rei ad fructuarium pertinet. *l.* 7. *ff. de uſufr.* Quicumque reditus eſt, ad uſufructuarium pertinet. Quæque obventiones ſunt ex ædificiis, ex areis, & cæteris quæcumque ædium ſunt. *d. l.* §. 1. Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *eod. l.* 59. §. 1. *eod.* Seminarii fructum puto ad fructuarium pertinere. Ita tamen ut & vendere ei, & ſeminare liceat. *l.* 9. §. 6. *eod.* Silvam cæduam poſſe fructuarium cædere. *d. l.* §. *ult.* Si apes in eo fundo ſint, earum quoque uſusfructus ad eum pertinent. *d. l.* §. 1. Numiſmatum aureorum, vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt. *l.* 28. *ff. eod.* Statuæ & imaginis fructum poſſe relinqui magis eſt: quia & ipſæ habent aliquam utilitatem, ſi quo loco opportuno ponantur. Licèt prædia quædam talia ſint ut magis in ea impendamus quàm de illis acquiramus, tamen uſusfructus eorum relinqui poteſt. *l.* 41. *eod.*

IV.

4. *The Uſufructuary makes the Fruits which he gathers, his own.*

The Uſufructuary who at the moment that he acquires his Right, and that it begins to take place, finds Fruits hanging on the Trees, or unſeparated from the Ground, which are ripe, may gather them, and they are his own. And if the Uſufruct happens to be extinct, either by the death of the Uſufructuary, or otherwiſe, in the time of Harveſt, the Portion of the Fruits which the Uſufructuary gathered before his death, altho' ſtill remaining on the Eſtate, yet being ſeparated from the Ground, will belong to his Heirs, Executors or Adminiſtrators. And what remains ungathered, will belong to the Proprietor, as alſo the Fruits which fell of themſelves, and to which the Uſufructuary had not put his hand. For ſeeing he has only a Right to enjoy, if this Right expires before the Enjoyment, he has nothing farther to pretend. So that when the Uſufructuary dies before Harveſt, his Heirs, Executors, or Adminiſtrators, will have no ſhare in the Fruits[d].

[d] Si pendentes fructus jam maturos reliquiſſet teſtator, fructuarius eos feret, ſi die legati cedente adhuc pendentes deprehendiſſet. Nam & ſtantes fructus ad fructuarium pertinent. *l.* 27. *ff. de uſufr.* Si fructuarius meſſem fecit, & deceſſit, ſtipulam, quæ in meſſe jacet, hæredis ejus eſſe Labeo ait. Spicam, quæ terra teneatur, domini fundi eſſe; fructumque percipi, ſpica aut fœno cæſo, aut uvâ ademptâ, aut excuſsâ oleâ, quamvis nondum tritum frumentum, aut oleum factum, vel vindemia coacta ſit. Sed ut verum eſt quod de olea excuſſa ſcripſit, ita aliter obſervandum de ea olea quæ per ſe deciderit. Julianus ait fructuarii fructus tunc fieri, cùm eos perceperit. *l.* 13. *ff. quib. mod. uſuſfr. vel uſ. am.* Fructuarius, etiamſi maturis fructibus, nondum tamen perceptis, deceſſerit, hæredi ſuo eos fructus non relinquet. *l.* 8. *in fine. ff. de ann. legat.*

It is to be remarked on this Article, that as an Uſufruct may be acquired by different Titles; ſuch as a Teſtament, a Contract, a Law, as has been taken notice of in the Preamble to this Title; ſo we ought to follow in each kind of Uſufruct, as to what concerns the Rights of the Uſufructuary, whatever has been regulated in that matter by the Title, altho' it be different from the Rule explained in this Article. Thus, the Enjoyment which the Incumbents of Church Benefices have of the Fruits belonging to them, is a kind of Uſufruct, which is regulated in another manner. For ſince the Fruits of the Benefice belong to the Incumbent on account of the Charges and Burdens, the Fruits of the laſt year, reckoning the year to commence, as is the Rule, from the firſt of January, *are ſhared between the Executors or Adminiſtrators of the late Incumbent, and his Succeſſor in the Benefice; in proportion to the time that the late Incumbent lived the laſt year. Thus the Fruits of the Dowry, after the diſſolution of the Marriage, are ſhared differently between the Survivor and the Heirs or Executors of the deceaſed, according to the different Cuſtoms of Places, as has been remarked in the Preamble to the Title of Dowries. Thus the Uſufruct of Fathers, and Wardſhips, are regulated according to the Proviſions made in ſuch caſes by the reſpective Cuſtoms and Uſages of Places.*

V.

5. *The Rent of the Leaſe belongs to the Uſufructuary, as the Fruits do.*

If the Fruits of Lands, which are ſubject to an Uſufruct, were let to Farm, the Uſufructuary who has actually acquired his Right at the time of the Harveſt, ſhall receive of the Farmer the Rent of the Farm, in the ſame manner as he would have gathered the Fruits, in caſe there had been no Leaſe. And altho' the Uſufruct come to be extinct between Harveſt-time and the Term of Payment, yet the Uſufructuary, or his Heirs, Executors, or Adminiſtrators will receive the whole Rent of the Leaſe, for that Crop[e].

[e] Defunctâ fructuariâ menſe Decembri, jam omnibus fructibus, qui in his agris naſcuntur, menſe Octobri, per colonos ſublatis, quæſitum eſt utrùm penſio hæredi fructuariæ ſolvi deberet: quamvis fructuaria ante Kalendas Martias, quibus penſiones inferri debeant, deceſſerit: an dividi debeat inter hæredem fructuariæ, & rempublicam cui proprietas legata eſt? Reſpondi rempublicam quidem cum colono nullam actionem habere: fructuariæ verò hæredem ſua die, ſecundùm ea quæ proponerentur, integram penſionem percepturum. *l.* 58. *ff. de uſufr.*

VI.

6. *The Revenues which are acquired ſucceſſively, are ſhared between the Proprietor, and the Uſufructuary, in proportion to the time.*

The Revenues which are acquired ſucceſſively, and from moment to moment, ſuch as the Rents of a Houſe, belong to the Uſufructuary in proportion to the time that his Right laſts. Thus, when an Uſufruct commences from the firſt of *January*, and ceaſes before the end of the year; the Proprietor ſhall have the Rents which accrue after the Uſufruct is extinct, and the Uſufructuary, or his Heirs, Executors, or Adminiſtrators, ſhall have the Rents for the time that the Uſufruct laſted[f].

[f] Si operas ſuas locaverit ſervus fructuarius, & imperfecto tempore locationis uſusfructus interierit: quod ſupereſt, ad proprietarium pertinebit. Sed & ſi ab initio certam ſummam propter operas certas ſtipulatus fuerit, capite deminuto eo, idem dicendum eſt. *l.* 26. *ff. de uſufr.*

VII.

7. *In what manner the Uſufructuary may anticipate the Harveſt.*

The Uſufructuary may gather, before a perfect Maturity, the Fruits whoſe nature is ſuch, that it is either cuſtomary, or more profitable to gather them before they are fully ripe. Thus we do not wait for the full maturity of Olives, Hay, or of a Copſe. But the Uſufructuary ought to tarry till the time of full Maturity for Harveſt, and for the Vintage[g].

[g] Silvam cæduam etiamſi intempeſtivè cæſa ſit, in fructu eſſe conſtat: ſicut olea immatura lecta: item fœnum immaturum cæſum, in fructu eſt. *l.* 48. §. 1. *ff. de uſufr.* In fructu id eſſe intelligitur, quod ad uſum hominis inductum eſt: neque enim maturitas naturalis hîc ſpectanda eſt: ſed id tempus, quo magis colono dominove eum fructum tollere expedit. Itaque cùm olea immatura plus habeat reditus, quàm ſi matura legatur, non poteſt videri, ſi immatura lecta eſt, in fructu non eſſe. *l. pen. ff. de uſ. & uſufr. leg.*

VIII.

8. *Augmentation or Diminution of the Uſufruct, by the change happening to the Eſtate.*

The Uſufruct increaſes, or diminiſhes, in proportion to the Augmentation, or Diminution which may happen to the Eſtate that is ſubject to the Uſufruct. And as the Uſufructuary bears the Loſs or Diminution of his Uſufruct, if the Eſtate periſhes, or is damaged by an Inundation, by Fire, or other Accident[h]; ſo likewiſe he reaps the advantage of the changes which make the Eſtate better, or larger. As if the Event of a Law-Suit acquires to the Eſtate a Service, or a greater Extent of Ground; or if the Neighbourhood of a River brings to it ſome Addition[i].

[h] *See the fourth, fifth, and ſixth Articles of the ſixth Section.*

[i] Huic vicinus tractatus eſt, qui ſolet in eo quod acceſſit tractari: & placuit alluvionis quoque uſumfructum ad fructuarium pertinere. *l.* 9. §. 4. *ff. de uſufr.*

IX.

9. Changes which the Uſufructuary may make in the Eſtate, for raiſing the revenue. The Uſufructuary may open a Quarry in the Ground of which he has the Uſufruct. For the Stones which he digs out of it are inſtead of Fruits; and it is the ſame thing with reſpect to the other matters which he ſhall get out of the ſaid Ground. And he may likewiſe pluck up by the roots a Plantation, as of Vines, for inſtance, to make ſome ſuch change in it, provided that the Eſtate be improved, and the Revenue increaſed by it. For the Uſufructuary may make Improvements, but he cannot make any change to the detriment of the Proprietor's Right. But altho' the Revenue were augmented by a change of the condition of the Eſtate, if this Improvement were only for a time, or if this change ſhould occaſion otherwiſe ſome Inconveniences or Expences, which might prove chargeable to the Proprietor, the Uſufructuary would be bound to indemnify him, he having exceeded the bounds of his Right[l]. Thus, it is by the circumſtances that we ought to judge of the changes which the Uſufructuary may, or may not make.

[l] Inde eſt quæſitum an lapidicinas, vel cretifodinas, vel arenifodinas ipſe inſtituere poſſit. Et ego puto etiam ipſum inſtituere poſſe, ſi non agri partem neceſſariam, huic rei occupaturus eſt. Proinde venas quoque lapidicinarum, & hujuſmodi metallorum inquirere poterit—— & cæterorum fodinas, vel quas pater-familiàs inſtituit, exercere poterit, vel ipſe inſtituere, ſi nihil agriculturæ nocebit. Et ſi fortè in hoc quod inſtituit plus reditus ſit, quàm in vineis, vel arbuſtis, vel olivetis quæ fuerunt, forſitan etiam hæc dejicere poterit. Si quidem ei permittitur meliorare proprietatem. *l.* 13. §. 5. *ff. de uſufr.* Si tamen quæ inſtituit uſufructuarius, aut cœlum corrumpant agri, aut magnum apparatum ſint deſideratura opificum forte, vel legulorum, quæ non poteſt ſuſtinere proprietarius, non videbitur viri boni arbitratu frui. *d. l.* 13. §. 6.

X.

10. Trees blown down. The Trees blown down by the Wind, or by ſome other Accident, belong to the Proprietor of the Ground of which they were a part. So that he is obliged to carry them away at his own charges, that they may no ways incommode. And the Uſufructuary receiving no benefit by them, he is not obliged to plant new ones in their ſtead[m].

[m] Si arbores vento dejectas dominus non tollat, per quod incommodior ſit uſusfructus, vel iter ſuis actionibus uſufructuario cum eo experiendum. *l.* 19. §. 1. *ff. de uſufr.* Arbores vi tempeſtatis, non culpâ fructuarii everſas, ab eo ſubſtitui non placet. *l.* 59. *eod.* See the following Article.

XI.

11. Dead Trees. The dead Trees belong to the Uſufructuary as a kind of Revenue, but with the charge of planting new ones in their room[n].

[n] In locum demortuarum arborum aliæ ſubſtituendæ ſunt: & priores ad fructuarium pertinent. *l.* 18. *ff. de uſufr.*

XII.

12. Trees blown down may be imployed in Repairs. If the Places ſubject to an Uſufruct happen to ſtand in need of ſome Repair, to which the Trees that are blown down by ſome accident may be ſerviceable, the Uſufructuary may make uſe of them for that purpoſe[o].

[o] Arboribus evulſis, vel vi ventorum dejectis uſque ad uſum ſuum & villæ poſſe uſufructuarium ferre Labeo ait. *l.* 12. *ff. de uſufr.* Materiam ipſam ſuccidere, quantum ad villæ refectionem, putat poſſe. *d. l.* 12.

XIII.

13. Vine-props. The Uſufructuary may take Trees out of a Wood, for making Props for the Vines, provided he does not do any damage to the Wood[p].

[p] Ex ſilva cædua pedamenta, & ramos ex arbore uſufructuarium ſumpturum: ex non cædua in vineam ſumpturum: dum ne fundum deteriorem faciat. *l.* 10. *ff. de uſufr.*

XIV.

14. Service acceſſory to the Uſufruct. If the Uſufructuary of a Piece of Ground cannot have acceſs to it, but thro' another Ground belonging to the perſon who created the Uſufruct; this Paſſage will be due to the Uſufructuary. Thus, if a Teſtator has bequeathed the Uſufruct of a Piece of Ground, to which one cannot enter, but thro' another Ground of his Succeſſion, and this other Ground remains with the Executor, or is deviſed to another Legatee; the Executor or the Legatee holding this Ground of the Teſtator, will be obliged to ſuffer the Service of the Paſſage[q]; and to give it ſuch, as ſhall be found neceſſary for cultivating and enjoying the Ground that is ſubject to the ſaid Uſufruct[r].

[q] Uſusfructus legatus adminiculis eget, ſine quibus uti frui quis non poteſt. Et ideo ſi uſusfructus legetur, neceſſe eſt tamen, ut ſequatur eum aditus. *l.* 1. §. 1. *ff. ſi uſusfr. pet.* Si uſusfructus ſit legatus ad quem aditus non eſt per hæreditarium fundum, ex teſtamento utique agendo fructuarius conſequetur, ut cum aditu ſibi præſtetur uſusfructus.

tus. *d. l.* 1. §. 2. In hac ſpecie non aliter concedendum eſſe legatario fundum vindicare, niſi prius jus tranſeundi uſufructuario præſtet. *l.* 15. §. 1. *ff. de uſu & uſufr. leg.*

[r] Utrùm autem aditus tantùm, & iter, an verò & via debeatur fructuario, legato ei uſufructu Pomponius libro quinto dubitat: & rectè putat, prout uſusfructûs perceptio deſiderat, hoc ei præſtandum. *d. l.* 1. §. 3. *ff. ſi uſuſf. pet.*

XV.

15. Conveniences which are not neceſſary to the Uſufructuary. If in the caſe of an Uſufruct bequeathed, the Uſufructuary wants ſome conveniences which are not abſolutely neceſſary for the Enjoyment, ſuch as that of a Paſſage, he cannot pretend that the Executor ſhould furniſh him ſuch ſorts of conveniences. Thus, he cannot demand that they ſhould give him more convenient Lights for a Chamber, a more eaſy Paſſage, or a Liberty to draw Water out of a Well. For the Uſufruct is limited to the Enjoyment of the Thing, ſuch as it is at the time that the Uſufructuary acquires his Right[s].

[s] Sed an & alias utilitates & ſervitutes ei hæres præſtare debeat, putà luminum, & aquarum, an verò non? Et puto eas ſolas præſtare compellendum, ſine quibus omnino uti non poteſt. Sed ſi cum aliquo incommodo utatur, non eſſe præſtandas. *l.* 1. §. *ult. ff. ſi uſusfr. pet.*

XVI.

16. The Uſufructuary has the Services. The Uſufructuary may in his own name ſue for the Right of a Service, if any is due to the Eſtate of which he has the Uſe and Profits, and may ſue the Neighbour who owes it, in the ſame manner as the Proprietor himſelf might do[t].

[t] Si fundo fructuario ſervitus debeatur, Marcellus libro 8. apud Julianum Labeonis & Nervæ ſententiam probat, exiſtimantium ſervitutem quidem eum vindicare non poſſe, verùm uſumfructum vindicaturum. Ac per hoc vicinum, ſi non patiatur eum ire & agere, teneri, ei quaſi non patiatur uti frui. *l.* 1. *ff. ſi uſusfruct. pet.*

XVII.

17. The Improvements and Repairs which the Uſufructuary may make. The Uſufructuary may make in the Eſtate of which he has the Uſufruct, Improvements, and Repairs, uſeful or neceſſary, and even for his bare pleaſure; provided he does not make the Eſtate the worſe, nor change the condition of the places. Thus, he cannot raiſe a Building higher, nor change the Apartments or other Dependencies of a Houſe, nor disfigure them, augment, or diminiſh them, not even by adding what would be better, or demoliſhing what is uſeleſs. But he may, for Inſtance, make new Lights, paint the Rooms, and imbelliſh the Houſe with Statues and other Ornaments[u].

[u] Neratius libro quarto membranarum ait, non poſſe fructuarium prohiberi quominus reficiat. Quia nec arare prohiberi poteſt, aut colere. Nec ſolùm neceſſarias refectiones facturum, ſed etiam voluptatis cauſa, ut tectoria, & pavimenta, & ſimilia. Neque autem ampliare nec utile detrahere poſſe quamvis melius repoſiturus ſit: quæ ſententia vera eſt. *l.* 7. *in f. & l.* 8. *ff. de uſufr.* Si ædium uſusfructus legatus ſit, Nerva filius, & lumina immittere eum poſſe ait. Sed & colores, & picturas, & marmora poterit, & ſigilla, & ſi quid ad domûs ornatum. Sed neque diætas transformare vel conjungere, aut ſeparare ei permittetur: vel aditus poſticaſve vertere, vel refugia aperire, vel atrium mutare, vel viridaria ad alium modum convertere. Excolere enim quod invenit poteſt, qualitate ædium non immutatâ. Item Nerva eum cui ædium uſusfructus legatus ſit, altius tollere non poſſe, quamvis lumina non obſcurentur, quia tectum magis turbatur. *l.* 13. §. 7. *eod. v.* §. 8. *eod.*

XVIII.

18. He cannot take away the Improvements, or Repairs which he has made. If the Uſufructuary has made Improvements, or Repairs, whether uſeful or neceſſary, or for his pleaſure, he can demoliſh nothing of what he has built, nor take away any thing but what may be preſerved after it is taken away[x].

[x] Sed ſi quid inædificaverit, poſtea eum neque tollere hoc, neque refigere poſſe. Refixa planè poſſe vindicare. *l.* 15. *ff. de uſufr.* See the laſt Article of the third Section of the Title of Dowries.

XIX.

19. The Uſufructuary may transfer, ſell, and give away his Right. The Uſufructuary may either enjoy the Thing of which he has the Uſufruct himſelf, or he may let out his Right to another: he may likewiſe transfer, ſell, or give away his Uſufruct. And the Diſpoſition which he makes of it, is to him inſtead of an Enjoyment of it, and preſerves his Right[y].

[y] Uſufructuarius vel ipſe frui ea re, vel alii fruendam concedere, vel locare, vel vendere poteſt. Nam & qui locat utitur, & qui vendit utitur. Sed & ſi alii precario concedat, vel donet, puto eum uti atque ideo retineri uſumfructum. *l.* 12. §. 2. *ff. de uſufr.* Cui uſusfructus legatus eſt, etiam invito hærede, eum extraneo vendere poteſt. *l.* 67. *eod.*

XX.

20. He may interrupt the Leaſe. The Uſufructuary has the liberty of interrupting the Leaſe which the Proprietor had made, in the ſame manner as the Buyer has[z]; unleſs it be otherwiſe regulated by his Title. For having the Right of enjoying the whole Revenue, and commonly during his Life; he is as it were Maſter; and is not obliged to let the Farmer enjoy a Profit which belongs to him.

[z] Quidquid in fundo naſcitur, vel quidquid inde percipitur, ad fructuarium pertinet: penſiones quoque jam antea locatorum agrorum ſi ipſæ quoque ſpecialiter comprehenſæ ſint. Sed ad exemplum venditionis, niſi fuerint ſpecialiter exceptæ, poteſt uſusfructuarius conductorem repellere. *l.* 59. §. 1. *ff. de uſufr.* See the fourth Article of the third Section of Letting and Hiring.

SECT. II.

Of Uſe, and Habitation.

Difference between Uſe and Uſufruct.

USE is diſtinguiſhed from Uſufruct by this, that where an Uſufruct is a Right to enjoy all the Fruits and Revenues which the Eſtate that is ſubject to it is capable of producing, Uſe conſiſts only in a Right to take out of the Fruits of the Ground, ſuch Portion of them as may be conſumed by Uſe, and which is neceſſary for the perſon who has the Uſe, or which is ſettled by his Title: and the Surplus belongs to the Proprietor of the Eſtate. Thus, thoſe who have the Right of Uſe in a Foreſt, or a Copice, can only take out of them what is neceſſary for their Uſe, or regulated by their Title. And he who has the Uſe of any other Ground, can only take out of it what may be neceſſary to ſupply the occaſions he ſhall have of thoſe kind of Fruits which the ſaid Ground produces: or the Uſe may be even reſtrained to certain kinds of Fruits or Revenues; without extending it to others. Thus we ſee in the *Roman* Law, that he who had only the ſimple Uſe of a Piece of Ground, had no ſhare of the Corn, or Oil that grew in it[a]: And that he who had the Uſe of a Flock of Sheep, was reſtrained only to make uſe of them for dunging his Grounds, and had no ſhare, either in the Wool, or Lambs: and even for the Milk, it is ſaid in ſome places that he could take only a very ſmall portion of it; and in other places it is ſaid, he had no right to any of it[b].

[a] Neque oleo (uſurum) neque frumento. *l.* 12. §. 1. *ff. de uſu & habit.*

[b] Modico lacte uſurum puto. *l.* 12. §. 2. *ff. de uſu & habitat.* Si pecorum vel ovium uſus legatus ſit, neque lacte, neque agnis, neque lana utetur uſuarius, quia ea in fructu ſunt. Plane ad ſtercorandum agrum ſuum pecoribus uti poteſt. §. 4. *inſt. de uſu & habit. d. l.* 12. §. 2.

Of Habitation.

Habitation is in Houſes, what Uſe is in Lands: and whereas he who has the Uſufruct of a Houſe, may enjoy the whole Houſe; he who has only a Right of Habitation, has his Enjoyment of it limited to what part is neceſſary for him, or ſettled by his Title. As to which it is neceſſary to obſerve, that altho' the word *Habitation* appears to be reſtrained in ſome Laws, to the ſenſe explained in this Definition[c]; yet it ſeems in others that Habitation, as alſo the Uſe of a Houſe, implies the Enjoyment of the whole Houſe. So that it is not ſo much by the ſenſe of theſe words *Habitation* and *Uſe*, that we are to extend or limit the Enjoyment of thoſe perſons who have theſe ſorts of Rights, as by the terms of the Title by which it is conveyed, which may help us to judge of the Intention, either of the Teſtator, if this Right is acquired by Teſtament, or of the Parties contracting, if it is by Contract that it is ſettled[d].

[c] *V. l.* 10. *ff. de uſu & habit. d. l.* 1. §. 1. & 2. *l.* 18. *eod.* See the ninth Article of the ſecond Section, and the ſeventh Article of the fourth Section.

[d] *V. l.* 4. *l.* 22. §. 1. *ff. de uſu & habit. l.* 15. *eod. l.* 13. C. *de uſufr. & habit.*

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9. *To what places Habitation extends.*
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11. *The Right of Habitation is during Life.*

I.

1. Definition of Uſe.

USE is a Right to take out of the Fruits ſubject to it, ſo much as he who has the Uſe may conſume on his Wants, or ſo much as is given him by his Title[a]. And this is regulated either by the Title it ſelf, if it has expreſſed the Quantity, or by the Prudence of the Judge, according to the Quality of him who has the Uſe, and the Intention of the Perſons who have ſettled this Right, or by the Cuſtoms and Uſage of the Places, if they have made any proviſion therein[b].

[a] Cui uſus relictus eſt, uti poteſt, frui non poteſt. *l.* 2. *ff. de uſu & habit.* Minus juris eſt in uſu quàm in uſufructu. Nam is qui fundi nudum habet uſum, nihil ulterius habere intelligitur, quàm ut oleribus, pomis, floribus, fœno, ſtramentis, & lignis ad uſum quotidianum utatur. §. 1. *inſt. de uſu & habit. l.* 10. §. 4. *l.* 12. §. 1. *ff. eod.* Non uſque ad compendium, ſed ad uſum ſcilicet, non uſque ad abuſum. *l.* 12. §. 1. *eod.*

[b] Uſu legato ſi plus uſus ſit legatarius quàm oportet, officio judicis, qui judicat quemadmodum utatur, continetur ne aliter quàm debet utatur. *l.* 22. §. *ult. ff. eod.* Largius cum uſurario agendum eſt. Pro dignitate ejus. *l.* 12. §. 1. *eod.*

II.

2. When the Uſe implies the Uſufruct. If the Fruits, out of which he who has the Uſe of them has a right to take whatever is neceſſary for his Occaſions, are ſo inconſiderable on the Ground of which he has the Uſe, that there is preciſely no more than what his Occaſions require, he ſhall have the whole, in the ſame manner as the Uſufructuary[c].

[c] Fundi uſu legato, licebit uſurario & ex penu quod in annum dumtaxat ſufficiat, capere: licet mediocris prædii eo modo fructus conſumantur. Quia, & domo, & ſervo ita uteretur, ut nihil alii fructuum nomine ſupereſſet. *l.* 15. *ff. de uſu & habit.*

III.

3. He who has the Uſe ought not to incommode the Proprietor. He who has the Uſe of a Piece of Ground, has liberty to go into it to uſe his Right, but without giving any trouble to the Proprietor[d].

[d] In eo fundo hactenus ei morari licet, ut neque domino fundi moleſtus ſit, neque his per quos opera ruſtica fiunt, impedimento. *l.* 11. *ff. de uſu & habit.* §. 1. *inſt. eod.*

IV.

4. The Uſe cannot be transferred to other perſons. Seeing the Right of Uſe is limited to the perſon of him to whom the Uſe is granted, he can neither ſell, let to hire, nor give away a Right which is perſonal to him, and which paſſing to another perſon might be more chargeable, or more inconvenient to the Proprietor[e]. And if there ſhould be any difficulty to know whether he who has the Uſe may uſe his Right otherwiſe than in perſon, it ought to be adjuſted by the Title, by the Quality of the Perſons, and by the other circumſtances.

[e] Nec ulli alii jus quod habet, aut vendere, aut locare, aut gratis concedere poteſt. *l.* 11. *in f. ff. de uſu & habit.* §. 1. *in fin. inſt. eod.* Quemadmodum enim concedere alii operas poterit, cum ipſe uti debeat. *l.* 12. §. *ult. ff. eod.* See the tenth Article of this Section.

V.

5. How the Uſe acquired to the Husband, or the Wife, is for both. The Right of Uſe, as alſo that of Habitation, which accrues either to the Huſband, or to the Wife, by a Legacy, or other Diſpoſition made in proſpect of death, is communicated from the one to the other: and they will uſe this Right in common together during the Life of the Perſon to whom it is given[f]. For he who hath bequeathed either an Uſe, or a Habitation, to one of the Parties joined together in Wedlock, hath had no mind to exclude the other from ſharing in it. But if a Right of Uſe of ſome Fruits was bequeathed either to the Huſband, or to the Wife, before they were married, the Marriage happening afterwards would not make the condition of the Proprietor worſe; and the Uſe would be limited to what had been regulated by the Title. And it would be the ſame thing, had the Uſe been acquired by Covenant, either before or after the Marriage. And in all theſe caſes, it is by the circumſtances that we are to judge of the effect which the Title ought to have[g].

[f] Domus uſus relictus eſt, aut marito, aut mulieri. Si marito poteſt illic hábitare, non ſolus, verùm familia cum quoque ſua. *l.* 2. §. 1. *ff. de uſu & hab.* Mulieri autem ſi uſus relictus ſit, poſſe eam & cum marito habitare. *l.* 4. §. 1. *eod.* See hereafter the eighth Article.

Cæterarum quoque rerum uſu legato, dicendum eſt uxorem cum viro in promiſcuo uſu èas res habere poſſe. *l.* 9. *eod.* Neque enim tam ſtrictè interpretandæ ſunt voluntates defunctorum. *l.* 12. §. 2. *in f. eod.* Conditionum verba quæ teſtamento præſcribuntur, pro voluntate conſiderantur. *l.* 101. §. 2. *ff. de cond. & demonſtr.*

[g] Semper in ſtipulationibus, & in cæteris contractibus id ſequimur quod factum eſt. *l.* 34. *ff. de reg. jur.* See the eighth Article, with the remark on it.

VI.

6. The Uſe laſts during Life. The Right of Uſe is not only for one, or more years, but it laſts during the Life of him who has the Uſe, if it is not otherwiſe provided by the Title of the ſaid Right[h].

[h] *See hereafter the eleventh Article of this Section, and the firſt Article of the ſixth Section.*

VII.

7. Definition of Habitation. Habitation is a Right to dwell in a Houſe, and he who hath this Right, hath as it were an Uſe, or an Uſufruct, according as his Title extends, or limits the Right of Inhabiting[i].

[i] Domus uſus. *l.* 2. §. 1. *ff. de uſu & hab.* See the texts quoted at the end of the Preamble to this Section. *See hereafter the ninth Article.*

VIII.

8. Habitation extends to the whole Family. The Right of Habitation extends to the whole Family of the perſon who has this Right. For he cannot dwell ſeparately from his Wife, his Children, and his Servants. And it is the ſame thing if this Right belongs to the Wife[l]. And this is underſtood likewiſe of the Habitation which was acquired before the Marriage[m].

[l] Poteſt illic habitare non ſolus, verùm familia cum quoque ſua. *l.* 2. §. 1. *ff. de uſu & habit.* See the fifth Article of this Section.

Mulieri autem ſi uſus relictus ſit, poſſe eam & cum marito habitare, Quintus Mutius primus admiſit, ne ei matrimonio carendum foret, cùm uti vult domo. Nam per contrarium quin uxor cum marito poſſit habitare nec fuit dubitatum. *l.* 4. §. 1. *ff. de uſu & habit.*

[m] Quid ergo ſi viduæ legatus ſit uſus? an nuptiis contractis, poſt conſtitutum uſum, mulier habitare cum marito poſſit? Et eſt verum poſſe eam cum viro, & poſtea nubentem habitare. *l.* 4. *eod.* See the fifth Article.

What is ſaid in this Article, that Habitation extends to the whole Family, ſignifies that he who has this Right may dwell with his whole Family, in the places that are ſubject to his Habitation. But the meaning of this Rule is not, that a Habitation which is limited, for Example, to one Apartment, ſhould extend to another, under pretext that the Family of the perſon who has this Right is ſtraitned for want of room. See the fifth Article.

IX.

9. *To what places Habitation extends.* Habitation extends, either to the whole Houſe, or only to a part of it, according as it appears to be regulated by the Title. But if the Habitation is given indefinitely, without naming either the whole Houſe, or any part of it, but only either according to the Condition, or the Neceſſities of him who acquires the Right, it will comprehend all neceſſary Conveniencies, even altho' nothing ſhould remain for the Proprietor[n].

[n] Ita uteretur (domo) ut nihil alii fructuum nomine ſupereſſet. *l.* 15. *ff. de uſu & habit.* Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tàm hæredis quàm uſuarii. Videamus tamen, ne, ſi fructum hæres accipiat, ipſe reficere debeat: ſi verò talis ſit res cujus uſus legatus eſt, ut hæres fructum percipere non poſſit, legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet. *l.* 18. *ff. de uſu & habit. We ſee in this Law both the caſes; one, where the Habitation extends to the whole Houſe: and the other, where it is confined to a part of it.* See the ſeventh Article of this Section.

X.

10. *The Right of Habitation may be transferred.* He who has a Right of Habitation in a Houſe, or in a part of it, may aſſign over and let out his Right to another, without dwelling in the Houſe himſelf[o], unleſs his condition is otherwiſe regulated by his Title[p].

[o] Si quidem habitationem quis reliquerit: ad humaniorem declinare ſententiam nobis viſum eſt: & dare legatario etiam locationis licentiam: quid enim diſtat ſive ipſe legatarius maneat, ſive alii cedat ut mercedem accipiat. *l.* 13. *C. de uſufr.* §. 5. *inſt. de uſu & habit.*

[p] Id ſequimur quod actum eſt. *l.* 34. *ff. de reg. jur.* See the fourth Article of this Section.

XI.

11. *The Right of Habitation is during life.* The Right of Habitation, as well as that of Uſe, is not limited to a time, but it laſts during the Life of the perſon who has the Right[q].

[q] Utrum autem unius anni ſit habitatio, an uſque ad vitam apud veteres quæſitum eſt. Et Rutilius donec vivat habitationem competere, ait. Quam ſententiam, & Celſus probat libro octavo decimo Digeſtorum. *l.* 10. §. 3. *ff. de uſu & habit.* See the ſixth Article.

SECT. III.

Of the Uſufruct of Things which are conſumed, or impaired, by Uſe.

Uſufruct of Moveables. THings Moveable are either wholly conſumed, or at leaſt impaired by Uſe. Thus, Grain and Liquors are wholly conſumed when one uſes them: and Cattel, Hangings, Beds, and other Moveables ſuffer ſome diminution by Uſe, and even by the bare effect of Time, altho' they were not uſed: and at laſt theſe Things periſh. But nevertheleſs a kind of Uſufruct has been eſtabliſhed of all Moveable Things, and even of thoſe which periſh by being uſed. This Uſufruct is acquired two ways, either by a particular Title, as if one makes a Gift of the Uſufruct, or bare Uſe, or of a Sute of Hangings and other Moveables; or by a general Title, if they chance to be comprehended in a Totality of Goods, ſuch as a Succeſſion, of which one has the Uſufruct. And it is this kind of Uſufruct of which the Rules ſhall be the ſubject matter of this Section.

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2. *Uſufruct of Moveable Effects in a Totality of Goods.*
3. *In what this Uſufruct conſiſts.*
4. *Uſufruct of Living Creatures.*
5. *The Uſufructuary of a Herd of Cattel, ought to ſupply out of the Fruits the places of thoſe which die.*
6. *The Uſufructuary of Animals which do not produce young ones, is not obliged to ſupply the places of thoſe that die.*
7. *Uſufruct of Things which are conſumed by uſe.*
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9. *The Bounds and extent of the Uſe of Moveables.*
10. *If the Uſufructuary of Moveables can let them out.*

I.

1. *Uſufruct of all ſorts of Things.* ALtho' it ſeems not to be natural that we ſhould have the Uſufruct of Moveable Things which periſh in the Uſe, ſuch as Corn, and Liquors; yet the Laws have received a kind of Uſufruct of this ſort of Things, as of

all others which we are capable of poſſeſſing[a]. For in effect there is not any one of theſe Things from which we may not draw ſome uſe, and we may eſtabliſh in them a kind of Uſufruct, according to their Nature, by the following Rules.

II.

2. Uſufruct of Moveable Effects in a Totality of Goods.

He who has the Univerſal Uſufruct of a Totality of Goods, has alſo the Right to enjoy and uſe all the Moveable Effects according to their Nature; to conſume what is liable to be conſumed in its ordinary uſe; to gather from the Living Creatures the Profits which they yield: to receive the Intereſt of Debts which bear Intereſt: and to make uſe of every thing according to its natural Uſe, either for its Revenue, or for its Conveniency, or for bare Pleaſure[b].

III.

3. In what this Uſufruct conſiſts.

The Uſufruct of Moveable Things which are not conſumed immediately by the uſe of them, conſiſts in the Right of enjoying them, and imploying them as the Proprietor would do, by putting them to the uſe for which they are deſigned, without abuſing them, and taking due care of them. Thus, a Suit of Hangings, of which one has the Uſufruct, may continue hung up, and the other Moveables may likewiſe be employed to their ſeveral uſes: and they ſhall be reſtored to the Proprietor in the condition in which they ſhall happen to be after the Uſufruct is expired, altho' waſted and diminiſhed by the effect of the Uſe, provided the Uſufructuary hath not miſuſed them[c].

IV.

4. Uſufruct of Living Creatures.

The Uſufructuary, who has Living Creatures in his Uſufruct, may draw from them the Revenues, and Services which the Maſter himſelf would draw. Thus, he may imploy the Oxen in Carriage, and Tillage, the Horſes either to carry and draw, or to till the Ground, or to ride upon, according to the uſes for which they are deſtined; the Sheep to dung the Grounds; and from them he may likewiſe draw the Profit of the Lambs, the Milk, and the Wool[d].

V.

5. The Uſufructuary of a Herd of Cattel, ought to ſupply out of the Fruits the places of thoſe which die.

If it is of a Stud of Mares, a Herd of Cattel, or a Flock of Sheep, that one has the Uſufruct, the Uſufructuary will have the Colts, the Calves, the Lambs, the Wool, and all the Services, and other Profits, according to the nature and uſe of theſe Animals[e]; but ſtill on condition that he preſerve entire the Number which he hath received, and that when any of them dies, he fill up their places out of the Fruits. For it is enough for him to enjoy the Profits which he reaps from the Animals, and to have over and above whatever exceeds the number which he is bound to keep intire[f].

VI.

6. The Uſufructuary of Animals which do not produce young ones, is not obli-

If it happens that the Uſufruct is of ſuch Animals as cannot produce young ones for ſupplying the places of thoſe that die, ſuch as a Set of Horſes, or Mules, or any one Beaſt alone, the Uſufructuary will not be bound to fill up

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[a] Senatus cenſuit, ut omnium rerum, quas in cujuſque patrimonio eſſe conſtaret, uſusfructus legari poſſit: quo Senatus conſulto indultum videtur, ut earum rerum quæ uſu tolluntur, vel minuuntur, poſſit uſusfructus legari. *l.* 1. *ff. de uſufr. ear. rer. quæ uſu conſ. l.* 3. *eod.* Sed de pecunia rectè caveri oportet his à quibus ejus pecuniæ uſusfructus legatus erit. *l.* 2. *eod.* §. 2. *inſt. de uſufr.*

[b] Omnium bonorum uſumfructum poſſe legari. *l.* 29. *ff. de uſufr. l.* 34. §. 2. *eod. V. l.* 1. *C. eod.* Conſtitit uſusfructus non tantùm in fundo, & ædibus, verùm etiam in ſervis, jumentis, cæteriſque rebus. *l.* 3. §. 1. *ff. eod. l.* 7. *eod* Numiſmatum aureorum vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt. *l.* 28. *eod.* Statuæ, & imaginis uſumfructum poſſe relinqui. *l.* 41. *eod.* Poſt quod omnium rerum uſusfructus legari poterit, an & nominum? Nerva negavit: ſed eſt verius quod Caſſius & Proculus exiſtimant, poſſe legari. *l.* 3. *ff. de uſufr. ear. rer. quæ uſu conſ.*

[c] Et, ſi veſtimentorum uſusfructus legatus ſit, non ſicut quantitatis uſusfructus legetur: dicendum eſt, ita uti eum debere ne abutatur. *l.* 15. §. 4. *ff. de uſufr.* Proinde & ſi ſcenicæ veſtis uſusfructus legetur, vel aulæi, vel alterius apparatus, alibi quàm in ſcæna non uteretur. *d. l.* §. 5. Si veſtis uſusfructus legatus ſit, ſcripſit Pomponius, quamquàm hæres ſtipulatus ſit finito uſufructu veſtem reddi, attamen non obligari promiſſorem, ſi eam ſine dolo malo attritam reddiderit. *l.* 9. §. 3. *ff. de uſuf. quem cau.*

[d] Si boum armenti uſus relinquatur, omnem uſum habebit, & ad arandum, & ad cætera ad quæ boves apti ſunt. *l.* 12. §. 3. *ff. de uſu & habit.* Equitii quoque legato uſu, videndum ne & domare poſſit, & ad vehendum ſub jugo uti: & ſi fortè auriga fuit, cui uſus equorum relictus eſt, non puto eum Circenſibus his uſurum, quia quaſi locare eos videtur. Sed ſi teſtator ſciens eum hujus eſſe inſtituti & vitæ reliquit, videtur etiam de hoc uſu ſenſiſſe. *d. l.* 12. §. 4. Si pecoris ei uſus relictus eſt, putà gregis ovilis, ad ſtercorandum uſurum dumtaxat Labeo ait. Sed neque lanâ neque agnis, neque lacte uſurum. *Hæc enim* magis *in fructu eſſe d. l.* §. 2.

[e] *See the preceding Article.*

[f] Planè ſi gregis vel armenti ſit uſusfructus legatus, debebit ex agnatis, gregem ſupplere. Id eſt in locum capitum defunctorum. *l.* 68. §. *ult. ff. de uſufr.* Si deceſſerit fœtus, periculum erit fructuarii, non proprietarii: & neceſſe habebit alios fœtus ſubmittere. *l.* 70. §. 2. *eod.* Eaque pleno grege edita ſunt, ad fructuarium pertinere. *d. l.* §. 42.

ged to ſupply the places of thoſe that die. up the place of that which dies[g], if its death happens without his fault.

[g] Sed quod dicitur debere eum ſummittere, toties verum eſt, quoties gregis, vel armenti, vel equitii, id eſt univerſitatis uſusfructus legatus eſt. Cæterum ſingulorum capitum nihil ſupplebit. *l.* 70. §. 3. *ff. de uſufr.*

VII.

7. *Uſufruct of Things which are conſumed by uſe.* The Uſufruct of Things which are conſumed in the uſe, carries along with it the Property of them, ſince one cannot uſe them but by conſuming them. But the Uſufructuary is diſtinguiſhed from the Proprietor, in that he is obliged after the Uſufruct is expired, to reſtore, according as his Title obliges him, either an equal Quantity of the ſame Kind with that which he received, or the Value of the Things at the time he received them[h]. For it is of this Value that he has had the Uſufruct.

[h] Si vini, olei, frumenti uſusfructus legatus erit, proprietas ad legatarium transferri debet. Et ab eo cautio deſideranda eſt, ut quandoque is mortuus, aut capite diminutus ſit, ejuſdem qualitatis res reſtituatur. Aut æſtimatis rebus certæ pecuniæ nomine cavendum eſt, quod & commodius eſt. Idem ſcilicet de cæteris quoque rebus, quæ uſu continentur intelligemus. *l.* 7. *ff. de uſufr. ear. rer. qua uſu conſ.* See the ſecond Article of the fourth Section.

VIII.

8. *It is equal, whether one has the Uſe, or Uſufruct of Things which are conſumed in the uſe.* It is the ſame thing whether we have the Uſe, or Uſufruct of Things which are conſumed in uſing, ſuch as Money, Grain, Liquors. For he who has the Uſe of theſe things, enjoys them as much as he who has the Uſufruct of them, ſince he diſpoſes of them as if he were Maſter of them[i].

[i] Quæ in uſufructu pecuniæ diximus, vel cæterarum rerum quæ ſunt in abuſu, eadem & in uſu dicenda ſunt. Nam idem continere uſum pecuniæ, & uſumfructum, & Julianus ſcribit, & Pomponius libro octavo de Stipulationibus. *l.* 5. §. *ult. ff. de uſuf. ear. rer. qua uſu conſum. l.* 10. §. 1. *eod.*

IX.

9. *The bounds and extent of the Uſe of Moveables.* The Uſe of all other Moveable Things hath its limits and its extent according to the Title which eſtabliſhes it; and it is regulated either by the Intention of the Parties contracting, if the Title is a Contract, or by that of the Teſtator, if it is a Teſtament. And we judge of the ſaid Intention either by the terms of the Title, or by the circumſtances, ſuch as that of the Quality of the perſon to whom the Uſe of theſe Things has been given, of the Motive of the Perſon who gave it, of the Uſe which he himſelf made of it, and other circumſtances of the like nature. Regard is alſo to be had to the Cuſtom of the Place, if there be any to which the Title may have relation. And it is by theſe Principles that we ought to judge, if, for Example, an Uſe of Moveables comprehends all Moveable Things without exception, or only ſome of them, and in what manner we are to make the diſtinction: if it extends to all ſorts of Services, and Profits, which one may draw from them, or if it is limited to ſome particular Services, and to ſome Profits[l].

[l] *See the firſt Article, and the fifth Article of the ſecond Section; as alſo the Laws cited on the fourth Article of this Section, and the following Article.*

X.

10. *If the Uſufructuary of Moveables can let them out.* He who has the Uſufruct of Moveable Things of which the Uſe conſiſts in letting them out to hire, ſuch as a Boat for carrying Merchandize, a Ship for a Voyage by Sea, may let ſuch Things to hire. But he cannot let out thoſe Things which are not deſtined to be let to Hire. For altho' the Uſufruct gives a full Right to enjoy all the Profit which may be drawn from the Things that are ſubject to it, yet this Right in Moveables ought to have its bounds, becauſe the miſuſe of them may deſtroy or damage them. So that the ways of uſing them ought to be regulated according to the Title, and according to the circumſtances of the Quality of the Perſons, the Nature of the Things, the Uſe which a good and careful Huſband ought to make of them, and other the like circumſtances[m].

[m] Et ſi veſtimentorum uſusfructus legatus ſit, non ſicut quantitatis uſusfructus legetur: dicendum eſt, ita uti eum debere, ne abutatur. Nec tamen locaturum, quia vir bonus ita non uteretur. *l.* 15. §. 4. *ff. de uſufr.* Proindè & ſi ſcenicæ veſtis uſusfructus legetur, vel aulæi, vel alterius apparatus, alibi quàm in ſcena non uteretur. Sed an & locare poſſit videndum eſt, & puto locaturum. Et licèt teſtator commodare non locare fuerit ſolitus, tamen ipſum fructuarium locaturum tam ſcenicam quàm funebrem veſtem. *d. l.* §. 5. Si fortè auriga fuit, cui uſus equorum relictus eſt, non puto eum Circenſibus his uſurum, quia quaſi locare eos videtur. Sed ſi teſtator ſciens eum hujus eſſe inſtituti & vitæ reliquit, videtur etiam de hoc uſu ſenſiſſe. *l.* 12. §. 4. *ff. de uſu & habit.* See the foregoing Article.

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SECT. IV.

Of the Engagements of the Uſufructuary, and of him who has the bare Uſe, to the Proprietor.

The CONTENTS.

1. *The Uſufructuary ought to make an Inventory of the Things ſubject to the Uſufruct.*
2. *He ought to give Security to make reſtitution.*
3. *He ought to take care of the Things ſubject to the Uſufruct.*
4. *He ought to uſe the Things as a good Huſband would do.*
5. *He ought to acquit the Charges.*
6. *He ought to make the Repairs.*
7. *The Engagements of the perſon who has the bare Uſe.*
8. *The relinquiſhing of the Uſufruct, or Uſe, to avoid the Charges.*

I.

1. The Uſufructuary ought to make an Inventory of the Things ſubject to the Uſufruct.

THE firſt Engagement of the Uſufructuary, is to charge himſelf with the Things of which he has the Uſufruct, whether they be Moveables, or Immoveables: and to make an Inventory of them in Writing, in preſence of the perſons intereſted, that it may appear in what Things they conſiſt, and in what condition they are when he receives them: in order to regulate what he is to reſtore after the Uſufruct is expired, and in what condition he ought to give the Things back[a].

II.

2. He ought to give Security to make reſtitution.

The ſecond Engagement of the Uſufructuary, is to give the neceſſary Security to the Proprietor, for the Reſtitution of the Things of which he has the Uſufruct; whether by his bare promiſe of making Reſtitution, or by giving Surety for his doing it, according as the Title of his Uſufruct may oblige him, or the circumſtances of the Nature of the Things, of the Quality of the Perſons, and others of the like nature may demand. As if it is an Uſufruct of Things which periſh in the Uſe, or which may be eaſily damnified. And the Security for Reſtitution implies likewiſe that of reſtoring the Things in the condition in which they ought to be[b].

III.

3. He ought to take care of the Things ſubject to the Uſufruct.

The third Engagement which the Uſufructuary is under, is to preſerve the Things of which he has the Uſufruct, and to take the ſame care of them as a good Huſband would do of what belongs to him[c]. Thus he who has the Uſufruct of a Houſe, ought to be watchful againſt Fire. Thus, he who has the Uſufruct of Beaſts, ought to take care that they be well kept, fed, and looked after.

IV.

4. He ought to uſe the Things as a good Huſband would do.

The fourth Engagement of the Uſufructuary, is to uſe and enjoy the Things of which he has the Uſufruct in the ſame manner as a good Huſband would do, drawing from them ſuch advantages as he can make, without miſuſing, or damnifying them, and without changing even what is deſtined for bare pleaſure, altho' it were to improve the Revenue. Thus he cannot cut down the Trees of an Avenue in order to make a Kitchen Garden, or to ſow Corn in the place[d].

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[a] Rectè facient & hæres, & legatarius, qualis res ſit, cum frui incipit legatarius, ſi in teſtatum redegerint, ut inde poſſit apparere, an & quatenus rem pejorem legatarius fecerit. *l.* 1. §. 4. *ff. uſuf. quem cav.* For this Uſage ſee the ſeventh Article.

[b] Si cujus rei uſusfructus legatus ſit, æquiſſimum prætori viſum eſt, de utroque legatarium cavere, & uſurum ſe boni viri arbitratu, & cùm uſusfructus ad eum pertinere deſinet, reſtituturum quod indè extabit *l.* 1. *ff. uſufr. quem cav.* Si cujus rei uſusfructus legatus erit, dominus poteſt in ea re ſatiſdationem deſiderare, ut officio judicis hoc fiat. Nam ſicuti debet fructuarius uti frui, ita & proprietatis dominus ſecurus eſſe debet de proprietate. Hæc autem ad omnem uſumfructum pertinere Julianus libro trigeſimo octavo Digeſtorum probat. *l.* 13. *ff. de uſufr. l.* 8. §. 4. *ff. qui ſatiſdare cog.* Uſufructu conſtituto conſequens eſt, ut ſatiſdatio boni viri arbitratu præbeatur, ab eo ad quem id commodum pervenit, quod nullam læſionem ex uſu proprietati afferat. Nec intereſt ſive ex teſtamento, ſive ex voluntario contractu uſusfructus conſtitutus eſt. *l.* 4. *C. de uſufr.* Si vini, olei, frumenti uſusfructus legatus erit, proprietas ad legatarium transferri debet: & ab eo cautio deſideranda eſt, ut quandoque eis mortuus, aut capite diminutus ſit, ejuſdem qualitatis res reſtituatur. *l.* 7. *ff. de uſufr. ear. rer. quæ uſu conſ. l.* 1. *C. de uſufr.*

[c] Debet omne, quod diligens pater familiàs in ſua domo facit, & ipſe facere. *l.* 65. *ff. de uſufr.* Uſurum ſe boni viri arbitratu. *l.* 1. *ff. de uſufr. quem cav. l.* 4. *C. eod.*

[d] Mancipiorum uſufructu legato, non debet abuti, ſed ſecundùm conditionem eorum uti. *l.* 15. §. 1. *ff. de uſufr.* Et generaliter Labeo ait, in omnibus rebus mobilibus modum eum tenere debere ne ſua feritate, vel ſævitia ea corrumpat. *d. l.* §. 3. Fructuarius cauſam proprietatis deteriorem facere non debet. *l.* 13. §. 4. *ff. eod.* Et aut fundi eſt uſusfructus legatus: & non debet neque arbores frugiferas excidere, neque villam diruere, nec quicquam facere in perniciem proprietatis. Et ſi fortè

voluptarium fuit prædium, viridaria vel geſtationes, deambulationes arboribus infructuoſis opacas, atque amœnas habens, non debebit dejicere, ut fortè hortos olitorios faciat, vel aliud quid quod ad reditum ſpectat. *d.* §. 4.

V.

5. He ought to acquit the Charges. The fifth Engagement of the Uſufructuary, is to acquit the Charges of the Things of which he has the Uſufruct, ſuch as the Land-Tax, and other Impoſts and Publick Duties, even thoſe which may chance to be impoſed after the Uſufruct has been acquired, the Quit-Rents, Ground-Rents, and other Charges[e].

[e] Si quid cloacarii nomine debeatur, vel ſi quid ob formam aquæ ductus quæ per agrum tranſiit, pendatur, ad onus fructuarii pertinebit. Sed & ſi quid ad collationem viæ, puto hoc quoque fructuarium ſubiturum. Ergo & quod ob tranſitum exercitus confertur ex fructibus. *l.* 27. §. 3. *ff. de uſufr.* Quæro ſi uſusfructus fundi legatus eſt, & eidem fundo indictiones temporariæ indictæ ſint, quid juris ſit? Paulus reſpondit idem juris eſſe & in his ſpeciebus, quæ poſtea indicuntur, quod in vectigalibus dependendis reſponſum eſt. Ideoque hoc onus ad fructuarium pertinet. *l.* 28. *ff. de uſufr.*

VI.

6. He ought to make the Repairs. The ſixth Engagement which the Uſufructuary lies under, is to be at the neceſſary Expences for preſerving and keeping in good caſe the Places, and other Things of which he has the Uſufruct. Such as to make the ſmall Repairs of a Houſe, to plant Trees in the room of thoſe which die in the Ground, to manure and improve the Lands, and to make the other leſſer Repairs, and to lay out the Expences which may be neceſſary for the Cultivation and Preſervation of the Places. But he is not bound to be at the charge of the greater Repairs, ſuch as the Rebuilding of a Houſe that is fallen without any neglect of his[f].

[f] Eum, ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt. *l.* 7. *C. de uſuf.* Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum ædes, per arbitrum cogi, Celſus ſcribit: hactenus tamen ut ſarta tecta habeat. Si qua tamen vetuſtate corruiſſent, neutiquam cogi reficere. *l.* 7. §. 2. *ff. de uſufr.* In locum demortuarum arborum aliæ ſubſtituendæ ſunt. *l.* 18. *eod.* Fructus deductis neceſſariis impenſis intelligitur. *l.* 4. §. 1. *ff. de oper. ſerv.*

VII.

7. Engagements of the perſon who has the bare Uſe. All theſe Engagements of the Uſufructuary are common to him who has the bare Uſe, in proportion to his Right of Uſe. Thus, when his Right gives him the whole Thing, as if he has a Right to inhabit a whole Houſe; he ought to charge himſelf with what is delivered to him, to give the neceſſary Security, take care of the Places, uſe them without miſuſing or damaging them, make the Repairs, and bear the other Charges which the Uſufructuary would be bound to do. But if his Right is limited, as if he has only a part of a Houſe, he is liable to Repairs and other Charges, only in proportion to what he poſſeſſes[g].

[g] Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tam hæredis, quàm uſuarii. Videamus tamen ne, ſi fructum hæres accipiat, ipſe reficere debeat. Si verò talis ſit res cujus uſus legatus eſt, ut hæres fructum percipere non poſſit, legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet. *l.* 18. *ff. de uſu & hab.*

VIII.

8. The relinquiſhing of the Uſufruct, or Uſe, to avoid the Charges. If the Uſufructuary, or the perſon who has the bare Uſe, chuſes rather to relinquiſh their Right, than to bear the Charges of it, they will be freed from the Charges, except only thoſe which became due in the time of their Enjoyment, and the Waſtes which either they themſelves, or the perſons for whom they are accountable, may have committed. And they will have the ſame liberty of relinquiſhing their Right, even after they have been condemned in a Court of Juſtice to acquit the Charges to which they were liable[h].

[h] Cùm fructuarius paratus eſt uſumfructum derelinquere, non eſt cogendus domum reficere, in quibus caſibus uſufructuario hoc onus incumbit. Sed & poſt acceptum contra eum judicium, parato fructuario derelinquere uſumfructum, dicendum eſt abſolvi eum debere à judice. *l.* 64. *ff. de uſufr.* Sed cùm fructuarius debeat, quod ſuo ſuorumque facto deteriùs factum ſit, reficere, non eſt abſolvendus, licèt uſumfructum derelinquere paratus ſit. *l.* 65. *eod.*

SECT. V.

Of the Engagements which the Proprietor is under to the Uſufructuary, and to him who has the bare Uſe.

The CONTENTS.

1. *The Proprietor ought to leave the Enjoyment of the Fruits, and the Uſe, free.*
2. *He cannot change the condition of the Places, altho' to the better.*
3. *He ought to remove the Obſtacles, againſt which he is Guarantee.*
4. *He ought to reimburſe what is laid out on Repairs, which he himſelf is bound to make.*
5. *The Uſufructuary enjoys the Things in the condition he finds them.*

I.

1. The Proprietor ought to leave the Enjoyment of the Fruits, and the Uſe, free.

THE Proprietor is bound to deliver to the Uſufructuary, and to him who has the bare Uſe, the Places and other Things ſubject to the Uſufruct, or to the Uſe: or to ſuffer them to take poſſeſſion of them, without putting them to any trouble, or inconvenience. And the perſons who have theſe Rights may ſue the Proprietor, as well as all other Poſſeſſors of the Things ſubject to the ſaid Rights, for a liberty to enjoy them[a].

[a] Utrùm autem adversùs dominum dumtaxat in rem actio uſufructuario competat, an etiam adversùs quemvis poſſeſſorem quæritur? Et Julianus libro ſeptimo Digeſtorum ſcribit, hanc actionem adversùs quemvis poſſeſſorem ei competere. *l.* 5. §. 1. *ff. ſi uſusfr. pet.*

II.

2. He cannot change the condition of the Places, altho' to the better.

The Proprietor cannot, either before or after the Delivery, make any change in the Places, and other Things ſubject to an Uſufruct, or Uſe, by which the condition of the Uſufructuary, or of him who has the Uſe, is made worſe, altho' it were to make Improvements. Thus, he can neither raiſe a Building higher, nor make a new one, in a Ground where none was before; unleſs it be with the conſent of the Uſufructuary, or him who has the Uſe. Much leſs can he grub up a Wood, pull down an Edifice, impoſe Services on it, or make any other Changes that may be of prejudice to the Uſufructuary, or him who has the Uſe. And if he has done it, he will be liable for the Damages and Loſſes which he ſhall have occaſioned[b].

[b] Neratius: uſuariæ rei ſpeciem, is cujus proprietas eſt, nullo modo commutare poteſt. Paulus: deteriorem enim cauſam uſuarii facere non poteſt. Facit autem deteriorem etiam in meliorem ſtatum commutata. *l. ult. ff. de uſu & habit.* Labeo ſcribit nec ædificium licere domino te invito altiùs tollere, ſicut nec areæ uſufructu legato, poteſt in area ædificium poni. Quam ſententiam puto veram. *l.* 7. §. 1. *in fin. ff. de uſufr.* Si ab hærede, ex teſtamento, fundi uſusfructus petitus ſit, qui arbores dejeciſſet, aut ædificium demolitus eſſet, aut aliquo modo deteriorem uſumfructum feciſſet, aut ſervitutem imponendo, aut vicinorum prædia liberando, ad judicis religionem pertinet, ut inſpiciat qualis ante judicium acceptum fundus fuerit: ut uſufructuario hoc quod intereſt, ab eo ſervetur. *l.* 2. *ff. ſi uſusfr. pet. l.* 15. §. *ult. ff. de uſufr.*

III.

3. He ought to remove the Obſtacles, againſt which he is Guarantee.

If the Uſufructuary, or the perſon who has the Uſe, cannot have the Enjoyment becauſe of ſome Obſtacle which the Proprietor is bound to remove, he ſhall be bound to get it removed, and to make good the Loſſes and Damages which are ſuſtained by the Non-enjoyment[c]. As if there were an Eviction, or ſome other Trouble, againſt which the Proprietor is bound to Warranty, or if he ſhould refuſe him any neceſſary Service which he is bound to give, as in the caſe of the fourteenth Article of the firſt Section.

[c] *This is a conſequence of the Right of the Uſufructuary.* Uſusfructus legatus adminuculis eget, ſine quibus uti frui quis non poteſt. *l.* 1. §. 1. *ff. ſi uſusfr. pet.* In his autem actionibus quæ de uſufructu aguntur, etiam fructus venire, plus quam manifeſtum eſt. *l.* 5. §. 3. & §. *ult. ff. eod.*

IV.

4. He ought to reimburſe what is laid out on Repairs, which he himſelf is bound to make.

If the Uſufructuary has made any neceſſary Repairs beyond thoſe which he is bound to make, the Proprietor ought to reimburſe him of what he has laid out on that account[d].

[d] Eum ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt. Proinde ſi quid ultrà quam impendi debeat erogatum potes docere, ſolemniter repoſces. *l.* 7. *C. de uſufr.*

V.

5. The U fructuary enjoys the things in the condition he finds them.

The Proprietor is not bound to rebuild, or reſtore to good condition, that which happens to be demoliſhed, or damaged at the time that the Uſufruct is acquired, unleſs he himſelf were the Author of the Damage, or that he were obliged by his Title to put the Things in a good condition. But the Uſufructuary is reſtrained to the Right of enjoying the Thing in the condition in which it is at the Time when he acquires his Right; in the ſame manner as he who acquires the Property of a Thing, ought to have it only ſuch as it was at the time when he acquired it[e].

[e] Non magis hæres reficere debet, quod vetuſtate jam deterius factum reliquiſſet teſtator, quàm ſi proprietatem alicui teſtator legaſſet. *l.* 65. §. 1. *ff. de uſufr.*

SECT. VI.

How Uſufruct, Uſe, and Habitation expire.

The CONTENTS.

1. *Theſe Rights expire by the death of the Uſufructuary, and of him who hath the Uſe.*
2. *And when the time which they ought to laſt, is elapſed.*
3. *Reſtitution of the Uſufruct to a third Uſufructuary.*
4. *If the Thing periſhes.*

5. *Inundation.*
6. *Uſufruct of what remains of the Land or Tenement.*
7. *Difference between an Univerſal Uſufruct, and one that is Particular.*
8. *Changes in the Land, or Tenement.*
9. *The Remainder of the Thing which is deſtroyed belongs to the Proprietor.*

I.

1. These Rights expire by the death of the Uſufructuary, and of him who hath the Uſe.

USufruct, Uſe, and Habitation expire by the Natural Death, and by the Civil Death of the perſon who had the Right to them, becauſe this Right is perſonal[a].

[a] Morte amitti uſumfructum, non recipit dubitationem. Cùm jus fruendi morte extinguatur, ſicuti ſi quid aliud quod perſonæ cohæret. *l.* 3. §. *ult. ff. quib. mod. uſusfr. amit. l.* 3. *C. de uſufr.* Capitis diminutione quæ vel libertatem, vel civitatem Romanam poſſit adimere. *l.* 16. *in f. C. de uſufr.* Finitur uſusfructus morte uſufructuarii & duabus capitis diminutionibus, maxima, & media. §. 3. *inſt. de uſuf.*

II.

2. And when the time which they ought to laſt is elapſed.

If the Title of the Uſufruct, of the Uſe and Habitation, has limited the Right to it to commence or determine at a certain time, or upon the exiſtence of a certain Condition, the Right will not commence, nor determine, till the condition ſhall happen, or the time be elapſed[b].

[b] Si ſub conditione mihi legatus ſit uſusfructus, medioque tempore ſit penes hæredem: poteſt hæres uſumfructum alii legare. Quæ res facit, ut ſi conditio extiterit, mei legati, uſusfructus ab hærede relictus finiatur. *l.* 16. *ff. quib. mod. uſusfr. vel uſ. am. l.* 17. *eod. V. l.* 12. *C. de uſufr.*

III.

3. Reſtitution of the Uſufruct to a third Uſufructuary.

If the Uſufructuary is charged to reſtore the Uſufruct to another perſon, his Right to the Uſufruct will determine whenever the time of making the ſaid Reſtitution comes[c].

[c] Si legatum uſumfructum legatarius alii reſtituere rogatus eſt. *l.* 4. *ff. quib. mod. uſusfr. vel uſ. am.*

IV.

4. If the Thing periſhes.

The Right of Uſufruct is limited to the Thing on which it is aſſigned, and does not affect the other Goods. So that it expires whenever the Land or Tenement, or other Thing which is ſubject to it, happens to periſh before the death of the Uſufructuary, or of the perſon who has the Uſe; as if a Piece of Ground be carried away by an Inundation, or a Houſe be burnt down, or ruined. And in this laſt caſe, the Uſufructuary would not even have the Uſufruct of the Materials, nor of the Place on which the Houſe ſtood. For the Uſufruct was ſpecially ſettled upon a Houſe: and it was reſtrained to what was ſpecified in the Title[d].

[d] Eſt enim uſusfructus jus in corpore, quo ſublato & ipſum tolli neceſſe eſt. *l.* 2. *ff. de uſuf.* Si ædes incendio conſumptæ fuerint, vel etiam terræ motu, vel vitio ſuo corruerint, extingui uſumfructum: & ne areæ quidem uſumfructum deberi. §. 3. *in f. inſt. de uſufr.* Nec cæmentorum. *l.* 5. §. 2. *ff. quib. mod. uſusfr. vel. uſ. am.* Si ædes incenſæ fuerint, uſusfructus ſpecialiter ædium legatus, peti non poteſt. *l.* 34. §. *ult. ff. de uſufr.*

V.

5. Inundation.

If a Piece of Ground were overflowed, either by the Sea, or by a River, the Uſufruct and the Uſe would not be loſt, except during the continuance of the Inundation: and it would be reſtored, if the Ground, or any part of it, returned to ſuch a condition as one might enjoy it, becauſe the Ground would not have changed its Nature[e].

[e] Si ager, cujus uſusfructus noſter ſit, flumine vel mari inundatus fuerit, amittitur uſusfructus. *l.* 23. *ff. quib. mod. uſusfr. vel uſ. am.* Cùm uſumfructum horti haberem, flumen hortum occupavit, deinde ab eo receſſit, jus quoque uſusfructus reſtitutum eſſe, Labeoni videtur, quia id ſolum perpetuò ejuſdem juris manſiſſet. *l.* 24. *eod.* Si cui inſulæ uſusfructus legatus eſt, quamdiu quælibet portio ejus inſulæ remanet, totius ſoli uſumfructum retinet. *l.* 53. *ff. de uſufr.*

VI.

6. Uſufruct of what remains of the Land or Tenement.

If it happens that a part of a Houſe periſhes, and that there remains another part of it, the Uſufruct will be preſerved of that part of the Houſe which remains, and of the Place on which ſtood the part of the Houſe which is deſtroyed. For the ſaid Place makes a part of the ſaid Houſe, and is an Acceſſory to the part of it that remains[f].

[f] Si cui inſulæ uſusfructus legatus eſt, quamdiu quælibet portio ejus inſulæ remanet, totius ſoli uſumfructum retinet. *l.* 53. *ff. de uſufr.*

VII.

7. Difference between an Univerſal Uſufruct, and one that is Particular.

In the caſes in which the Thing ſubject to an Uſufruct happens to periſh, we ought to obſerve this difference between the Uſufruct of a Totality of Goods, and that of a particular Thing; that whereas the Particular Uſufruct of a Houſe, for Example, is extinct in ſuch a manner whenever the Houſe periſhes, either by a Fall, or by Fire, or other Caſualty, that the Uſufructuary has no manner of Uſufruct in the Place which remains; on the contrary, if his Uſufruct was Univerſal of all the Goods, he ſhall have the Uſufruct of the Place where the Houſe ſtood, and of the Materials

terials which may chance to remain; for they are a part of the Totality of Goods[g]. And it would be the ſame thing in the Uſufruct of a Country-Farm, where the Buildings ſhould happen to go to ruin; for in this caſe the Uſufruct would be preſerved on the Place which ſhould remain, as being an Acceſſory, and making a part of the Whole of the ſaid Farm[h].

[g] Univerſorum bonorum, an ſingularum rerum uſusfructus legetur, hactenus intereſſe puto: quòd, ſi ædes incenſæ fuerint, uſusfructus ſpecialiter ædium legatus peti non poteſt. Bonorum autem uſufructu legato, areæ uſusfructus peti poterit. *l.* 34. §. *ult. ff. de uſuſfr.* In ſubſtantia bonorum etiam area eſt. *d. l. in fine.*

[h] Fundi uſufructu legato, ſi villa diruta ſit, uſusfructus non extinguetur: quia villa fundi acceſſio eſt, non magis quàm ſi arbores deciderint. Sed & eo quoque ſolo, in quo fuit villa, uti frui potero. *l.* 8. & *l.* 9. *ff. quib. mod. uſuſfr. v. uſ. am.*

VIII.

8. *Changes in the Land, or Tenement.* If there happens any change in the Thing ſubject to an Uſufruct; as if a Pond is dried up, if Arable Land becomes a Marſh, if a Foreſt is converted into Meadow, or Arable Ground; in all theſe and the like caſes, the Uſufruct either ceaſes, or does not ceaſe, according to the Quality of the Title of the Uſufruct, the Intention of thoſe who ſettled it, the time when theſe Changes happen, whether before the Uſufructuary has acquired his Right, or only after, the cauſes of theſe Changes, and the other circumſtances. Thus in an Uſufruct of the Whole Goods, no change extinguiſhes the Uſufruct of what remains; and the Uſufructuary enjoys the Thing in the condition to which it is reduced. Thus in a Particular Uſufruct bequeathed by a Teſtator of ſome Piece of Ground, if he himſelf changes the face of the Places after he has made his Teſtament, and that of a Meadow, for Inſtance, of which he had deviſed the Uſufruct, he makes a Houſe and a Garden; in theſe and the like caſes, where the changes in the Things denote the change of the Will, they annul the Legacy of the Uſufruct, which was limited to Things that are no longer in being. But in an Uſufruct that is acquired by Covenant, the Proprietor is not at liberty to make what changes he pleaſes: And he who ſhould change the nature or condition of the Things, without the conſent of the Uſufructuary, would be bound to indemnify him. And as to the changes which happen by Caſualties, whether before or after the Uſufruct is acquired, it determines, or is preſerved, according to the foregoing Rules, and to what happens to be regulated by the Uſufructuary's Title[i].

[i] Agri vel loci uſusfructus legatus; ſi fuerit inundatus, ut ſtagnum jam ſit, aut palus, proculdubio extinguetur. *l.* 10. §. 2. *ff. quib. mod. uſuſfr. vel. uſ. am.* Sed & ſi ſtagni uſusfructus legetur, & exaruerit ſic ut ager ſit factus, mutata re uſusfructus extinguitur. *d. l.* §. 3. Si ſilva cæſa illic ſationes fuerint factæ, ſine dubio uſusfructus extinguitur. *d. l.* §. 4. Si areæ ſit uſusfructus legatus, & in ea ædificium ſit poſitum, rem mutari, & uſumfructum extingui conſtat. Planè ſi proprietarius hoc fecit, ex teſtamento vel dolo tenebitur. *l.* 5. §. *ult. eod.*

IX.

9. *The Remainder of the Thing which is deſtroyed belongs to the Proprietor.* If the thing ſubject to an Uſufruct chances to periſh, or comes to be changed in ſuch a manner that the Uſufruct ſubſiſts no longer, what remains of the Thing belongs to the Proprietor. Thus, the Materials of a Houſe that is demoliſhed, the Hides of the Beaſts of a Herd of Cattle which ſhould happen to periſh thro' ſome Accident, ought to be delivered to the Proprietor; for the Right of the Uſufructuary was limited to the Enjoyment of what was in being, and it is extinct by this Change[l].

[l] Certiſſimum eſt exuſtis ædibus, nec cæmentorum uſumfructum deberi. *l.* 5. §. 2. *ff. quib mod. uſuſfr. vel. uſ. am.* Caro, & corium mortui pecoris in fructu non eſt, quia mortuo eo uſusfructus extinguitur. *l. pen. eod.*

TITLE XII.

Of SERVICES.

The Origin of Services, and their Use. THE Order of Civil Society not only ſubjects Mankind one to another, by the Wants which render the reciprocal Uſe of Offices, Services, and Intercourſe between Man and Man neceſſary; but it renders it moreover neceſſary for the Uſe of Things, that there ſhould be the Subjections, Dependencies, and Connexions between one Thing and another, without which there is no putting them in Uſe. Thus, for Things Moveable, there are none of them, or but a very few, that come to our hands in the condition in which they ought to be for our Service, but thro' a Concatenation of the Uſe of many other Things; whether it be for digging them out of the Places from whence they are to be fetched, or for making them fit for Uſe, or for applying them to effectual Service. Thus, for Immoveables, there are none of them likewiſe, or but a few, from which one may reap either the Fruits, or the other Revenues, except by the Uſe of divers Things: and even oftentimes by making one Ground or Tenement ſerve for the Uſe of another; as we make, for Inſtance, one Piece of Ground ſerve for giving Paſſage to another, or one Houſe for receiving the Water that falls from another neighbouring Houſe. It is theſe ſorts of Subjections of one Land or Tenement for the uſe of another, which we call Services; but we do not give this Name to the Subjections which render one Moveable Thing neceſſary for the Uſe of another Thing, whether Moveable or Immoveable.

Theſe Services have two Characters, which diſtinguiſh them from all other Uſe that may be made of one Thing for the Uſe of another. The firſt is, that they are perpetual[a]; whereas every one of the other Subjections is of no duration. And the other is, that in theſe Services of Lands and Tenements, the Land or Tenement ſubject to the Service belongs always to another Owner than the perſon who is Maſter of the Land or Tenement to which the Service is due. For we do not give the Name of Service to the Right which the Maſter of a Land or Tenement has to make uſe of it for himſelf[b].

It is theſe kinds of Services which ſubject the Land or Tenement of one perſon to the Uſe and Service of the Land or Tenement of another, which ſhall be the ſubject matter of this Title; which we have placed among Covenants, becauſe Services are moſt commonly ſettled by Covenant[c], as in a Sale, in an Exchange, in a Tranſaction, in a Partition: and altho' they are ſometimes eſtabliſhed by Teſtament, or by a Decree of a Court of Juſtice, yet it was more proper to bring in in this place a Matter which cannot be inſerted in many places, and which is ranked here according to its Natural Order.

SECT. I.

Of the Nature of Services, of their Kinds, and the manner how they are acquired.

The CONTENTS.

1. *Definition of Service.*
2. *In what Service conſiſts.*
3. *Services are for Lands and Tenements.*
4. *Divers ſorts of Services.*
5. *Two general Kinds of Services.*
6. *Services of Houſes and Lands.*
7. *Acceſſories to Services.*
8. *Services are regulated by their Titles.*
9. *Services are interpreted favourably for Liberty.*
10. *Services that are neceſſary, may be decreed by the Judge.*
11. *Services may be acquired by Preſcription.*
12. *The manner of the Service may be known by the condition of the Places.*
13. *Services are loſt, or diminiſhed, by Preſcription.*
13. *Services are annexed to the Lands and Tenements.*
15. *The Property of the place which ſerves, belongs to the Maſter of the Land or Tenement that owes the Service.*
16. *A Service may be for the uſe of two Lands or Tenements.*
17. *A Service which appears to be uſeleſs.*
18. *Lands and Tenements which have ſeveral Owners.*
19. *Poſſeſſion of Services by Tenants, and other Poſſeſſors.*
20. *Poſſeſſion of one alone for the Service common to many.*
21. *The privilege of one Partner hinders Preſcription againſt the others.*

I.

1. *Definition of Service.*

SErvice is a Right which ſubjects a Land or Tenement to ſome Service, for the uſe of another Land or Tenement, which belongs to another Maſter; as for Example, the Right which the Proprietor of an Eſtate has to paſs thro' the Grounds of his Neighbour, to get at his own[a].

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[a] Omnes ſervitutes prædiorum perpetuas cauſas habere debent. *l.* 28. *ff. de ſerv. præd. urb.*

[b] Nemo ipſe ſibi ſervitutem debet. *l.* 10. *ff. cum præd.* nulli enim res ſua ſervit. *l.* 26. *ff. de ſervit. præd. urban.*

[c] Iiſdem ferè modis conſtituitur, quibus & uſumfructum conſtitui diximus. *l.* 5. *ff. de ſervit.* §. *ult. inſt. de ſervit.* See before, at the beginning of the Title of Uſufruct.

[a] (Servitutes) rerum, ut ſervitutes ruſticorum prædiorum, & urbanorum. *l.* 1. *ff. de ſervit.* Iter eſt jus eundi. *l.* 1. *ff. de ſervit. præd. ruſt.*

II.

2. In what Service conſiſts. All Services give to the perſons to whom they are due a Right which they would not have naturally; and they diminiſh the Liberty of the Uſe of the Land or Tenement which owes the Service, ſubjecting the Owner of the ſaid Land or Tenement, to what he ought either to ſuffer, or do, or not do, for leaving the uſe of the Service free. Thus he whoſe Land is ſubject to a Right of Paſſage, ought to bear with the inconveniency of the ſaid Paſſage: Thus, he whoſe Wall ought to bear the Building that is raiſed upon it, is bound to repair the ſaid Wall, if there be occaſion: Thus, all thoſe who owe any Service, can do nothing that may trouble the uſe of it[b].

[b] Servitutum non ea natura eſt, ut aliquid faciat quis, veluti viridaria tollat, ut amœniorem proſpectum præſtet, aut in hoc ut in ſuo pingat: ſed ut aliquid patiatur, aut non faciat. *l. 15. §. 1. ff. de ſerv.* Etiam de ſervitute quæ oneris ferendi cauſa impoſita erit, actio nobis competit: ut & onera ferat, & ædificia reficiat, ad eum modum, qui ſervitute impoſita comprehenſus eſt. *l. 6. §. 2. ff. ſi ſervit. vindic.*

It follows from the Rule explained in this Article, that in all diſputes about Services, one of the Parties endeavours to ſubject the Land or Tenement of the other againſt Natural Liberty; and the other ſtands up for this Liberty; which makes the Cauſe of him who denies the Service to be the moſt favourable, as ſhall be explained in the ninth Article. De ſervitutibus in rem actiones competunt nobis (ad exemplum earum quæ ad uſumfructum pertinent) tam confeſſoria, quàm negatoria: confeſſoria ei qui ſervitutes ſibi competere contendit: negatoria domino qui negat. *l. 2. ff. ſi ſerv. vind. §. 2. inſt. de act.*

III.

3. Services are for Lands and Tenements. Altho' Services be properly for the behoof of Perſons, yet they are called real, becauſe they are inſeparable from Lands or Tenements. For it is a Land or Tenement that ſerves for another Land or Tenement; and the ſaid Service does not paſs to the Perſon but becauſe of the Land or Tenement. Thus, one cannot have a Service which conſiſts in the Right of going into another Man's Ground, to gather Fruit, or to walk in it, nor for other Uſes which have no relation to that of a Land or Tenement[c]. But ſuch a Right would be of another nature, as for Example, it would be a Letting to hire, if the Right were purchaſed for a Sum of Money.

[c] Servitutes rerum. *l. 1. ff. de ſervit.* Ideo autem hæ ſervitutes prædiorum appellantur, quoniam ſine prædiis, conſtitui non poſſunt. Nemo enim poteſt ſervitutem acquirere, vel urbani, vel ruſtici prædii, niſi qui habet prædium. *l. 1. §. 1. ff. comm. præd. §. 3. inſt. de ſervit.* Ut pomum decerpere liceat, & ut ſpatiari, & ut cœnare in alieno poſſimus, ſervitus imponi non poteſt. *l. 8. eod.* Neratius libris ex Plautio, ait, nec hauſtum pecoris, nec appulſum, nec cretæ eximendæ, calciſque coquendæ jus poſſe in alieno eſſe, niſi fundum vicinum habeat. *l. 5. §. 1. ff. de ſervit. præd. ruſt.* Hauriendi jus non hominis, ſed prædii eſt. *l. 20. §. ult. eod.*

IV.

Services are of ſeveral ſorts, according to the divers kinds of Lands or Tenements, and the different uſes which may be made of one Land or Tenement for the Service of another. Thus for Houſes, and other Buildings, the one is ſubjected for the uſe of the other, either not to be raiſed higher, or to receive the Waters which fall from the other, or to bear ſome part of the Weight of the other Houſe, by fixing a Beam in the Wall, and the like: And for Lands, one is ſubjected for the uſe of the other, either to a Paſſage, or to a Draught of Water, or to other Rights of a different ſort[d]. *4. Divers ſorts of Services.*

[d] Non extollendi: Stillicidium avertendi in tectum vel aream vicini: item immittendi tigna in parietem vicini. *l. 2. ff. de ſervit. præd. urban.* Iter, actus, via, aquæductus. *l. 1. ff. de ſervit. præd. ruſt.* paſſim his titulis.

V.

All Services are comprehended under two General Kinds; One is, of ſuch as are Natural, and of an abſolute neceſſity, as the diſcharge of the Water of a Spring, which runs into the Ground which is below: The other is, of thoſe which Nature does not make abſolutely neceſſary, but which Men eſtabliſh for a greater conveniency, altho' the Land or Tenement which ſerves be not naturally ſubjected to the other. As if it is agreed that a Houſe cannot be raiſed higher, that it may not hinder the Proſpect of another Houſe; that it ſhall receive the Waters falling from the adjacent Houſe: that the Poſſeſſor of a Piece of Ground may draw Water out of a Spring, or a Rivulet in the neighbouring Ground, either at certain times, ſuch as to water his Grounds; or for a conſtant uſe, ſuch as to convey Water in a Pipe thro' a neighbouring Ground, for the uſe of a Fountain[e]. *5. Two general Kinds of Services.*

[e] *This is a conſequence of the nature of Services.* See hereafter the tenth Article of this Section.

VI.

All the Kinds of Services are either for the uſe of Houſes and other Buildings; or for the uſe of Lands, ſuch as Meadow Ground, Arable Land, Orchards, Gardens, and others; whether they be ſituated in Town or Country[f]. *6. Services of Houſes and Lands.*

Servitutes

[f] Servitutes ruſticorum prædiorum, & urbanorum. *l.* 1. *ff. de ſervit.*

In the Roman *Law, all Houſes and Buildings whatſoever, whether in Town or Country, were called* prædia urbana: *and all Lands, whether Meadows, Arable Lands, or Vineyards, have the denomination of* prædia ruſtica. Urbana prædia omnia ædificia accipimus, non ſolùm ea quæ ſunt in oppidis, ſed etſi fortè ſtabula vel alia meritoria in villis, & in vicis vel ſi prætoria voluptati tantùm deſervientia. Quia urbanum prædium non locus facit, ſed materia. *l.* 198. *ff. de verb. ſign.* §. 3. *inſt. de ſervit.*

VII.

7. Acceſſories to Services. The Right of Service comprehends the Acceſſories, without which it cannot be uſed. Thus, the Service of drawing Water out of a Well, or Spring, implies the Service of a Paſſage to get to the Well: Thus, the Service of a Paſſage, implies the Liberty of building, or repairing a Work that is neceſſary for making uſe of the ſaid Paſſage; and if the Work cannot be made in the place allotted for the Paſſage, one may work in the adjacent parts, according as the neceſſity requires; but in Repairing one ought not to make any innovation in the ancient condition of the place[g].

[g] Qui habet hauſtum, iter quoque habere videtur ad hauriendum. *l.* 3. §. 3. *ff. de ſervit. præd. ruſt.* Si iter legatum ſit quia niſi opere facto iri non poſſit, licere fodiendo, ſubſtruendo iter facere Proculus ait. *l.* 10. *ff. de ſervit.* Refectionis gratia accedendi ad ea loca quæ non ſerviant, facultas tributa eſt his quibus ſervitus debetur. Quà tamen accedere eis ſit neceſſe, niſi in ceſſione ſervitutis nominatim præfinitum ſit, qua accederetur. *l.* 11. *ff. comm. præd.* Si propè tuum fundum jus eſt mihi aquam rivo ducere, tacita hæc jura ſequuntur, ut reficere mihi rivum liceat, ut adire quà proximè poſſim ad reficiendum eum ego, fabrique mei, item ut ſpatium relinquat mihi dominus fundi, quò dextra & ſiniſtra ad rivum adeam: & quò terram, limum, lapidem, arenam, calcem jacere poſſim. *d. l.* 11. §. 1. Reficere ſic accipimus ad priſtinam formam iter, & actum reducere. Hoc eſt ne quis dilatet, aut producat, aut deprimat, aut exaggeret: & aliud eſt enim reficere, longè aliud facere. *l.* 3. §. 15. *ff. de itin. actuque priv.*

VIII.

8. Services are regulated by their Titles. The Right and Uſe of a Service is regulated by the Title which eſtabliſhes it: and it hath its Bounds and its Extent according as has been covenanted, if the Title is a Contract; or according to what has been preſcribed by the Teſtament, if the Service has been eſtabliſhed by Teſtament. Thus he to whom a Service is due cannot make its condition heavier, neither can the perſon who owes the Service prejudice the Right of him to whom it is due; but both the one and the other ought to ſtand to the Title, whether it be with reſpect to the quality of the Service, or to the manner in which the one ought to uſe it, and the other to ſuffer it. Thus, for Inſtance, if a Right of paſſage is granted only for one to go on foot, he cannot make uſe of it to go on horſeback; and if the Paſſage is granted only for the day-time, it gives no right to paſs in the night. But if the manner of uſing the Service were uncertain; as if the place neceſſary for a paſſage were not regulated by the Title, it would be ſettled by the Advice of ſkilful perſons[h].

[h] Servitutes ipſo quidem jure, neque ex tempore, neque ad tempus, neque ſub conditione, neque ad certam conditionem (verbi gratia quamdiu volam) conſtitui poſſunt. Sed tamen, ſi hæc adjiciantur, pacti, vel per doli exceptionem, occurretur contra placita ſervitutem vindicanti. *l.* 4. *ff. de ſervit.* Modum adjici ſervitutibus poſſe conſtat: veluti quo genere vehiculi agatur, vel non agatur: veluti ut equo dumtaxat, vel ut certum pondus vehatur, vel grex ille tranſducatur, aut carbo portetur. *d. l.* 4. §. 1. *v. l.* 29. *ff. de ſerv. præd. ruſt.* Iter nihil prohibet ſic conſtitui, ut quis interdiu dumtaxat, eat: quod ferè circa prædia urbana etiam neceſſarium eſt. *l.* 14. *ff. comm. præd. v. l.* 14. *ff. ſi ſervit. vind. d. l.* §. 1. Latitudo actus itineriſque ea eſt, quæ demonſtrata eſt. Quod ſi nihil dictum eſt, hoc ab arbitro ſtatuendum eſt. *l.* 13. §. 2. *ff. de ſervit. præd. ruſt. d. l.* §. *ult. l.* 11. §. 1. *ff. de ſerv. præd. urb.*

IX.

9. Services are interpreted favourably for Liberty. Seeing Services derogate from the Liberty that is Natural to every one to make uſe of what is their own, they are reſtrained to what is preciſely neceſſary for the uſe of the Perſons to whom they are due; and one leſſens the Inconveniency of them, as much as is poſſible. Thus, he who has a Right of Paſſage thro' another man's Field, and whoſe Title does not ſpecify the place thro' which he may paſs, has not the liberty of chuſing his Paſſage wheresoever he pleaſes; but it will be aſſigned him thro' the place that is leaſt inconvenient to the Proprietor of the Ground which ſerves; and not, for Example, acroſs a Plantation, or thro' a Building. But if the Title of the Service, or the Poſſeſſion, regulates the Paſſage, altho' it be thro' a place that is very inconvenient for the Proprietor of the Ground which ſerves, yet he muſt ſtand to it[i].

[i] Si via, iter, actus, aquæductus legetur ſimpliciter per fundum, facultas eſt, hæredi per quam partem fundi velit conſtituere ſervitutem. *l.* 26. *ff. de ſervit. præd. ruſt.* Si cui Simplicius via per fundum cujuſpiam cedatur, vel relinquatur: in infinito (videlicet per quamlibet ejus partem) ire agere licebit: civiliter modò. Nam quædam in ſermone tacitè excipiuntur. Non enim per villam ipſam, nec per medias vineas ire agere ſinendus eſt, cùm id æquè commodè per alteram partem facere poſſit, minore ſervientis fundi detrimento. *l.* 9. *ff. de ſerv.* Verùm conſtitit, ut quà primùm viam direxiſſet, ea demum ire agere deberet: nec amplius mutandæ

ejus poteſtatem haberet. *d. l. 9.* Si mihi conceſſeris iter aquæ per fundum tuum, non deſtinata parte, per quam ducerem: totus fundus tuus ſerviet. Sed quæ loca ejus fundi tunc cùm ea fieret ceſſio, ædificiis, arboribus, vineis, vacua fuerint, ea ſola eo nomine ſervient. *l. 21. & l. 22. ff. de ſervit. pr. ruſt.* See the ſecond Article, and the Remark that is made upon it.

X.

10. Services that are neceſſary, may be decreed by the Judge. Services are eſtabliſhed and acquired, not only by Covenant, or by Teſtament[l], but alſo by Authority of Juſtice, if the Services which are refuſed, be naturally neceſſary. Thus when the Proprietor of a Piece of Ground cannot go to it, without paſſing thro' a neighbouring Ground, the Judge obliges the Proprietor of the ſaid Ground to grant the paſſage thro' the place that is the leaſt inconvenient, allowing him a ſuitable Recompence for his Loſs[m]. For this Neceſſity is in place of a Law; and Natural Equity demands that a Ground ſhould not remain uſeleſs, and that the ſaid Proprietor ought to ſuffer for his Neighbour, what he would wiſh others to ſuffer for him in the like caſe.

[l] Via, iter, actus, ductus aquæ iiſdem ferè modis conſtituitur, quibus & uſumfructum conſtitui diximus. *l. 5. ff de ſervit.* See before, the beginning of the Title of Uſufruct.

[m] Præſes etiam compellere debet, juſto pretio iter ei præſtari. Ita tamen ut judex etiam de opportunitate loci proſpiciat, ne vicinus magnum patiatur detrimentum. *l. 12. ff. de relig.* See the caſe of this Law in the fourth Article of the thirteenth Section of the Covenant of Sale.

XI.

11. Services may be acquired by Preſcription. The Right of Service may be acquired without a Title, by Preſcription[n].

[n] Si quis diuturno uſu, & longa quaſi poſſeſſione jus aquæ ducendæ nactus ſit, non eſt ei neceſſe docere de jure quo aqua conſtituta eſt, veluti ex legato, vel alio modo. Sed utilem habet actionem, ut oſtendat per annos fortè tot uſum ſe, non vi, non clam, non precario poſſediſſe. *l. 10. ff. ſi ſervit. vind. l. 5. §. 3. ff. de itiner. act. priv.* Si quas actiones adverſùs eum qui ædificium contra veterem formam extruxit, ut luminibus tuis officeret, competere tibi exiſtimas more ſolito per judicem exercere non prohiberis. Is qui judex erit, longi temporis conſuetudinem vicem ſervitutis obtinere ſciet: modò ſi is qui pulſatur, nec vi, nec clam, nec precario poſſidet. *l. 1. C. de ſervit. l. 2. eod.* Traditio planè & patientia ſervitutum inducet officium prætoris. *l. 2. §. ult. ff. de ſervit. præd. ruſt.*

There are ſome Cuſtoms, in which the Right of Service cannot be acquired by Preſcription, without a Title; altho' Liberty from Services may be there acquired by Preſcription. See the thirteenth Article of this Section, and the fifth and following Articles of the ſixth Section.

XII.

12. The manner of the Service may be known by the conditions of the places. The proof which may be drawn from the ancient condition of the places, is a kind of Title for preſerving, and eſtabliſhing a Service by Preſcription. And it ſerves alſo to regulate the manner and uſe of the Service. Thus, the Entry of a Paſſage, the Bounds of a Way, a Sky-Light in a Houſe, a Water-Pipe clap'd on againſt a Wall, a Roof of a Houſe with a jutting out, and other the like Marks of Services, regulate the uſe of them. And it is not permitted either to him who hath the Service, or to him who ought to ſuffer it, to innovate any thing in the ancient condition of the places[o].

[o] Contra veterem formam. *d. l. 1. C. de ſervit.* Qui luminibus vicinorum officere, aliudve quid facere contra commodum eorum vellet, ſciet ſe formam ac ſtatum antiquorum ædificiorum cuſtodire debere. *l. 11. ff. de ſervit. præd. urban.*

XIII.

13. Services are loſt, or diminiſhed, by Preſcription. Seeing a Service may be acquired by Preſcription, with much more reaſon may a Freedom from a Service be acquired the ſame way. And if he whoſe Land or Tenement was ſubject to ſome Service has freed himſelf from it, during a time ſufficient for acquiring a Preſcription, the Service ſubſiſts no longer. Thus, he whoſe Houſe was ſubjected to the Service of not being raiſed higher, is not any more ſubject to the ſaid Service, if after having raiſed his Houſe higher, he has poſſeſſed it ſo raiſed, during the time required for Preſcription[p]. And it is the ſame thing, as to the manner of uſing a Service: Thus, he who had a Right to a Draught of Water both by day and night, loſes the Uſe of drawing it in the night-time, if he lets it preſcribe: and if his Service was either at all hours, or only at ſome; he is reſtrained to thoſe to which the Preſcription ſhall have limited him.

[p] Libertatem ſervitutum uſucapi poſſe verius eſt. *l. 4. §. ult. ff. de uſurp. & uſuc.* Itaque ſi cùm tibi ſervitutem deberem, ne mihi puta liceret, altiùs ædificare, & per ſtatutum tempus altiùs ædificatum habuero, ſublata erit ſervitus. *d. §. ult. l. 32. §. 1. ff. de ſervit. præd. urb.* Si is qui nocturnam aquam habet, interdiu per conſtitutum ad amiſſionem tempus uſus fuerit, amiſit nocturnam ſervitutem, qua uſus non eſt. Idem eſt in eo qui certis horis aquæ ductum habens, aliis uſus fuerit, nec ulla parte earum horarum. *l. 10. §. 1. ff. quemad. ſervit. amitt.* See the fifth and following Articles of the ſixth Section.

XIV.

14. Services are annexed to the Lands and Tenements. Services being annexed to the Lands and Tenements, and not to Perſons, they cannot paſs from one Perſon to another, unleſs the Land or Tenement paſſes likewiſe. And he who has a Right of Service, cannot transfer it to another, keeping the Land or Tenement to himſelf; nor aſſign over, let out, or lend the Uſe of it. Thus, he who has a Draught of Water cannot ſhare it with others. But if the Land or Tenement for which the Draught of Water was eſtabliſhed, be divided among many Proprietors, as among Co-Heirs, Co-Legatees, Joint-Purchaſers, or otherwiſe; each Share will retain the Uſe of the Service in proportion to its Extent, altho' ſome Shares ſhould ſtand leſs in need of it, or that the Uſe of it were leſs ſerviceable to them than to the others[q].

[q] Ex meo aquæductu Labeo ſcribit, cuilibet poſſe me vicino commodare, Proculus contrà, ut ne in meam partem fundi aliam, quàm ad quam ſervitus acquiſita ſit, uti ea poſſit. Proculi ſententia verior eſt. *l.* 24. *ff. de ſervir. præd. ruſt.*

Per plurium prædia aquam ducis, quoquo modo impoſita ſervitute, niſi pactum vel ſtipulatio etiam de hoc ſubſecuta eſt, neque eorum cui vis, neque alii vicino poteris hauſtum ex vivo cedere. *l.* 33. §. 1. *ff. de ſervit. præd. ruſt.* See the fifth Article of the fifth Section.

XV.

15. The Property of the place which ſerves, belongs to the Maſter of the Land or Tenement that owes the Service.

The part of the Land or Tenement that is ſubject to a Service, out of which the Service is taken, ſuch as the Way for a Paſſage, belongs to the Maſter of the Land or Tenement which ſerves; and he who receives the Service has no Right of Property in that part of the Land or Tenement that ſerves, but only a Right to uſe it for his Service[r].

[r] Si partem fundi mei certam tibi vendidero: aquæductus jus, etiamſi alterius cauſâ plerumque ducatur, te quoque ſequetur. Neque ibi aut bonitatis agri, aut uſus ejus aquæ ratio habenda eſt: ita ut eam ſolam partem fundi quæ pretioſiſſima ſit, aut maximè uſum ejus aquæ deſideret, jus ejus ducendæ ſequatur: ſed pro modo agri detenti, aut alienati, fiat ejus aquæ diviſio. *l.* 25. *ff. de ſervit. præd. ruſt.*

Loci corpus non eſt dominii ipſius cui ſervitus debetur, ſed jus eundi habet. *l.* 4. *ff. ſi ſervit. vind.*

XVI.

16. A Service may be for the uſe of two Lands or Tenements.

One and the ſame Service may ſerve for the uſe of two Lands or Tenements. Thus, a Diſcharge of Water may ſerve for two Houſes: Thus, a Paſſage, or an Aqueduct, may ſerve for two or more Lands or Tenements[ſ].

[ſ] Qui per certum locum iter, aut actum alicui ceſſiſſet, eum pluribus per eundem locum, vel iter, vel actum cedere poſſe verum eſt. Quemadmodum ſi quis vicino ſuas ædes ſervas feciſſet, nihilominus aliis, quot vellet multis, eas ædes ſervas facere poteſt. *l.* 15. *ff. com. præd.*

XVII.

17. A Service which appears to be uſeleſs.

Altho' a Service may appear to be uſeleſs, ſuch as a Draught of Water to him whoſe Land or Tenement is in no want of it, or who has Water enough in his own Grounds; yet one may retain, or purchaſe ſuch a Service. For beſides that one may poſſeſs Things that are uſeleſs, it may ſo happen that there may be occaſion to uſe them[t].

[t] Ei fundo quem quis vendat ſervitutem imponi etſi non utilis ſit, poſſe exiſtimo. Veluti ſi aquam alicui ducere non expediret, nihilominus conſtitui ea ſervitus poſſit: quædam enim habere poſſumus, quamvis ea nobis utilia non ſunt. *l.* 91. *ff. de ſervit.*

XVIII.

18. Of Lands and Tenements which have ſeveral Owners.

He who has the Property of an Eſtate only in common with others, without any diviſion of the ſeveral Shares, cannot ſubject any part of it to a Service without the conſent of all his Co-Partners: and any one of them may hinder it[u], until that the Eſtate being divided into Shares, every one may impoſe a Service on his own Share, if he thinks fit. And likewiſe he who poſſeſſes in common and undivided a Portion of the Land or Tenement to which the Service is due, cannot by himſelf free the Land or Tenement which owes the Service; but the Service remains for the Portions of the others. For the Services are for every part of the Land or Tenement to which they are due, and every one of the Proprietors has an Intereſt in the Service for his own Portion[x].

[u] Unus ex dominis communium ædium ſervitutem imponere non poteſt. *l.* 2. *ff. de ſervit.* Unus ex ſociis fundi communis permittendo jus eſſe ire agere, nihil agit. *l.* 34. *ff. de ſervit. præd. ruſt.*

[x] Quoniam ſervitutes pro parte retineri placet. *d. l.* 34. *l.* 8. §. 1. *ff. de ſervit.* Quæcumque ſervitus fundo debetur, omnibus ejus partibus debetur. *l.* 23. §. *ult. ff. de ſervit. præd. ruſt.* See the ſeventh Article of the fourth Section.

XIX.

19. Poſſeſſion of Services by Tenants, and other Poſſeſſors.

Services are preſerved againſt Preſcription, not only by the uſe that is made of them by the Proprietors of the Lands or Tenements to which they are due, but likewiſe by the uſe made of them by all other Poſſeſſors, who are in the place of the Maſter; ſuch as Farmers, Tenants, Uſufructuaries, and even thoſe who poſſeſs wrongfully; for they preſerve to the Maſter the Poſſeſſion of his Service[y].

[y] Uſu retinetur ſervitus, cùm ipſe cui debetur, utitur, quive in poſſeſſionem ejus eſt, aut mercenarius, aut hoſpes, aut medicus, quive ad viſitandum dominum venit, vel colonus aut fructuarius. *l.* 20. *ff. quemadmodum. ſerv. amitt.* Licet malæ fidæi poſſeſſor ſit, retinebitur ſervitus. *l.* 24. *ff. eod.*

XX.

20. Poſſeſſion of one alone for the

If a Service be due for the uſe of a Land or Tenement belonging in com-

Service common to many. mon to many perſons, the Poſſeſſion of one of the Partners preſerves the Service for all the reſt; for it is in the Name of all the Partners that he poſſeſſes. But if many perſons have each of them their ſeveral Right of Service in particular, altho' it be in the ſame part of the Land or Tenement which owes the Service, yet every one preſerves only his own Right, and Preſcription may run againſt the others who do not uſe their Right[z].

[z] Si plurium fundo iter aquæ debitum eſſet, per unum eorum omnibus his inter quos is fundus communis fuiſſet, uſurpari potuiſſet. *l.* 16. *ff. quemad. ſerv. amit.* Aquam quæ oriebatur in fundo vicini, plures per eundem rivum jure ducere ſoliti ſunt, ita ut ſuo quiſque die à capite duceret. Primò per eundem rivum eumque communem, deinde ut quiſque inferior erat, ſuo quiſque proprio rivo: & unus ſtatuto tempore quo ſervitus amittitur, non duxit: exiſtimo, eum jus ducendæ aquæ amiſiſſe, nec per cæteros qui duxerunt ejus jus uſurpatum eſſe. Proprium enim cujuſque eorum jus fuit, neque per alium uſurpari poterit. *d. l.* 16.

XXI.

21. The Privilege of one Partner hinders Preſcription againſt the others. If one of the Proprietors of a Land or Tenement belonging to them in common, and to which a Service is due, has any Quality which hinders Preſcription from running againſt him, as if he is a Minor; the Service is not loſt, altho' all the Proprietors ceaſe to uſe it, becauſe the Minor preſerves it for the whole Land or Tenement[a].

[a] Si communem fundum ego & pupillus haberemus, licèt uterque non uteretur: tamen propter pupillum, & ego viam retineo. *l.* 10. *ff. quemad. ſerv. amitt.*

SECT. II.

Of the Services of Houſes, and other Buildings.

The CONTENTS.

1. *Services of Buildings.*
2. *Diſcharge of Waters from the Houſes.*
3. *A Sink, or Drain.*
4. *The Lights, and Proſpect of a Houſe.*
5. *The Services for the Lights of a Houſe are of two ſorts.*
6. *Services for Proſpects are of two ſorts.*
7. *The right of Reſting on another's Building.*
8. *One cannot treſpaſs on his Neighbour's Ground.*
9. *What one may do in his own Ground, to the prejudice of his Neighbour.*
10. *Inconveniencies which the Neighbour ought, or ought not to ſuffer.*

I.

1. Services of Buildings. THE Services of Houſes, and other Buildings, are of ſeveral ſorts, according to their Wants; ſuch as that of receiving the Water that falls from another Houſe, the Lights of a Houſe, the Proſpect, a Right of fixing a Beam in another's Wall, a Paſſage, and others of the like nature[a]. But there is none of them which is naturally neceſſary, and in ſuch a manner as that he who builds on his own Ground can oblige his Neighbour to ſuffer a Service for the uſe of his Building, if he has neither a Title, nor a Right of Poſſeſſion to juſtify it. For he may and ought to raiſe his Building wholly on his own Ground, keeping the neceſſary diſtance, and not encroaching any ways on his Neighbour's Ground which joins to his[b]. And if any Service is neceſſary to him, and he has it not, he cannot acquire it but by a mutual conſent.

[a] Urbanorum prædiorum jura talia ſunt, altiùs tollendi, & officiendi luminibus vicini, aut non extollendi: item ſtillicidium avertendi in tectum vel aream vicini, aut non avertendi: item immittendi tigna in parietem vicini: & denique projiciendi, protegendive, cæteráque iſtis ſimilia. *l.* 2. *ff. de ſervit. præd. urban.* §. 1. *inſt. de ſervit.*

[b] Imperatores Antoninus & Verus Auguſti reſcripſerunt, in areæ quæ nulli ſervitutem debet, poſſe dominum, vel alium voluntate ejus ædificare, intermiſſo legitimo ſpatio à vicina inſula. *l.* 14. *ff. de ſervit. præd. urb. V. l.* 12. *C. de ædif. priv.* See the eighth and ninth Articles of this Section.

II.

2. Diſcharge of Waters from the Houſes. The Right of diſcharging the Waters from off the Roof of a Houſe, is a Service which may be differently eſtabliſhed, either in ſuch a manner that the whole Roof may have a Jutting out on another Man's Ground, and ſo let its Waters drop from the Eves there; or that all its Water may be gathered together, and run thro' one Gutter jutting out from the Building, or thro' a Pipe clapt on againſt the Wall[c].

[c] Fluminum & ſtillicidiorum ſervitutem. *l.* 1. *ff. de ſervit. præd. urb.*

III.

3. A Sink, or Drain. The diſcharge of a Sink or Drain, into a neighbouring Ground, is a Service for the uſe of a Houſe, and one may eſtabliſh others of the like nature according as occaſion requires[d].

[d] Jus cloacæ mittendæ ſervitus eſt. *l.* 7. *ff. de ſervit.* Cloacam habere licere per vicini domum. *l.* 2. *ff. de ſervit. præd. ruſt.* Quominus illi cloacam, quæ ex ædibus ejus in tuas pertinet, qua de agitur, purgare, & reficere liceat, vim fieri veto. *l.* 1. *ff. de cloac.* *This Service is likewiſe for the uſe of Lands.* V. d. l. 2. ff. de ſervit. præd. ruſt.

IV.

4. The Lights and Proſpect of a Houſe.

The Lights of a Houſe are open places for receiving Light into a Chamber, or other Room; and a Proſpect hath, beſides the Light, an open View of the adjacent parts, whether in Town, or Country[e].

[e] Lumen id eſt ut cœlum videretur: & intereſt inter lumen & proſpectum. Nam proſpectus etiam ex inferioribus locis eſt, lumen ex inferiore loco eſſe non poteſt. *l.* 16. *ff. de ſervit. præd. urban.*

V.

5. The Services for the Lights of a Houſe are of two ſorts.

The Services for the Lights of a Houſe are of two ſorts. One is of thoſe which give to the Proprietor of a Houſe the Right of opening his own Wall, or a Partition Wall, for receiving Light on the ſide where his Neighbour's Tenement ſtands, with a Right to hinder his Neighbour from raiſing his Building ſo high as to take away the ſaid Light[f]: And the other ſort, is of ſuch Services as give a Right to hinder the Neighbour from opening his own Wall, or a Partition-Wall, that he may have a Window looking into a Court, or other place: or which bound the Liberty of making Lights, to Lights that are without a Proſpect, or ſuch others as happen to be ſettled by the Title[g].

[f] Luminum in ſervitute conſtituta, id acquiſitum videtur, ut vicinus lumina noſtra excipiat. Cum autem ſervitus imponitur ne luminibus officiatur, hoc maximè adepti videmur, ne jus ſit vicino, invitis nobis, altiùs ædificare, atque ita minuere lumina noſtrorum ædificiorum. *l.* 4 *ff. de ſervit. præd. urb.*

[g] Eos qui jus luminis immittendi non habuerunt, aperto pariete communi, nullo jure feneſtras immiſiſſe reſpondi. *l.* 40. *eod.* See the ſecond Article of the firſt Section, with the Remark upon it.

VI.

6. Services for Proſpects are of two ſorts.

The Services for a Proſpect are likewiſe of two ſorts. One is of thoſe which give the Right of a free Proſpect, with Power to hinder the adjacent Building from being raiſed ſo as to take away the Proſpect: And the other, is of ſuch Services as give the Proprietor a Right to hinder his Neighbour from having either Proſpect, or Light, on the ſide on which they join, or to oblige him to have it only ſuch as is conformable to his Title[h].

[h] Eſt & hæc ſervitus, ne proſpectui officiatur. *l.* 3. *ff. de ſervit. præd. urban.* Inter ſervitutes ne luminibus officiatur, & ne proſpectui offendatur, aliud, & aliud obſervatur, quod in proſpectu plus quis habet, ne quid ei officiatur ad gratiorem proſpectum & liberum. *l.* 15. *eod.* Non extollendi. *l.* 2. *eod.* (*jus*) altiùs tollendi, & officiendi luminibus. *d. l.* 2. Qui jus luminis immittendi non habuerunt. *l.* 40. *eod.*

VII.

7. The Right of Reſting on another's Building.

The Right of Reſting a Building on another's, is a Right to fix in our Neighbour's Wall, a Plank, a Building, or other Thing. And when it is a Partition-Wall, the Joint Proprietors have a right to reſt any thing on it, every one on his own ſide: and the ſame Wall ſerves reciprocally to two Maſters for two Services. But whether the Wall belong to one Maſter alone, or be a Partition-Wall, they ought not to load it otherwiſe than is reaſonable, and according as is regulated by the Service[i].

[i] Jus immittendi tigna in parietem vicini. *l.* 2. *ff. de ſervit. præd. urb.* Etiam de ſervitute quæ oneris ferendi cauſâ impoſita erit, actio nobis competit, ut & onera ferat. *l.* 6. §. 2. *ff. ſi ſerv. vind.* *l.* 33. *ff. de ſerv. præd. urb.* Si paries communis, opere abs te facto, in ædes meas ſe inclinaverit: potero tecum agere, jus tibi non eſſe parietem illum ita habere. *l.* 14. §. 1. *ff. ſi ſerv. vind.*

VIII.

8. One cannot treſpaſs on his Neighbour's Ground.

Altho' a Proprietor may do in his own Ground whatever he pleaſes, yet he cannot make in it any Work which may deprive his Neighbour of the Liberty of enjoying his own, or which may cauſe him any Damage. Thus, the Proprietor of a Piece of Ground, on which there is no Building, cannot raiſe one, whoſe Roof may jut out on his Neighbour's Ground, and there diſcharge its Waters. Thus, one cannot make a Plantation, or a Building, and other Works, but at certain diſtances from the Confines. Thus, one cannot make a Stove, an Oven, or any other Work againſt even a Partition-Wall which may be in hazard of being damaged by it: And as for ſuch ſorts of Works as may do hurt, and which cannot be made but at certain diſtances, or with other precautions, we ought, with regard to them, to obſerve the Rules which Cuſtom and Uſe have eſtabliſhed[l].

[l] Imperatores Antoninus & Verus Auguſti reſcripſerunt, in area quæ nulli ſervitutem debet, poſſe dominum, vel alium voluntate ejus ædificare, intermiſſo legitimo ſpatio à vicina inſula. *l.* 14. *ff. de ſerv. præd. urb.* Domum ſuam reficere unicuique licet, dum non officiavit invito alteri, in quo jus non habet. *l.* 61. *ff. de reg. jur.*

Si fiſtulæ per quas aquam ducas, ædibus meis applicatæ, damnum mihi dent, in factum actio mihi competit. *l.* 18. *ff. de ſervit. præd. urb.* Fiſtulam junctam parieti communi, quæ aut ex caſtello, aut ex cœlo aquam capit, non jure haberi Proculus ait. *l.* 19. *eod.* Rem non permiſſam facit, tubulos ſecundùm communem parietem extruendo. *l.* 13. *eod.* *v. l.* 8. §. 5. *l.* 17. §. 2. *ff. ſi ſervit. vind.* See the following Article, and the ſecond Article of the firſt Section of the Title of thoſe who have Lands or Houſes bordering upon one another.

There are Cuſtoms which regulate the manner in which ſuch Works ought to be made, as are mentioned in this Article.

IX.

9. What one may do in his own Ground, to the prejudice of his Neighbour. Altho' one ought not to make any Work by which his Neighbour's Building may be damaged, yet every one has the Liberty of doing in his own Ground whatſoever he pleaſes, even altho' it ſhould occaſion to his Neighbour ſome other ſort of inconvenience. Thus he who is not ſubject to any Service, may raiſe his Houſe as high as he pleaſes, altho' by the ſaid Elevation he ſhould darken the Lights of his Neighbour's Houſe. For this kind of Work alters nothing in the Fabrick of the other Houſe; and he who is the Maſter of the Houſe ought to have placed his Lights ſo as to be out of danger of this Inconvenience, which he had no right to hinder, and which he might have eaſily foreſeen[m].

[m] Cum eo qui tollendo obſcurat vicini ædes, quibus non ſerviat, nulla competit actio. *l. 9. ff. de ſervit. præd. urb.* *l. 8. l. 9. C. de ſervit. v. l. 26. ff. de damn. inf.* See the ninth and tenth Articles of the third Section of the Title of Damages occaſioned by Faults. See the foregoing Article.

X.

10. Inconveniencies which the Neighbour ought, or ought not to ſuffer. The Works, or other Things, which every one may make, or have in his own Ground, and which ſend into the Apartments of others who dwell in the ſame Houſe, or into the Neighbouring Houſes, a Smoak, or Smells that are offenſive, ſuch as the Works of Tanners, and Diers, and the other different Inconveniencies which one Neighbour may cauſe to another, ought to be born with, if the Service of them is eſtabliſhed[n]: And if there is no Service ſettled, the Inconvenience ſhall either be born with, or hindred, according to the Quality of the Places, and that of the Inconveniency, and according as the Rules of the Civil Policy, or the Uſage of the Places, if there be any ſuch, may have provided in the ſaid Matters.

[n] Ariſto Cerellio Vitali reſpondit, non putare ſe ex taberna caſearia fumum in ſuperiora ædificia jure immitti poſſe, niſi ei rei ſervitus talis admittatur. *l. 8. §. 5. ff. ſi ſervit. vind.* In ſuo enim alii hactenus facere licet, quatenus nihil in alienum immittat: fumi autem, ſicut aquæ eſſe immiſſionem. Poſſe igitur ſuperiorem cum inferiore agere, jus illi non eſſe id ita facere. *d. §.*

SECT. III.

Of the Services of Lands.

The CONTENTS.

1. *Services of Lands.*
2. *Paſſage.*
3. *A Draught of Water.*
4. *Aqueduct.*
5. *Other ſorts of Services.*
6. *Services for the uſe of Cattel.*

I.

1. Services of Lands. THE Services of Lands, ſuch as Meadows, Arable Lands, Vineyards, Gardens, Orchards, and others, are of ſeveral ſorts, according to the ſeveral Wants; ſuch as a Paſſage to go from one Field to another, a Right to draw Water in another Man's Ground, an Aqueduct, or others of the like nature[a].

[a] Servitutes ruſticorum prædiorum ſunt hæ: iter, actus, via aquæductus. *l. 1. ff. de ſervit. præd. ruſt.* In ruſticis computanda ſunt, aquæ hauſtus, pecoris ad aquam appulſus, jus paſcendi, calcis coquendæ, arenæ fodiendæ. *d. l. §. 1. inſt. de ſerv.*

II.

2. Paſſage. The Right of Paſſage is a Service which may be eſtabliſhed different ways according to its Title; either for the Paſſage of a Man on foot only, or for one on Horſeback, or for a Beaſt loaded, or for a Waggon[b].

[b] Iter eſt jus eundi, ambulandi homini, non etiam jumentum agendi; actus eſt jus agendi vel jumentum, vel vehiculum: via eſt jus eundi, & agendi, & ambulandi. *l. 1. ff. de ſervit præd. ruſt.*

III.

3. A Draught of Water. The Draught of Water is a Right to take in a Neighbour's Ground Water out of a Spring or Brook, to carry it into another Ground, either at what time one pleaſes, or by Intervals and at certain Seaſons, or conſtantly without intermiſſion[c].

[c] Quotidiana aqua non illa eſt, quæ quotidiè ducitur, ſed ea qua quis quotidiè poſſit uti, ſi vellet. *l. 1. §. 2. ff. de aqua quot. & æſt.* Ea quoque dicitur quotidiana, cujus ſervitus intermiſſione temporis diviſa eſt. *d. l. §. 3.* Æſtiva ea eſt, qua æſtate ſola uti expedit. *d. §. 3. V. l. 2. §. 2. ff. de ſerv. præd. ruſt.*

IV.

4. Aqueduct. An Aqueduct is a Conveyance of Water from one Ground to another, either in Pipes under ground, or above ground[d].

[d] Aquæductus eſt jus aquam ducendi per fundum alienum. *l.* 1. *ff. de ſervit. præd. ruſt.* Aquam rivo ducere. *l.* 11. §. 1. *ff. comm. præd.*

V.

5. Other ſorts of Services. One may eſtabliſh Services of another nature, for divers uſes. Such as the Right of taking out of a Neighbour's Ground, Sand, Stone, Lime, for the uſe of another Ground: of fetching Water out of a Neighbour's Ground, and of gathering and depoſiting there the Fruits of another Ground, till they can be conveniently carried away at a certain ſeaſon: of having in another Man's Ground a Cauſey along the Banks of a River, a Canal, a Ditch, or any other Work, with a Right of free Ingreſs and Egreſs to the Ground for repairing the Work, and other different Services according to people's Wants [e].

[e] In ruſticis computandæ ſunt, aquæ hauſtus—— (jus) calcis coquendæ, arenæ fodiendæ. *l.* 1. §. 1. *ff. de ſerv. præd. ruſt.* Cretæ eximendæ. *l.* 5. §. 1. *eod.* Nec cretæ eximendæ, calciſque coquendæ jus, poſſe in alieno eſſe, niſi fundum vicinum habeat. *d.* §. Ut maximè calcis coquendæ, & cretæ eximendæ ſervitus conſtitui poſſit: non ultrà poſſe, quàm quatenus ad eum ipſum fundum opus ſit. *d.* §. *& l.* 6. In ruſticis computandæ ſunt aquæ hauſtus. *l.* 1. §. 1. *eod.* Ut fructus in vicina villa cogantur, coactique habeantur. *l.* 3. §. 1. *eod.* Pedamenta ad vineam, ex vicini prædio ſumantur, conſtitui poſſe. *d.* §. Si lacus perpetuus in fundo tuo eſt, navigandi quoque ſervitus, ut perveniatur ad fundum vicinum, imponi poteſt. *l.* 23. §. 1. *eod.* Ut quibus agris magna ſint flumina, liceat mihi ſcilicet in agro tuo aggeres, vel foſſas habere. *l.* 1. §. *ult. ff. de aqua & aq. pluv.* Non ergo cogemus vicinum aggeres munire, ſed nos in ejus agrum muniemus: eritque iſta quaſi ſervitus. *l.* 1. §. *ult. ff. de aqua & aq. pluv.*

We ſee in the thirteenth Section, l. 1. ff. comm. præd. *an Example of another kind of Service, of a Piece of Ground which has in it a Quarry, and out of which the Proprietor is bound by ſome Title, or Cuſtom, to let particular perſons dig what Stones they may have occaſion for, they paying him a certain acknowledgment.*

It is to be remarked on what is ſaid in this Article, of the Service of gathering Fruits, and keeping them in another Man's Ground, that without any particular Right, all Proprietors of Grounds into which the Fruits of Neighbouring Grounds may chance to fall, are obliged to ſuffer the Owners to come and gather them. Tit. ff. de glande legenda.

VI.

6. Services for the uſe of Cattel. One may have likewiſe Services for the uſe of Cattel which are kept in a Ground, either for watering them at a Fountain in a neighbouring Ground, or for depaſturing them at certain ſeaſons [f].

[f] In ruſticis computanda ſunt—— pecoris ad aquam appulſus jus paſcendi. *l.* 1. §. 1. *ff. de ſervit. præd. ruſt.* Pecoris paſcendi ſervitutes, item ad aquam appellandi, ſi prædii fructus maxime in pecore conſiſtat, prædii magis quam perſonæ videtur. *l.* 4. *eod. l.* 20. §. 1. *ff. ſi ſerv. vind.* Item, ſic poſſunt ſervitutes imponi, & ut boves per quos fundus colitur in vicino agro paſcantur. *l.* 3. *ff. de ſerv. præd. ruſt.*

SECT. IV.

Of the Engagements of the Proprietor of the Land, or Tenement, which owes the Service.

The CONTENTS.

1. *He ought to tolerate the Service.*
2. *He ought to tolerate the Works neceſſary for the uſe of the Service.*
3. *What the perſon is bound to, whoſe Wall ought to bear the building of another.*
4. *If it is neceſſary to repair a Partition-Wall.*
5. *Expences for repairing a Wall that ſerves for ſupporting a Building.*
6. *The Proprietor of a Land or Tenement which ſerves, may relinquiſh it.*
7. *If the Eſtate to which the Service is due be divided.*
8. *When two Services are due from one Tenement to another.*

I.

1. He ought to tolerate the Service. THE Proprietor of the Land, or Tenement, which ſerves, is bound to ſuffer the uſe of the Service, and to do nothing that may either hinder the ſaid uſe, or diminiſh it, or render it inconvenient: and he ought to change nothing in the antient condition of the places, nor in any thing elſe neceſſary to the Service [a].

[a] Si quas actiones adverſus eum, qui ædificium contra veterem formam extruxit, ut luminibus tuis officeret, competere tibi exiſtimas; more ſolito, per judicem, exercere non prohiberis. *l.* 1. *C. de ſervit.* Sciet ſe formam, ac ſtatum antiquorum ædificiorum, cuſtodire debere. *l.* 11. *ff. de ſervit. præd urb.*

II.

2. He ought to tolerate the Works neceſſary for the uſe of the Service. He ought likewiſe to ſuffer the Works neceſſary for repairing, and keeping in good condition the Places, and other Things deſtined for the Service [b]. But he is not bound to repair the Places at his own charge [c], unleſs he be obliged to it by the Title, or by a Poſſeſſion that is equivalent to a Title.

[b] *See the ſeventh Article of the firſt Section.*

[c] In omnibus ſervitutibus, refectio ad eum pertinet qui ſibi ſervitutem aſſerit, non ad eum cujus res ſervit. *l.* 6. §. 2. *ff. ſi ſervit. vind.* See the following Article.

III.

3. What the perſon is He whoſe Wall ought to bear the Building of another, or any other Burden, *bound to, whoſe Wall ought to bear the building of another.* den, is obliged to have it ſuch as may be ſufficient for bearing the Burden: and he is bound likewiſe to maintain it in ſuch condition, and to repair it if there be occaſion[d]. Unleſs it were that the exceſs of the Load had thrown it down, or damaged it. And in this caſe he who has over-loaded it will be bound to leſſen the Burden, to repair the Wall, and to make good the Damages and Loſs which this Over-loading may have cauſed[e].

[d] Etiam de ſervitute, quæ oneris ferendi cauſa impoſita erit, actio nobis competit, ut & onera ferat, & ædificia reficiat, ad eum modum qui ſervitute impoſita comprehenſus eſt. *l.* 6. §. 2. *ff. de ſervit. vind. l.* 8. *eod.* Eum debere columnam reſtituere, quæ onus vicinarum ædium ferebat, cujus eſſent ædes, quæ ſervirent, non eum qui imponere vellet. *l.* 33. *ff. de ſervit. præd. urb.*

[e] Si paries communis opere abs te facto, in ædes meas ſe inclinaverit, potero tecum agere, jus tibi non eſſe parietem illum ita habere. *l.* 14. §. 1. *ff. ſi ſervit. vind.*

IV.

4. If it is neceſſary to repair a Partition-Wall. If one of the Proprietors of a Partition-Wall, upon which each of them may reſt any thing on their own ſide, has made Imbelliſhments on it, ſuch as Painting, or Carving, and the Wall opens, or falls down, or that the other Proprietor is obliged to demoliſh it, in order to rebuild it ſuch as it ought to be for the Service, the two Proprietors ſhall contribute equally to the Charges neceſſary for reſtoring the Wall to the condition in which it ought to be. But the Loſs of the Imbelliſhments will fall upon him who made them[f].

[f] Parietem communem incruſtare licet, ſecundum Capitonis ſententiam: ſicut licet mihi pretioſiſſimas picturas habere in pariete communi. Cæterùm, ſi demolitus ſit vicinus, & ex ſtipulatu, actione damni infecti agatur, non pluris, quàm vulgaria tectoria æſtimari debent: quod obſervari & in incruſtatione oportet. *l.* 13. §. 1. *ff. de ſervit. præd. urb.* See the fifth Article of the fifth Section of Damages occaſioned by Faults.

V.

5. Expences for repairing a Wall that ſerves for ſupporting a Building. If it is neceſſary to rebuild a Wall which ſerves for bearing a Building, or ſupporting any Thing belonging to another perſon, he who is Owner of the Wall, and who ought to maintain it in good condition, will be liable only for the Charges neceſſary to repair the Wall, and whatever is laid out either in demoliſhing that which reſted on the Wall, or in ſupporting it, will be born by the perſon who had the Right to reſt the ſaid Thing on the Wall[g].

[g] Sicut autem refectio parietis ad vicinum pertinet, ita fultura ædificiorum vicini cui ſervitus debetur, quamdiu paries reficietur, ad inferiorem vicinum non debet pertinere. Nam ſi non vult ſuperior fulcire, deponat: & reſtituet, cùm paries fuerit reſtitutus. *l.* 8. *ff. ſi ſervit. vind.*

VI.

6. The Proprietor of a Land or Tenement which ſerves, may relinquiſh it. If the Proprietor of a Land or Tenement which owes a Service, or of a Wall which is ſubject to bear the Building of another perſon, chuſes rather to abandon his Right of Property, than to make the Repairs which his Service obliges him to, he ſhall be diſcharged from them by relinquiſhing the Land or Tenement. For it was the Land or Tenement that was bound to ſerve, and not the Perſon[h].

[h] Evaluit Servii ſententia in propoſita ſpecie, ut poſſit quis defendere jus ſibi eſſe cogere adverſarium reficere parietem ad onera ſua ſuſtinenda. Labeo autem, hanc ſervitutem non hominem debere, ſed rem, denique licere domino rem derelinquere, ſcribit. *l.* 6. §. 2. *ff. ſi ſerv. vind.*

VII.

7. If the Eſtate to which the Service is due be divided. If an Eſtate to which a Right of Paſſage is due be divided among ſeveral Proprietors, the Service will be preſerved to each Portion, for it was due to every individual part of the Eſtate. But the Proprietor of the Ground, which owes the Service of the Paſſage, will be bound to give it only in the ſame place for all the Proprietors, and they cannot uſe the Service but by agreeing among themſelves ſo as not to enter into the Ground which owes the Service, but at the place where the Service was eſtabliſhed[i].

[i] Quæcumque ſervitus fundo debetur, omnibus ejus partibus debetur: & ideo quamvis particulatim vænierit, omnes partes ſervitus ſequitur, & ita ut ſinguli recte agant, jus ſibi eſſe fundi. Si tamen fundus cui ſervitus debetur, certis regionibus inter plures dominos diviſus eſt, quamvis omnibus partibus ſervitus debeatur, tamen opus eſt ut hi qui non proximas partes ſervienti fundo habebunt, tranſitum per reliquas partes fundi diviſi jure habeant, aut ſi proximi patiantur tranſeant. *l.* 23. §. *ult. ff. de ſerv. præd. ruſt.* See the eighteenth Article of the firſt Section.

VIII.

8. When two Services are due from one Tenement to one another. If a Tenement is ſubject to two Services, as for inſtance, a Houſe which cannot be raiſed higher to the prejudice of the Proſpect of a neighbouring Houſe, and which is alſo bound to receive the Water that comes from it, and if the Proprietor of the Houſe which ſerves, happens to purchaſe the Liberty of one of the two Services, without making any mention of the other, as if he purchaſes the liberty to raiſe his Building higher, and to take away his Neighbour's Proſpect; he cannot extend the ſaid liberty to the prejudice of the ſecond

cond Service, which ſtill ſubſiſts, and he muſt raiſe his Building no higher than that it may ſtill be capable of receiving the Water that falls from the neighbouring Houſe[l].

SECT. V.

Of the Engagements of the Proprietor of the Land, or Tenement, for which a Service is due.

The CONTENTS.

1. *He who has a Right of Service, can innovate nothing.*
2. *The Over-loading of a Wall that ſerves.*
3. *Repairs for the uſe of the Service.*
4. *Of the Damage which is a natural conſequence of the Service.*
5. *The Right of Service is not to be extended beyond its bounds, nor can it be communicated to others.*

I.

1. He who has a Right of Service, can innovate nothing.

THE Proprietor of the Land or Tenement, to which a Service is due, cannot uſe it but according to his Title, without innovating any thing, either in the Land or Tenement which owes the Service, or in his own to which the Service is due, that may make the condition of the Service harder. Thus, he cannot over-load a Wall, enlarge a Paſſage, advance the Eaves of a Houſe whoſe Waters his Neighbour is bound to receive, nor make any other changes of the like nature which may increaſe the Service, or render it more inconvenient; and he can only leſſen it, or make it eaſier[a].

II.

2. The Over-loading of a Wall that ſerves.

If he who has a Right to reſt any thing on the Wall of another, or on a Wall belonging to him in common with another, ſhoves the Wall forward, or over-loads it in ſuch a manner, that the Wall which was ſufficient for the Service, is by that means thrown down, or damaged; he ſhall be liable for all the Damage that happens thereby[b].

III.

3. Repairs for the uſe of the Service.

He to whom a Service is due, ought to make the Repairs neceſſary for uſing it, ſuch as the Repair of the way of his Paſſage, of his Aqueduct, and others of the like nature[c].

IV.

4. Of the Damage which is a natural conſequence of the Service.

If the Land, or Tenement, which ſerves, ſuffers any Damage by a natural conſequence of the Service, as if a Piece of Ground is overflowed by a Torrent, which has been occaſioned by the Service of a Conveyance of Water from thence; if the Roof of a Houſe is damaged by the fall of an extraordinary quantity of Rain, which comes from the Roof of the neighbouring Houſe whoſe Waters it was bound to receive, he to whom the Service is due will not be accountable for ſuch ſort of Damages. But if he had made any Change in the condition of the places, contrary to the Title of his Service, and that the ſaid Change had been the occaſion of the Damage, he would be bound to make it good[d].

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[l] Si domus tua ædificiis meis utramque ſervitutem deberet, ne altius tolleretur, & ut ſtillicidium ædificiorum meorum recipere deberet, & tibi conceſſero, jus eſſe invito me altius tollere ædificia tua: quod ad ſtillicidium meum attinet, ſic ſtatui debebit, ut ſi altius ſublatis ædificiis tuis, ſtillicidia mea cadere in ea non poſſint, ea ratione altius tibi ædificare non liceat: ſi non impediantur ſtillicidia mea, liceat tibi altius tollere. *l. 21. ff. de ſervit. præd. urb. v. l. 20. ff. de ſervit. præd. ruſt.*

[a] Lenius facere poterimus, acrius non. Et omninò ſciendum eſt meliorem vicini conditionem fieri poſſe, deteriorem non poſſe, niſi aliquid nominatim, ſervitutem imponenda, immutatum fuerit. *l. 20. §. 5. in f. ff. de ſervit. præd. urban.* Statum antiquorum ædificiorum cuſtodire debere. *l. 11. eod. l. 1. C. de ſervit.* Si nova (tigna) velis immittere, prohiberi à me potes. *l. 14. ff. ſi ſervit. vind.* Si paries communis opere abs te facto in ædes meas ſe inclinaverit, potero tecum agere, jus tibi non eſſe, parietem illum ita habere. *d. l. 14. §. 1.* Stillicidium quoquo modo acquiſitum ſit, altiùs tolli poteſt; levior enim ſit eo facto ſervitus, cùm quod ex alto cadet lenius, & interdum direptum, nec perveniat ad locum ſervientem: inferius demitti non poteſt, quia fit gravior ſervitus, id eſt pro ſtillicidio flumen. Eadem cauſa retroduci poteſt ſtillicidium, quia in noſtro magis incipiat cadere, produci non poteſt, ne alio loco cadat ſtillicidium, quam in quo poſita ſervitus eſt. *l. 20. §. 5. ff. de ſervit. præd. urb.*

[b] Quod ſi quia alter eum preſſerat, vel oneraverat, idcirco damnum contingat, conſequens eſt dicere detrimentum hoc quod beneficio ejus contingit, ipſum ſarcire debere. *l. 40. §. 1. ff. de dam. inf.*

[c] In omnibus ſervitutibus refectio ad eum pertinet, qui ſibi ſervitutem aſſerit, non ad eum cujus res ſervit. *l. 6. §. 2. ff. ſi ſervit. vind.* See the ſecond and third Articles of the fourth Section.

[d] Servitus naturaliter non manu facto lædere poteſt fundum ſervientem, quemadmodum ſi imbri creſcat aqua in rivo, aut ex agris in eum confluat. *l. 20. §. 1. ff. de ſervit. præd. ruſt.* Nam ut verius quis dixerit, non aqua, ſed loci natura nocet. *l. 1. §. 14. ff. de aqua & aquæ pluv. arc.*

V.

5. The Right of Service is not to be extended beyond its bounds, nor can it be communicated to others.

He to whom any Service is due cannot only not communicate the uſe of it to any other, but he may not even extend it for his own uſe beyond what is given him by the Title. Thus, he who has a Draught of Water for a particular Ground, cannot uſe it for his other Grounds; and if the Draught of Water be only for one part of a Ground, he can uſe it only for that part[e].

[e] Ex meo aquæductu Labeo ſcribit, cuilibet poſſe me vicino commodare Proculus contrà ut ne in meam partem fundi aliam, quàm ad quam ſervitus acquiſita ſit, uti ea poſſim. Proculi ſententia verior eſt. *l. 24. ff. de ſervit. præd. ruſt.*

Per plurium prædia aquam ducis, quoquo modo impoſita: niſi pactum vel ſtipulatio etiam de hoc ſubſecuta eſt, neque eorum cuivis, neque alii vicino poteris hauſtum ex rivo cedere. *l. 33. §. 1. eod.* See the fourteenth Article of the firſt Section.

SECT. VI.

How Services come to ceaſe.

The CONTENTS.

1. *The Right of Service periſhes with the Land, or Tenement.*
2. *Confuſion of the Property of the Lands or Tenements.*
3. *If after this Confuſion the Proprietor ſells again the Land, or Tenement, which ſerved.*
4. *When a Land or Tenement, that is between two other Lands or Tenements hinders the uſe of the Service.*
5. *Preſcription of Services.*
6. *Different ways of preſcribing, according to the differences of Services.*
7. *Preſcription of Services whoſe uſe is not perpetual, but interrupted by Intervals of Time.*
8. *Continuation of Preſcription from one Poſſeſſor to another.*
9. *When an Eſtate is ſold by a Decree of Court, the Services nevertheleſs continue.*

I.

1. The Right of Service periſhes with the Land, or Tenement.

THE Service ceaſes, when the Things come to be in ſuch a condition that there is no uſing it; as if the Land, or Tenement, which owes the Service, or that for whoſe behoof it was eſtabliſhed, happens to periſh; and it would be the ſame thing if the Land or Tenement ſubſiſting, the Cauſe for which the Service was eſtabliſhed ſhould chance to ceaſe. Thus, for Example, if a Spring from whence the Neighbour has a Right to fetch Water, happens to be dried up, he would loſe the Right of entring into the Ground where the Spring was. But if the Spring ſhould chance to flow again, even after the time appointed for Preſcription, the Service would be re-eſtabliſhed; and nothing could be imputed to the perſon to whom the Service was due, for not having uſed it during the time that it could not have its uſe[a].

[a] Si fons exaruerit, ex quo ductum aquæ habeo: iſque *poſt conſtitutum tempus* ad ſuas venas redierit: an aquæductus amiſſus erit, quæritur? Et Atilicinus ait, Cæſarem Statilio Tauro reſcripſiſſe, in hæc verba; hi qui ex fundo Sutrino aquam ducere ſoliti ſunt, adierunt me, propoſueruntque aquam, qua per aliquot annos uſi ſunt, ex fonte qui eſt in fundo Sutrino ducere non potuiſſe, quòd fons exaruiſſet, & poſteà ex eo fonte aquam fluere cœpiſſe, petieruntque à me, ut quod jus non negligentia, aut culpa ſua amiſerant; ſed qui ducere non poterant, his reſtitueretur. Quorum mihi poſtulatio, cùm non iniqua viſa ſit, ſuccurrendum his putavi, quod jus habuerunt, tunc cùm primùm ea aqua pervenire ad eos non potuit, id eis reſtitui placet. *l. 34. in f. & l. 35. f. de ſervit. præd. ruſt.* See the fourth Article of this Section, and the Remark made upon it.

II.

2. Confuſion of the Property of the two Lands or Tenements.

Services ceaſe likewiſe, when the Maſter of the Land, or Tenement, that ſerves, or he that is Maſter of the Land, or Tenement, for which the Service was eſtabliſhed, becomes Proprietor of both. For a Service is a Right on the Eſtate of another perſon; and the Right which the Maſter has over his own Eſtate is not called a Service[b].

[b] Servitutes prædiorum confunduntur, ſi idem utriuſque prædii dominus eſſe cœperit. *l. 1. ff. quemad. ſerv. am.* Nemo ipſe ſibi ſervitutem debet. *l. 10. ff. com. præd.* Nulli enim res ſua ſervit. *l. 26. ff. de ſervit. præd. urb.*

III.

3. If after this Confuſion, the Proprietor ſells again the Land or Tenement, which ſerved.

If the Proprietor of the Land, or Tenement, for which the Service was eſtabliſhed, acquires the Property, of the Land, or Tenement, which ſerves, and afterwards ſells it again without reſerving the Service, it is ſold free. For the Service was annulled, by the Rule explained in the foregoing Article: and it is not re-eſtabliſhed to the prejudice of the new Purchaſer, on whom this Charge was not impoſed[c].

[c] Si quis ædes quæ ſuis ædibus ſervirent cùm emiſſet, traditas ſibi accepit, confuſa ſublataque ſervitus eſt. Et ſi rurſus vendere vult, nominatim imponenda ſervitus eſt, alioquin liberæ veniunt. *l. 30. de ſervit.*

IV.

4. When a Land or Tenement, that is between two

If between the Land or Tenement that ſerves, and that to which the Service is due, there be another Land or Tenement, which hinders the uſe of the *other Lands or Tenements, hinders the uſe of the Service.*

Service, the Service is ſuſpended whilſt the ſaid Obſtacle remains. Thus, for Example, if between two Houſes, one of which cannot be raiſed ſo high as to prejudice the Proſpect of the other, there ſtands a third Houſe, which not being liable to the ſame Service has been raiſed, and does obſtruct the ſaid Proſpect; the Proprietor of the Houſe which owes the Service may raiſe his. Thus he who had a Right of Paſſage loſes the uſe of his Service, if between his Ground and that which ſerves there be another Ground which is not bound to grant the Paſſage, and ſo by that means makes his Right of Paſſage uſeleſs. But if theſe Obſtacles chance to be removed, as if the Houſe ſtanding between the two be demoliſhed, or if a Paſſage be acquired thro' the Ground which ſeparated the other two; he to whom the Service was due, recovers the uſe of it[d].

V.

5. Preſcription of Services.

Services are loſt by Preſcription: or they are reduced to ſo much as is retained of them by Poſſeſſion during the time ſufficient for Preſcription[e].

VI.

6. Different ways of preſcribing, according to the differences of Services.

The Services which conſiſt in ſome Action on the part of thoſe to whom they are due, are loſt by Preſcription, when the perſons to whom the Services are due ceaſe to make uſe of them. As a Paſſage, and a Draught of Water, which are loſt by Preſcription, when the perſons to whom they are due ceaſe to paſs, or to draw Water. But the Services which conſiſt barely in fixing the State of the Places, in which no Innovation is to be made, ſuch as a Service of not raiſing a Building higher to hinder a Proſpect, a Diſcharge of the Water from off a neighbouring Houſe, are never loſt by Preſcription, except when there is a change of the State of the Places, which annuls the Service, and which laſts during the time limited for Preſcription; as if the Proprietor of a Houſe which is ſubject to a Service having raiſed it higher, has continued in Poſſeſſion of this Change, or if the Waters have been diſcharged another way[f].

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[d] Si fortè qui medius eſt, quia ſervitutem non debebat, altiùs extulerit ædificia ſua ut jam ego non videar luminibus tuis obſtaturus, ſi ædificavero, fruſtra intendes jus mihi non eſſe ita ædificatum habere, invito te, ſed ſi intra tempus ſtatutum, rurſus depoſuerit ædificium ſuum vicinus, renaſcetur tibi vindicatio. *l. 6. ff. ſi ſerv. vind.* In ruſticis prædiis impedit ſervitutem medium prædium, quod non ſervit. *l. 7. §. 1. ff. de ſerv. præd. ruſt.*

We have not ſet down in this Article that which the words of the Law, intra ſtatutum tempus, *ſeem to imply,* viz. *that this Right does not revive but when there is no Preſcription. For we ſee on the contrary, by the Laws quoted on the firſt Article of this Section, that Preſcription ought not to run againſt him who could not uſe the Service.* Quod jus non negligentiâ, aut culpâ ſuâ amiſerat, ſed quia ducere non poterat. *And altho' that be not the ſame caſe with this of the fourth Article, yet there may be circumſtances in the caſes comprehended in it, which may make it reaſonable that the Service ſhould be preſerved againſt Preſcription. Thus, for Example, if the Poſſeſſor of three Houſes keeping one of them to himſelf, has ſold that in the middle, and given away the third, impoſing on the Buyer, and on the Donee, the Service of not raiſing their Houſes higher; and it happens that the Purchaſer of the Houſe in the middle is evicted of it by a third perſon, who not being bound to the Service, raiſes the ſaid Houſe higher; 'tis true that the Donee in this caſe may likewiſe raiſe his; but if the Donor ſhould come to regain Poſſeſſion of the Houſe which he had ſold, altho' after the time limited for Preſcription were elapſed, and he ſhould have a mind to take poſſeſſion again of his Service; his Donee being ſtill in poſſeſſion of the Houſe that was ſubject to the Service, could he inſiſt on Preſcription againſt his Title? But if this Donee had ſold the Houſe to a third perſon who was ignorant of the Service, and who had preſcribed againſt it, would it be juſt in regard to him to interrupt the Preſcription? So that theſe ſorts of Queſtions may depend on the circumſtances. And even in the caſe of the firſt Article of this Section, if we ſuppoſe that the Ground which owed the Service was poſſeſſed by a third Purchaſer, who knew nothing of the Service of a Draught of Water, and who had poſſeſſed the Ground during the time required for Preſcription, the perſon to whom the Service was due never having entered any Proteſtation for ſaving his Right, ought it to revive againſt this third Poſſeſſor after ſo long a time? And might not we impute to the perſon who ſhould claim the Service, his Neglect in not taking the precautions neceſſary for preſerving his Right.*

[e] Si is, qui nocturnam aquam habet, interdiu per conſtitutum ad amiſſionem tempus uſus fuerit, amiſit nocturnam ſervitutem, qua uſus non eſt. Idem eſt in eo qui certis horis aquæductum habens aliis uſus fuerit, nec ulla parte earum horarum. *l. 10. §. 1. ff. quemadm. ſerv. amit.* Ut omnes ſervitutes non utendo amittantur, non biennio, quia tantummodò ſoli rebus annexæ ſunt, ſed decennio contra præſentes, vel viginti ſpatio annorum contra abſentes. *l. 13. C. de ſervit.* See the eleventh and thirteenth Articles of the firſt Section.

[f] Hæc autem jura, ſimiliter ut ruſticorum quoque prædiorum, certo tempore non utendo, pereunt: niſi quod hæc diſſimilitudo eſt, quod non omnimodo pereunt non utendo, ſed ità, ſi vicinus ſimul libertatem uſucapiat: veluti ſi ædes tuæ ædibus meis ſerviant, ne altius tollantur, ne luminibus mearum ædium officiatur, & ego per ſtatutum tempus, feneſtras meas præfixas habuero vel obſtruxero: ita demùm jus meum amitto, ſi tu per hoc tempus ædes tuas altiùs ſublatas habueris. Alioquin ſi nihil novi feceris, retineo ſervitutem. Item, ſi tigni immiſſi ædes tuæ ſervitutem debent, & ego exemero tignum, ita demùm amitto jus meum ſi tu foramen unde exemptum eſt tignum obturaveris, & per conſtitutum tempus ita habueris. Alioquin, ſi nihil novi feceris, integrum jus ſuum permanet. *l. 6. ff. de ſervit. præd. urb.* Si ego via quæ nobis per vicini fundum debebatur, uſus fuero, tu autem conſtituto tempore ceſſaveris, an jus tuum amiſeris? Et è contrario: ſi vicinus, cui via per noſtrum fundum debebatur, per meam partem iërit, egerit, tuam partem ingreſſus non fuerit: an partem tuam liberaverit? Celſus reſpondit: ſi diviſus

eſt fundus inter ſocios regionibus : quod ad ſervitutem attinet, quæ ei fundo debebatur, perinde eſt atque ſi ab initio duobus fundis debita ſit: & ſibi quiſque dominorum uſurpat ſervitutem, ſibi non utendo deperdit. *l.* 6. §. 1. *quemadm. ſerv. am.*

VII.

7. Preſcription of Services, whoſe uſe is not perpetual, but interrupted by Intervals of Time.

If the uſe of a Service is not perpetual, but by Intervals of ſome years, ſuch as a Service of a Paſſage for going to a Copſe, which one uſes only at the time they cut down the Wood, either once in five years, or every ten years, or after any other long Interval of Time, and only during the time neceſſary for cutting down and tranſporting the Wood; the Preſcription againſt ſuch a Service is not acquired in the ordinary time of ten years, in the places where the time for Preſcription is limited to ten years; but the time ought to be fixed either to twenty years, or to more or fewer, according to the time limited for Preſcription, in the Places, and by the Cuſtoms obſerved therein, if there are any, and according to the Quality and Intervals of the Service, and other circumſtances[g].

[g] Si alternis annis, vel menſibus quis aquam habeat, duplicato conſtituto tempore amittitur. Idem & de itinere cuſtoditur. *l.* 7. *ff. quemad. ſervit. amit.* Cùm talis quæſtio in libris Sabinianis volveretur, quidam enim pactus erat cum vicino ſuo, ut liceret ei vel per ſe, vel per ſuos homines, per agrum vicini tranſitum facere, iterque habere uno tantummodò die per quinquennium, quatenus ei licentia eſſet in ſuam ſylvam inde tranſire, & arbores excidere, vel facere quidquid neceſſarium ei viſum fuiſſet: & quæreretur, quando hujuſmodi ſervitus non utendo amitteretur? Et quidam putarent, ſi in primo vel ſecundo quinquennio per eam viam itum non eſſet, eandem ſervitutem penitus tolli, quaſi per biennium ea non utendo deperdita, ſingulo die quinquennii pro anno numerando: aliis autem aliam ſententiam eligentibus, nobis placuit ita cauſam dirimere, ut, quia jam per legem latam à nobis proſpectum eſt, ne ſervitutes per biennium non utendo depereant, ſed per decem, vel viginti annorum curricula: & in propoſita ſpecie, ſi per quatuor quinquennia nec uno die, vel ipſe, vel homines ejus, eadem ſervitute uſi ſunt, tunc eam penitùs amitti, viginti annorum deſidia. Qui enim in tam longo prolixoque ſpatio ſuum jus minime conſecutus eſt, ſera pœnitentia ad priſtinam ſervitutem reverti deſiderat. *l. ult. C. de ſervit.*

VIII.

8. Continuation of Preſcription from one Poſſeſſor to another.

If a Right of Service paſſes from one Proprietor to another, the time of Preſcription which had run againſt the firſt Proprietor, is joined to the time which has run againſt the ſecond, and Preſcription is acquired againſt him by theſe two times joined together[h]. As on the contrary, a ſecond Poſſeſſor acquires a Service by the Poſſeſſion of his Predeceſſor joined to his own.

[h] Tempus quo non eſt uſus præcedens fundi dominus cui ſervitus debetur, imputatur ei qui in ejus loco ſucceſſit. *l.* 18. §. 1. *ff. quemad. ſervit. am.*

IX.

9. When an Eſtate is ſold by a decree of Court, the Services nevertheleſs continue.

If the Eſtate which owes the Service is ſold by a Decree of Court, the Service is nevertheleſs preſerved; for it is ſold in the condition it is in. And much more is the Service preſerved, if it is the Eſtate to which the Service is due, that is decreed to be ſold[i]

[i] Si fundus ſerviens, vel is cui ſervitus debetur publicaretur, utroque caſu durant ſervitutes, quia cum ſua conditione quiſque fundus publicaretur. *l.* 23. §. 2. *ff. de ſervit. præd. ruſt.*

TITLE XIII.

Of TRANSACTIONS.

Uſe of Tranſactions.

There are two ſorts of ways for terminating by mutual conſent Law-Suits, or for preventing them. The firſt is the way of an Agreement between the Parties, who ſettle either by themſelves, or by the Counſel and Aſſiſtance of their Friends, the Conditions of an Agreement, and who ſubmit themſelves to the ſaid conditions by a Treaty; and this is what is called a Tranſaction. The ſecond is the Award of Arbitrators, to whom the Parties refer their Differences by a Compromiſe. So that Tranſactions and Compromiſes are two Kinds of Covenants, the firſt of which ſhall be the ſubject matter of the preſent Title; and that of Compromiſes ſhall be explained in the following Title.

SECT. I.

Of the Nature and Effect of Tranſactions.

The CONTENTS.

1. *The Definition.*
2. *Divers ways of tranſacting.*
3. *Tranſactions are limited to their ſubject matter.*
4. *A Tranſaction with one of the Parties intereſted, is of no prejudice to the others.*

5. *A Tranſaction with another than the Adverſary.*
6. *A Tranſaction concerning one Right, is of no prejudice to another Right of the like nature, which accrues afterwards.*
7. *A Tranſaction with the Stipulation of a Penalty.*
8. *Tranſaction with the Surety.*
9. *Tranſactions have the force of Judgments.*

I.

1. *The Definition.*

A Tranſaction is an Agreement between two or more perſons, who for preventing or ending a Law-Suit, adjuſt their Differences by mutual conſent, in the manner which they agree on; and which every one of them prefers to the hopes of Gaining, joined with the danger of Loſing[a].

[a] Qui tranſigit quaſi de re dubia, & lite incerta, neque finita tranſigit. *l.* 1. *ff. de tranſ.* Propter timorem litis. *l.* 2. *C. eod.* Litigiis jam motis & pendentibus, ſeu poſtea —— movendis. *l. ult. C. eod.* (controverſia) certa lege finita. *l.* 14. *ff. eod.*

II.

2. *Divers ways of tranſacting.*

Tranſactions put an end to, or prevent Law-Suits ſeveral ways, according to the nature of the Differences, and the divers Agreements which ſettle them. Thus, he who had ſome Pretenſion, either deſiſts from it altogether by a Tranſaction, or obtains a part of what he claims, or even the whole. Thus, he of whom a Demand is made of a Sum of Money, either pays it, or gives his Bond for it, or is diſcharged either of the whole, or of a part of it. Thus he who was in diſpute about a Warranty, a Service, or any other Right, either ſubjects himſelf to it, or frees himſelf from it. Thus, he who complained of a Sentence, either gets it to be reformed, or acquieſces under it. And in fine, the Parties tranſact on the conditions to which they are willing to agree, according to the general Rules of Contracts[b].

[b] Tranſactio nullo dato, vel retento, ſeu promiſſo, minimè procedit. *l.* 38. *C. de tranſ.* Ut partem bonorum ſuſciperet, & à lite diſcederet. *l.* 6. *eod.* Nihil ita fidei congruit humanæ, quàm ea quæ placuerant cuſtodiri. *l.* 20. *eod. toto Tit. ff. & C. de tranſ.*

What is ſaid in this thirty eighth Law, C. de tranſ. *that it is no Tranſaction, where one does not give, or promiſe, or keep ſome thing, ought not to be taken in the ſtrict literal ſenſe. For one may tranſact without either giving, or promiſing, or retaining any thing. Thus he who is ſued as Surety for another, may be diſcharged of this Suit, altho' there be nothing either given, or promiſed, or retained on either ſide.*

III.

3. *Tranſactions are limited to their ſubject matter.*

Tranſactions regulate only the differences which appear clearly to be comprehended in them by the Intention of the Parties, whether it be explained by a general, or particular Expreſſion: or that it be known by a neceſſary Conſequence of what is expreſſed; and they do not extend to Differences which the Parties never intended to comprehend in them[c].

[c] Tranſactio quæcumque ſit, de his tantùm, de quibus inter convenientes placuit, interpoſita creditur. *l.* 9. §. 1. *ff. de tranſ.* Ei, qui nondum certus, ad ſe querelam contra patris teſtamentum pertinere, de aliis cauſis, cum adverſario pacto tranſegit, tantùm in his interpoſitum pactum nocebit, de quibus inter eos actum eſſe probatur. *d. l.* §. 3. Iniquum eſt perimi pacto, id de quo cogitatum non docetur. *d. l. in fine. l.* 5. *eod.*

IV.

4. *A Tranſaction with one of the Parties intereſted, is of no prejudice to the others.*

If he who had, or might have had a Difference with ſeveral perſons, tranſacts with one of them for what concerns him in particular; the Tranſaction will be no hindrance why his Right ſhould not ſubſiſt againſt the others; and why he may not either ſue them at Law, or tranſact with them in another manner. Thus he to whom two Tutors are accountable for one and the ſame Adminiſtration, may tranſact with one of them, for his part, and ſue the other. Thus, the Creditor of a perſon deceaſed, or the Legatee, may tranſact their Claim with one of two Heirs, or Executors, for his Portion, and ſue the other Co-Heir, or Co-Executor, for what falls to his Share to pay[d].

[d] Neque pactio, neque tranſactio cum quibuſdam ex curatoribus, ſive tutoribus facta, auxilio cæteris eſt, in hiſque ſeparatim communiterve geſſerunt, vel gerere debuerunt. Cum igitur tres curatores habueris, & cum duobus ex his tranſegeris, tertium convenire non prohiberis. *l.* 1. *C. de tranſ. l.* 15. *ff. de tut. & rat. diſtr.*

V.

5. *A Tranſaction with another than the Adverſary.*

If he who has a Difference, tranſacts it with one whom he believes to be his adverſe Party, but is not, the ſaid Tranſaction will have no effect. Thus, for Inſtance, if a Creditor to an Inheritance, tranſacts with one whom he took to be Heir, but who was not, this Tranſaction will be without effect, both with regard to the Creditor, and alſo with regard to the true Heir[e]. For the true Heir could not be bound by the deed of another perſon; and the Creditor was under no Obligation on his part to the Heir, with whom he did not treat, and for whom he might perhaps have leſs conſideration, than for the perſon whom he took to be Heir.

[e] Debitor, cujus pignus creditor diſtraxit, cum Mævio qui ſe legitimum creditoris hæredem eſſe jactabat, minimo tranſegit: poſtea teſtamento prolato, Septicium hæredem eſſe apparuit. Quæſitum eſt, ſi agat pigneratitia debitor cum Septicio, an is uti poſſit exceptione tranſactionis factæ cum Mævio, qui hæres eo tempore non fuerit, poſſitque Septicius pecuniam, quæ Mævio, ut hæredi à debitore numerata eſt, condictione repetere quaſi ſub prætextu hæreditatis acceptam. Reſpondit, ſecundùm ea quæ proponerentur, non poſſe, quia neque cum eo ipſe tranſegit, nec negotium Septicii Mævius gerens accepit. *l. 3. §. 2. ff. de tranſ.*

VI.

6. A Tranſaction concerning one Right, is of no prejudice to another Right of the like nature, which accrues afterwards.

If he who had tranſacted concerning a Right which he had in his own perſon, acquires afterwards a like Right which belonged to another, the Tranſaction would be of no prejudice to this ſecond Right. Thus, for Example, if one come to full Age has tranſacted with his Tutor for the Account of the Share of his Father's Eſtate that fell to him, and he ſucceeds afterwards to his Brother, to whom the ſame Tutor was likewiſe accountable for his Share of his Father's Eſtate, this Tranſaction will not hinder the ſame Queſtions which it had adjuſted as to one Portion, from ſubſiſting, with regard to the other: And this ſecond Right remains whole and entire[f].

[f] Qui cum tutoribus ſuis de ſola portione adminiſtratæ tutelæ ſuæ egerat, & tranſegerat adverſus eoſdem tutores ex perſona fratris ſui, qui hæres extiterat, agens præſcriptione factæ tranſactionis non ſummovetur. *l. 9. ff. de tranſ.*

VII.

7. A Tranſaction with the Stipulation of a Penalty.

We may add to a Tranſaction the Stipulation of a Penalty againſt the Party who fails to perform it. And in this caſe the Non-performance of what has been agreed on, gives a right to exact the Penalty, according as the Agreement has been made, and purſuant to the Rules explained in the Title of Covenants[g].

[g] Promiſſis tranſactionis cauſa non impletis, pœnam in ſtipulationem deductam, ſi contra factum fuerit, exigi poſſe conſtat. *l. 37. C. de tranſ. l. 16. ff. eod.* See the fourth and fifth Articles of the third Section of Covenants.

VIII.

8. Tranſaction with the Surety.

The Creditor who tranſacts with the Surety of his Debtor, may diſcharge only the Surety, and the Tranſaction will be of no prejudice to him, with regard to the Debtor. But if it is with the Debtor himſelf, that he has tranſacted, the Surety will likewiſe have the benefit of the Tranſaction, becauſe his Obligation is only an Acceſſory to that of the principal Debtor[h].

[h] Si fidejuſſor conventus & condemnatus fuiſſet, mox reus tranſegiſſet cum eo, cui erat fidejuſſor condemnatus, tranſactio valeat quæritur. Et puto valere, quaſi omni causâ & adverſus reum, & adverſus fidejuſſorem diſſoluta. Si tamen ipſe fidejuſſor condemnatus tranſegit, tranſactione non peremit rem judicatam. *l. 7. §. 1. ff. de tranſ.*

IX.

9. Tranſactions have the force of Judgments.

Tranſactions have a force equal to the Authority of Things adjudged, becauſe they are in the place of a Judgment, which is ſo much the ſtronger, becauſe the Parties have conſented to it; and becauſe the Engagement which delivers the Parties from a Law-Suit is altogether favourable[i].

[i] Non minorem auctoritatem tranſactionum quam rerum judicatarum eſſe, recta ratione placuit. *l. 20. C. de tranſ.* Propter timorem litis, tranſactione interpoſita, pecunia rectè cauta intelligitur. *l. 2. C. eod. l. 65. §. 1. ff. de cond. ind.*

SECT. II.

Of the Diſſolution of Tranſactions, and of Nullities in them.

The CONTENTS.

1. *Fraud in a Tranſaction makes it null.*
2. *Error has the ſame effect.*
3. *If the Tranſaction derogates from a Right, of which the Title is unknown.*
4. *When a Tranſaction is founded on forged Writings.*
5. *Of Damage ſuffered by Tranſactions.*
6. *A Tranſaction made to colour an unlawful Contract.*
7. *A Tranſaction concerning a Law-Suit, in which Judgment has been given, altho' the Parties know nothing of it.*

I.

1. Fraud in a Tranſaction makes it null.

THE Tranſactions in which one of the Parties contracting has been engaged by the Fraud of the other, have no effect. Thus he who by a Tranſaction relinquiſhes a Right which he was not able to maintain, for want of a Title which his Adverſary concealed, would be reſtored to his Right, if this Truth ſhould come to light. And it would be the ſame thing with an Heir who had tranſacted with his Co-Heir, who had fraudulently concealed from him the true ſtate of the Inheritance[a].

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[a] Si per ſe vel per alium ſubtractis inſtrumentis,

quibus veritas argui potuit, deciſionem litis extorſiſſe prodetur, ſi quidem actio ſupereſt, replicationis auxilio doli mali, pacti exceptio removetur. *l. 19. C. de tranſ.* Qui per fallaciam cohæredis, ignorans univerſa quæ in vero erant, inſtrumentum tranſactionis, ſine aquiliana ſtipulatione interpoſuit, non tam paciſcitur, quàm decipitur. *l. 9. §. 2. ff. eod. V. l. 65. §. 1. ff. de cond. ind.*

II.

2. Error has the ſame effect.

If he who had acquired a Right by a Teſtament which he knew nothing of, derogates from this Right by a Tranſaction with the Executor, the ſaid Tranſaction will be without effect, when the Teſtament comes to appear; and that even altho' the Executor had known nothing of it. Thus, for Example, if the Debtor to an Eſtate tranſacts, and pays a Debt which had been remitted by the Teſtament; if a Legatee, or a Truſtee tranſacts about a Right which was regulated by a Codicil, they may get the Tranſaction to be repealed. For the Teſtament, or the Codicil, was a Title common to the Parties, and it ought not to loſe its effect by a Tranſaction which was only a conſequence of the Ignorance of this Truth[b].

[b] Cum tranſactio propter fideicommiſſum facta eſſet, & poſtea codicilli reperti ſunt. Quæro an quanto minus ex tranſactione conſecuta mater defuncti fuerit, quàm pro parte ſua eſt: id ex fideicommiſſi cauſa conſequi debeat? Reſpondi debere. *l. 3. §. 1. ff. de tranſ.* Si poſteà codicilli proferuntur, non improbè mihi ducturus videtur, de eo dumtaxat ſe cogitaſſe, quod illarum tabularum, quas tunc noverat ſcriptura contineretur. *l. 12. in fine eod.* De his controverſiis quæ ex teſtamento proficiſcuntur, neque tranſigi, neque exquiri veritas aliter poteſt, quàm inſpectis, cognitiſque verbis teſtamenti. *l. 6. eod.*

III.

3. If the Tranſaction derogates from a Right, of which the Title is unknown.

If he who by a Tranſaction derogates from a Right fallen to him by a Title which he knew nothing of, but which was not concealed from him by his adverſe Party, comes afterwards to recover the ſaid Title, the Tranſaction may either ſubſiſt, or be annulled, according to the circumſtances. Thus in the caſe of the foregoing Article it is annulled. Thus on the contrary, if it was a general Tranſaction concerning all the Affairs which the Parties might have with one another, the Writings newly diſcovered relating to one of the Differences, which neither of the Parties knew any thing of, would not change any thing in the Tranſaction, the Intention of the Parties having been to compenſate, and to extinguiſh all ſorts of Pretenſions[c].

[c] Sub prætextu ſpecierum poſt repertarum, generali tranſactione, finita reſcindi prohibent jura. *l. 29. C. de tranſ. l. 19. eod. v. l. 31. ff. de jurejur. l. 1. C. de reb. cred. & jurejur.*

IV.

4. When a Tranſaction is founded on forged Writings.

If a Tranſaction has been grounded on forged Writings, which paſſed for true ones, and the forgery be diſcovered afterwards, he who complains of it may procure the Tranſaction to be annulled, in all that has been regulated on that foundation. But if the Tranſaction contained other Points, which had no dependance on the forged Writings, they would ſubſiſt. And there would be no other changes made, except ſuch as ſhould be occaſioned by the diſcovery of the Truth which had remained in the dark becauſe of the forged Writings[d].

[d] Si de falſis inſtrumentis tranſactiones, vel pactiones initæ fuerint, quamvis jusjurandum de his interpoſitum ſit, etiam civiliter falſo revelato, eas retractari præcipimus: ita demum ut, ſi de pluribus cauſis, vel capitulis eædem pactiones, ſeu tranſactiones initæ fuerint; illa tantummodo cauſa vel pars retractetur, quæ ex falſo inſtrumento compoſita convicta fuerit, aliis capitulis firmis manentibus. *l. pen. C. de tranſ. v. tit. C. ſi ex falſ. inſtr.*

V.

5. Of Damage ſuffered by Tranſactions.

Tranſactions are not annulled by the Damage which one of the contracting Parties ſuffers, in giving more than he really owes, or receiving leſs than what is due to him. Unleſs there were ſome fraud in the Tranſaction. For theſe ſorts of Loſſes are compenſated with the Advantage of putting an end to a Law-Suit, and preventing the uncertainty of the Event. And it is for the Publick Good, not to annul Tranſactions on pretence of Damages ſuffered by one of the Parties; which Practice would ſoon grow too common, and would multiply Law-Suits[e].

[e] Hæres ejus, qui poſt mortem ſuam rogatus erat univerſam hæreditatem reſtituere, minimam quantitatem, quam ſolam in bonis fuiſſe dicebat, his quibus fideicommiſſum debebatur, reſtituit. Poſtea, repertis inſtrumentis, apparuit quadruplo amplius in hæreditate fuiſſe: quæſitum eſt an in reliquum, fideicommiſſi nomine, conveniri poſſit? reſpondit, ſecundùm ea quæ proponerentur, ſi non tranſactum eſſet, poſſe. *l. 78. §. ult. ff. ad Trebell.* *We muſt not extend this Law ſo far, as to take it in a ſenſe contrary to what has been ſaid in the firſt Article. For if this Heir or Executor had been guilty of any Fraud, he could not take any advantage of the Tranſaction.*

By the Ordinance of Charles IX. *of* 1560, *Damage alone, without Fraud or Force, is not ſufficient to diſſolve Tranſactions.*

VI.

6. A Tranſaction made to colour an unlawful Contract.

The Tranſactions which are made only to colour an Illegal Act, and to make another kind of Contract which is prohibited by ſome Law, to paſs under the Name and Appearance of a Tranſaction,

action, are null. Thus, for Inſtance, if thoſe who are intruſted with the Adminiſtration of the Affairs of a Town, treat with one of its Debtors, who by his intereſt with them obtains a Diſcharge, under the colour of a feigned Tranſaction; the ſaid Tranſaction will be annulled. And it would be the ſame thing in caſe of a Deed of Gift made, under colour of a Tranſaction, in favour of a perſon to whom one could not give legally[f].

[f] Præſes Provinciæ exiſtimabit utrùm de dubia lite tranſactio inter te & civitatis tuæ adminiſtratores facta ſit, an ambitioſè id quod indubitarè deberi poſſet, remiſſum ſit. Nam priore caſu, ratam manere tranſactionem jubebit: poſteriore verò caſu, nocere civitati, gratiam non ſinet. *l. 12. C. de tranſ. v. l. 5. §. 5. ff. de donat. int. vir. & ux.*

VII.

7. A Tranſaction concerning a Law-Suit, in which Judgment has been given, although the Parties know nothing of it.

If after Judgment has been given in a Law-Suit, without the knowledge of the Parties, they agree it by a Tranſaction; the Tranſaction will ſubſiſt, if there lies an Appeal from the Sentence. For ſince the Law-Suit may ſtill be continued, the Event remains uncertain. But if there lies no Appeal from the Sentence, as if the Matter has been decided by a final Judgment from which there lies no Appeal, the Tranſaction would be null. For there was no longer any Law-Suit depending, and the Parties tranſacted only becauſe they preſuppoſed that the Matter in diſpute was not decided, and that neither of them had acquired his Right. So that this Error, together with the Authority of Things Adjudged, makes that which has been Judicially determined, to be preferred to a Conſent, which he who has deſiſted from his Right would not have given, had it not been that he believed himſelf to be in a danger in which he was not[g].

[g] Poſt rem judicatam etiamſi provocatio non eſt interpoſita, tamen ſi negetur judicatum eſſe, vel ignorari poteſt an judicatum ſit, quia adhuc lis ſubeſſe poſſit, tranſactio fieri poteſt. *l. 11. ff. de tranſact.* Poſt rem judicatam tranſactio valet, ſi vel appellatio interceſſerit, vel appellare potueris. *l. 7. ff. eod.* Si cauſa cognita prolata ſententia ſicut jure traditum eſt appellationis, vel in integrum reſtitutionis ſolemnitate ſuſpenſa non eſt, ſuper judicato fruſtrà tranſigi non eſt opinionis incertæ. *l. 32. C. de tranſ.* Si poſt rem judicatam quis tranſegit, & ſolverit, repetere poterit idcircò quia placuit tranſactionem nullius eſſe momenti. Hoc enim Imperator Antoninus cum Divo patre ſuo reſcripſit. *l. 23. §. 1. ff. de cond. ind.* Quid ergo ſi appellatum? vel hoc ipſum incertum ſit, an judicatum ſit, vel an ſententia valeat? magis eſt ut tranſactio vires habeat. Tunc enim reſcriptis locum eſſe credendum eſt, cùm de ſententia indubitata, quæ nullo remedio attentari poteſt, tranſigitur. *d. §. in fine.*

TITLE XIV.

Of COMPROMISES.

The Uſe of Compromiſes.

Altho' there be Judges appointed for deciding all Differences, and that one of the contending Parties cannot oblige the other to plead before any other Judge; yet it is natural that it ſhould be free for the two Parties to agree to make choice of other perſons to be their Judges. And thoſe who being deſirous to make up their Differences cannot agree among themſelves as to the conditions of their Accommodation, may refer the matter to Arbitrators, who are ſo called, becauſe the perſons who chuſe them give them power to arbitrate, and to regulate what ſhall ſeem juſt and reaſonable to them, for terminating the Differences of which they are made Judges[a].

[a] *We muſt not confound the Arbitrators named by Compromiſe, of which mention is made in this Title, with third Perſons to whom it is referred to make an Eſtimate of any thing.* See the eleventh Article of the third Section of Covenants, and the eleventh Article of the ſecond Section of Partnerſhip. Arbitrorum genera ſunt duo. Unum ejuſmodi, ut ſive æquum ſit, ſive iniquum, parere debeamus: quod obſervatur, cùm ex compromiſſo ad arbitrium itum eſt. Alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat, etſi nominatim perſona ſit comprehenſa, cujus arbitratu fiat. *l. 76. ff. pro ſocio.*

By the Ordinance of Francis II. *in the year* 1560, *ratified by that of* Moulins, *Art.* 83. *the Parties who are at variance together about the Partition of an Eſtate fallen to the next of Kin, about making up the Accounts of a Guardianſhip, and other Adminiſtrations, Reſtitution of a Dowry, and Jointure, are obliged to name for Arbitrators, Relations, Friends, or Neighbours; and if one of the Parties ſhould refuſe to do it, they are to be compelled by the Judge.*

This Ordinance of 1560 *enjoined the ſame thing among Merchants, with reſpect to differences, in relation to their Traffick. It is by vertue of the ſame Ordinance, that Appeals from the Awards of Arbitrators lie to the Sovereign Courts. By the Ordinance of* 1673, *in the Title of Partnerſhips, Art.* 9. *and the following Articles, the Co-Partners are obliged to ſubmit their differences to the deciſion of Arbitrators.*

The Covenant by which Arbitrators are named, is called a Compromiſe, becauſe they who name the Arbitrators promiſe reciprocally to one another to execute whatever ſhall be arbitrated; and the Judgment pronounced by the Arbitrators, is called an Award.

The authority of Awards.

The Authority of Awards is founded on the Will of thoſe who have named the Arbitrators. For it is this Will which engages thoſe that make the Reference, to execute what ſhall be arbitrated by the Perſons whom they have choſen to be their Judges. But becauſe the Effect of Sentences pronounced by Arbitrators, cannot be the ſame with that of Sentences pronounced by Judges, who have Authority to judge, and to put their Judgments in Execution; and that beſides the Parties who chuſe Arbitrators do not diveſt themſelves of the Right of getting that which has been wrongfully arbitrated to be reformed; the perſons therefore who make the Reference do not oblige themſelves abſolutely to execute what ſhall be awarded; but they engage themſelves only either to abide by the Award, or to a certain Penalty which the Contravener ſhall be bound to pay to the other.

Time given to the Arbitrators to pronounce their Award. It is uſual, and even neceſſary, in Compromiſes, to fix a time within which the Arbitrators ſhall pronounce their Award. For on one hand, a delay is neceſſary for inſtructing the Arbitrators, and putting the things in a condition of being determined; and on the other hand, this time ought to be limited, becauſe it would not be juſt that it ſhould be in the power either of the Arbitrators, or Parties, to put off the Final Deciſion for ever. So that the Power of Arbitrators determines at the time limited by the Compromiſe.

SECT. I.

Of the nature of Compromiſes, and of their Effect.

The CONTENTS.

1. *Definition of a Compromiſe.*
2. *The manner of proceeding in Compromiſes.*
3. *The Compromiſe obliges only to the Penalty.*
4. *A Compromiſe is either general or particular.*
5. *The Compromiſe ends when the time limited for it expires.*
6. *If the Compromiſe is at an end by the death of one of the Parties.*
7. *One cannot compromiſe Accuſations of Crimes.*
8. *Nor a Cauſe, in which the State, 'or Honour of a perſon is concerned.*

I.

1. Definition of a Compromiſe. A Compromiſe is a Covenant by which perſons who have a Law-Suit, or Difference with one another, name Arbitrators to decide the matter; and oblige themſelves reciprocally, either to perform what ſhall be arbitrated; or to undergo a certain Penalty, of a Sum of Money, which the perſon who ſhall contravene the Award, ſhall be bound to pay to the other, who is willing to ſtand to it[a].

[a] Inter Caſtellianum & Seium controverſia de finibus orta eſt, & arbiter electus eſt, ut arbitratu ejus res terminetur. Ipſe ſententiam dixit præſentibus partibus, & terminos poſuit. Quæſitum eſt, an ſi ex parte Caſtelliani, arbitro paritum non eſſet pœna ex compromiſſo commiſſa eſt? Reſpondi, ſi arbitrio paritum non eſſet in eo, quod utroque præſente arbitratus eſſet pœnam commiſſam. *l.* 44. *ff. de recept.* Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2. *eod.*

II.

2. The manner of proceeding in Compromiſes. The Parties who have put their Differences in Compromiſe, declare their Pretenſions, and prove them, as the method is in a Court of Juſtice, by producing Writings and Evidences, obſerving in this the order which they agree on by mutual conſent, or which is regulated by the Arbitrators[b].

[b] Compromiſſum ad ſimilitudinem judiciorum redigitur, & ad finiendas lites pertinet. *l.* 1. *ff. de recept. l.* 14. §. 1. *C. de jud.*

III.

3. The Compromiſe obliges only to the Penalty. The Effect of the Compromiſe, is to oblige him who ſhall refuſe to perform the Award to pay the Penalty[c].

[c] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2. *ff. de recept.*

IV.

4. A Compromiſe is either general or particular. We may compromiſe either in general all Differences, or only ſome of them in particular. And the power of the Arbitrators is limited to what is explained in the Compromiſe[d].

[d] Plenum compromiſſum appellatur, quod de rebus omnibus controverſiiſve compoſitum eſt. Nam ad omnes controverſias pertinet. Sed ſi forte de una re ſit diſputatio, licet pleno compromiſſo actum ſit, tamen ex cæteris cauſis actiones ſupereſſe. Id enim venit in compromiſſum, de quo actum eſt, ut veniret. *l.* 21. §. 6. *ff. de recept.*

V.

5. The Compromiſe ends when the time limited for it expires. The Compromiſe, and the Power which it gives to Arbitrators ends, when the time which it preſcribed is expired, altho' the Award has not been pronounced[e].

[e] Si ultra diem compromiſſo comprehenſum judicatum eſt, ſententia nulla eſt. *l.* 1. *C. de recept.*

VI.

6. If the Compromiſe is at an end The Compromiſe expires likewiſe by the death of one of the Parties, and does *by the death of one of the Parties.* does not oblige the Survivor to the Heirs, or Executors of the other, nor thoſe Heirs, or Executors, to the Survivor; unleſs it have been otherwiſe ſettled by the Compromiſe[f].

[f] Si hæredis mentio, vel cæterorum facta in compromiſſo non fuerit, morte ſolvetur compromiſſum. *l. 27. §. 1. ff. de recept.*

The Engagement of the Compromiſe may have for its Motive the conſideration which one of the Parties may chance to have for the other; which conſideration does not paſs to their Heirs, or Executors.

VII.

7. *One cannot compromiſe Accuſations of Crimes.* Arbitrators having no other Power than that which the Parties can give them, we cannot put to Arbitration certain Cauſes, which the Laws, and Good Manners do not ſuffer to be expoſed to any other event, beſides that which the Natural Authority of Juſtice gives them, and which we cannot bring before other Judges than thoſe who are cloathed with Publick Authority. Thus we cannot compromiſe Accuſations of Crimes, ſuch as Murder, Robbery, Sacrilege, Adultery, Forgery, and others of the like nature[g]. For on one ſide, the Publick Intereſt is concerned in theſe ſorts of Cauſes, which makes the King's Advocate, or Attorney General, a Party in them, whoſe Function is to ſue for Vengeance of a Publick Crime, without regard to what paſſes between the Parties: And on the other ſide, the Party accuſed can neither defend his Honour, nor his Innocence, which is attacked in publick, but in publick, and before the Judges who exerciſe the Miniſtry of Juſtice: and it would be contrary to Good Manners, and moreover uſeleſs for him to ſubmit voluntarily to juſtify his Innocency before Arbitrators, who having no ſhare in the Adminiſtration of Juſtice, could neither juſtify, nor condemn him.

[g] Julianus indiſtinctè ſcribit, ſi per errorem de famoſo delicto ad arbitrum itum eſt, vel de ea re de qua publicum judicium ſit conſtitutum, veluti de adulteriis, ſicariis, & ſimilibus: vetare debet prætor ſententiam dicere, nec dare dictæ executionem. *l. 32. §. 6. ff. de recept.* See the following Article.

VIII.

8. *Nor a Cauſe, in which the State or Honour of a perſon is concerned.* Neither can we compromiſe Cauſes which relate to the State of Perſons[h]. As if the queſtion were to know whether one is Legitimate, or a Baſtard, whether one is a Profeſſed Monk, or not, whether a Gentleman or a Plebeian. Nor can ſuch Cauſes be put to Arbitration, the conſequence whereof may intereſt our Honour, or Dignity, in ſuch a ſort, that Good Manners do not allow us to compromiſe their Event, nor to chuſe Judges for deciding them.

[h] De liberali cauſa compromiſſo facto, rectè non compelletur arbiter ſententiam dicere: quia favor libertatis eſt, ut majores judices habere debeat. *l. 32. §. 7. ff. de recept. l. ult. C. ubi cauſ. ſtat. agi debet.*

SECT. II.

Of the Power and Engagement of Arbitrators; and who may be an Arbitrator, and who not.

The CONTENTS.

1. *The Arbitrators ought to give their Award within the time limited by the Compromiſe.*
2. *Power to the Arbitrators to prorogue the time.*
3. *Delay for inſtructing the Cauſe.*
4. *Arbitrators cannot change their Award.*
5. *Arbitrators cannot judge, unleſs they are all together.*
6. *The Power of the Arbitrators is regulated by the Compromiſe.*
7. *Who may be Arbitrators, and who not.*
8. *Women cannot be Arbitrators.*

I.

THE Arbitrators ought to give their Award within the time limited by the Compromiſe, and it would be null, if it were given after the ſaid time is expired. For their Power is then at an end, and they are no longer Arbitrators[a]. *1. The Arbitrators ought to give their Award within the time limited by the Compromiſe.*

[a] Si ultrà diem compromiſſo comprehenſum judicatum eſt, ſententia nulla eſt. *l. 1. C. de recept.*

II.

The Parties may give power to the Arbitrators to prolong the time; and in this caſe their Power laſts during the time of the Prorogation[b]. *2. Power to the Arbitrators to prorogue the time.*

[b] Hæc clauſula, *diem compromiſſi proferre,* nullam aliam dat arbitro facultatem, quam diem prorogandi. *l. 25. §. 1. ff. de recept. l. 32. §. ult. eod.* Arbiter ita ſumptus ex compromiſſo, ut & diem proferre poſſit hoc quidem facere poteſt. *l. 33. eod.*

III.

If the Compromiſe regulates a certain time for inſtructing the Cauſe which the Arbitrators are to decide, they cannot give their Award till the ſaid time is expired[c]. *3. Delay for inſtructing the Cauſe.*

[c] Arbiter ita ſumptus ex compromiſſo, ut & diem proferre poſſit, hoc quidem facere poteſt, referre autem contradicentibus litigatoribus, non poteſt. *l.* 33. *ff. de recept.*

IV.

4. Arbitrators cannot change their Award.

The Arbitrators having once given their Award, they cannot retract it, nor change any thing in it. For the Compromiſe was only to give them power to give an Award, and when that is done, their power is at an end. But their power is not at an end by an Interlocutory Sentence, on an Incident in the Cauſe, and they may give different Interlocutory Sentences, on ſuch Incidents, as often as occaſion requires[d].

[d] Arbiter etſi erraverit in ſententia dicenda, corrigere eam non poteſt. *l.* 20. *ff. de recept.* Videndum erit an mutare ſententiam poſſit. Et aliàs quidem eſt agitatum, ſi arbiter juſſit dari, mox vetuit: utrùm eo quod juſſit, an eo quod vetuit, ſtari debeat. Et Sabinus quidem putavit poſſe. Caſſius ſententiam magiſtri ſui benè excuſat, & ait, Sabinum non de ea ſenſiſſe ſententia quæ arbitrium finiat, ſed de præparatione cauſæ ut puta ſi juſſit litigatores Calendis adeſſe, mox Idibus jubeat. Nàm mutare eum diem poſſe. Cæterum ſi condemnavit, vel abſolvit, dum arbiter eſſe deſierit, mutare (ſe) ſententiam non poſſe. *l.* 19. §. *ult. eod.*

V.

5. Arbitrators cannot judge, unleſs they are all together.

If there are ſeveral Arbitrators named by the Compromiſe, they cannot give their Award unleſs they all ſee the Proceſs, and give judgment of it together. And altho' the greater part had given the Award in the abſence of one who was named with the others, yet the Award would be null, becauſe the abſent perſon ought to have been one of the Judges, and had he been preſent, he might have been able by his Reaſoning, to bring the other Arbitrators over to his Opinion[e].

[e] Si plures ſunt qui arbitrium receperunt, nemo unus cogendus erit ſententiam dicere, ſed aut omnes, aut nullus. *l.* 17. §. 2. *ff. de recept.*

Celſus libro ſecundo Digeſtorum ſcribit, ſi in tres fuerit compromiſſum ſufficere quidem duorum conſenſum, ſi præſens fuerit & tertius. Alioquin abſente eo, licet duo conſentiant, arbitrium non valere: quia in plures fuit compromiſſum, & potuit præſentia ejus trahere eos in ejus ſententiam: ſicuti tribus judicibus datis, quod duo ex conſenſu, abſente tertio judicaverint, nihil valet: quia id demum quod major pars judicavit, ratum eſt, cùm & omnes judicaſſe palam eſt. *d. l.* 17. §. *ult. &* *l.* 18. *eod.*

VI.

6. The Power of the Arbitrators is regulated by the Compromiſe.

The Arbitrators can judge of nothing elſe beſides that which is ſubmitted to their Judgment by the Compromiſe, and they muſt obſerve the Conditions which are there preſcribed; and if they judge otherwiſe, their Award is null[f].

[f] De officio arbitri tractantibus ſciendum eſt, omnem tractatum ex ipſo compromiſſo ſumendum. Nec enim aliud illi licebit, quàm quod ibi ut efficere poſſit, cautum eſt. Non ergo quodlibet ſtatuere arbiter poterit, nec in qua re libet, niſi de qua re compromiſſum eſt, & quatenus compromiſſum eſt. *l.* 32. §. 15. *ff. de recept.*

VII.

7. Who may be Arbitrators, and who not.

All perſons may be Arbitrators, except ſuch as are under ſome Incapacity, or Infirmity, which renders them unfit for that Function[g].

[g] Neque in pupillum, neque in furioſum, aut ſurdum, aut mutum compromittitur. *l.* 9. §. 1. *ff. de recept.*

VIII.

8. Women cannot be Arbitrators.

Women, who becauſe of their Sex cannot be Judges, are likewiſe incapable of being named Arbitrators by a Compromiſe[h]; altho' they may exerciſe the Function of ſkilful Perſons, as to things within their knowledge, in any Art or Profeſſion in which they are ſkilled. For this Function is not of the ſame Quality with that of a Judge.

[h] Sancimus mulieres ſuæ pudicitiæ memores, & operum quæ eis natura permiſit, & à quibus eas juſſit abſtinere, licet ſummæ atque optimæ opinionis conſtitutæ, in ſe arbitrium ſuſceperint, vel ſi fuerint patronæ, etiam ſi inter libertos ſuam interpoſuerint audientiam, ab omni judiciali agmine ſeparari ut ex earum electione nulla pœna, nulla pacti exceptio, adverſus juſtos earum contemptores habeatur. *l. ult. C. de recept.*

TITLE XV.

Of PROXIES, MANDATES, and COMMISSIONS.

The Origin and Uſe of Proxies, Mandates, and Commiſſions.

Abſence, Indiſpoſition, and many other Impediments, do often hinder perſons from looking after their own Affairs, and in theſe caſes he who cannot act himſelf, chuſes a perſon whom he impowers to do what he would do himſelf, if he were preſent.

Thus, thoſe who have any Affair to be tranſacted, and cannot be preſent themſelves, ſuch as a Sale, a Partnerſhip, a Tranſaction, or other Affairs of all kinds, give a Power to other perſons to treat for them. And he to whom this Power is given, is called a Proxy, or Attorney, he being conſtituted to take care of the Intereſt, and to procure the Advantage of the Perſon who has imployed him.

Thus, they whoſe Dignity, or great Imployments hinder them from looking after their Domeſtick Concerns, chuſe Perſons to whom they give power to take care of them; and thoſe perſons are called either Comptrollers, Stewards, or by other names; according to the Quality of the Perſons who imploy them, and the Affairs committed to their charge.

Thus, they who have Offices, or Imployments, of which the Functions may be performed by others than themſelves, ſuch as Receivers, Farmers of the King's Revenue, and many others, imploy in the execution of theſe Offices, Deputies and Clerks.

Thus, they who deal in any Commerce by Land, or Sea, whether by themſelves, or in Partnerſhip with others, have likewiſe their Factors and Agents to manage the particular Concerns of their Buſineſs, which they themſelves have not leiſure to look after.

What is common to Proxies, and Commiſſions.

All theſe ways of deputing other perſons in the place of the Maſters, have this in common to them; that thoſe who commit to others the care of their Affairs, and thoſe who charge themſelves with them, enter into Covenant with one another, by which the Maſter, on his part, regulates the Power which he gives to him whom he conſtitutes his Proxy, or whom he appoints his Agent, for his particular Affairs, or for the Buſineſs of his Office; and he who charges himſelf with the Buſineſs, accepts on his part, of the Power and Charge intruſted to him: And both the one and the other enter into the Engagements which follow from the ſaid Covenant.

The ſubject matter of this Title.

It is this kind of Covenant, and theſe Engagements, that ſhall be the ſubject matter of this Title. And ſeeing the Rules concerning Proxies, or Letters of Attorney, are almoſt all of them common to Commiſſions, and to other the like ways of deputing one Perſon in the room of another; it will be eaſy to apply to every one of them what ſhall be ſaid of Proxies.

Mandates.

We have inſerted in the Title, the word *Mandates*, becauſe it is the word uſed in the *Roman* Law to expreſs Proxies; and likewiſe in our Language it ſignifies a manner of giving ſome Order, as he does who by a Note in Writing orders his Debtor, or his Agent, to give, or pay a Sum of Money, or any other thing, to ſome perſon. The Mandate, in this Senſe, is a kind of Covenant, of the like nature with theſe treated of in this Title. For the Creditor, for Example, who requires his Debtor to pay to another, obliges himſelf to diſcharge the Debtor of what he ſhall have paid by vertue of this Order. And the Debtor who on his part accepts of the Order, obliges himſelf to his Creditor to execute it.

It is to be remarked as to the word *Mandate*, that it had alſo in the *Roman* Law other meanings, to ſignify other ſorts of Covenants, which have relation to theſe mentioned in this Title. Thus, they gave the Name of Mandate to the Tranſaction between a Debtor, and the perſon who becomes his Surety; becauſe the Debtor was conſidered as requiring, or praying his Surety to engage for him. Thus they expreſſed by the ſame name, the Agreement between a perſon who transferred a Debt, and him who accepted it; conſidering the Transferor as giving Order to his Debtor to pay the Debt to another, and the perſon accepting the Transfer, as being veſted with the Right of the Transferor, to receive that which is transferred to him.

But ſeeing this Matter of Transfers does not properly belong to this place, and that it has been treated of in the Contract of Sale, of which the Aſſignments of Rights is a kind, and that the Matter of Sureties is alſo of another nature, and belongs to another place; we ſhall not take in theſe Matters under this Title.

We ſhall not ſay any thing here of Proctors, or Attorneys at Law, for managing Law-Suits, they being Officers who have their Functions regulated, the greateſt part whereof do not depend on the Will of the perſons who conſtitute them, but on the Rules and Practice of the reſpective Courts of Juſtice; which is a matter that does not come within the deſign of this Treatiſe. And as to their Functions, in which they ought to follow the directions of their Clients, we may apply to them the Rules which ſhall be explained in this Title.

SECT. I.

Of the Nature of Proxies, Mandates, and Commiſſions.

The CONTENTS.

1. *Definition of a Procuration, or Letter of Attorney.*

2. *Definition of a Proxy.*
3. *How the Covenant is formed between the perſon who appoints a Proxy, and the Proxy.*
4. *If the Proxy is preſent.*
5. *The manner of giving the power.*
6. *The Procuration may be conditional.*
7. *Procuration general, or ſpecial.*
8. *Power indefinite, regulated, and limited.*
9. *The Function of a Proxy is gratuitous.*
10. *A Proxy for an Affair in which he himſelf is intereſted.*
11. *A Procuration for the Affair of a third perſon.*
12. *The effect of a Procuration to manage the Affairs of a third perſon.*
13. *Of Advice, and Recommendation.*

I.

1. *Definition of a Procuration, or Letter of Attorney.*

A Procuration, or Letter of Attorney, is an Inſtrument, by which he who is not at leiſure to look after his own Concerns, gives power to another to do it for him, as if he himſelf were preſent. Whether it be that he is barely to manage and take care of ſome Eſtate, or ſome Affair, or that he is to treat in his name with others[a].

[a] Uſus procuratoris perquàm neceſſarius eſt, ut qui rebus ſuis ipſi ſupereſſe vel nolunt, vel non poſſunt, per alios poſſint vel agere, vel conveniri. *l.* 1. §. 2. *ff. de procur.* Id facere quod dominus faceret. *l.* 35. §. 3. *eod.* Ad agendum, ad adminiſtrandum. *l.* 43. *eod.*

II.

2. *Definition of a Proxy.*

A Proxy is the perſon who does the buſineſs of another, having a power from him[b].

[b] Procurator eſt qui aliena negotia, mandatu domini adminiſtrat. *l.* 1. *ff. de procur.*

III.

3. *How the Covenant is formed between the perſon who appoints a Proxy, and the Proxy.*

The Covenant which makes the Engagements between the Proxy, and the perſon who conſtitutes him, is formed when the Procuration or Letter of Attorney is accepted. And if the Parties are not preſent, the Covenant is accompliſhed whenever the Proxy charges himſelf with the Order that is contained in the Procuration, or Letter of Attorney, or executes it. For then his conſent is joined to that of the perſon who has conſtituted him[c].

[c] Dari procurator & abſens poteſt. *l.* 1. §. *ult. ff. de procur.* Ea obligatio quæ inter dominum & procuratorem conſiſtere ſolet, mandati actionem parit. *l.* 42. §. 2. *eod.* Si mandavi tibi ut aliquam rem mihi emeres—— túque emiſti, utrimque actio naſcitur. *l.* 3. §. 1. *ff. mand.* Obligatio mandati, conſenſu contrahentium conſiſtit. *l.* 1. *ff. mand.*

IV.

4. *If the Proxy is preſent.*

If the Proxy is preſent, and accepts of the Procuration, or Letter of Attorney, charging himſelf with the Execution of what is contained in it, the Covenant is formed at the ſame time[d].

[d] (Procurator) conſtitutus coram. *l.* 1. §. 1. *ff. de procur.*

V.

5. *The manner of giving the power.*

One may give a power to treat, act, or to do any other thing, not only by a Procuration, or Letter of Attorney in due form, but alſo by a bare miſſive Letter, or Note in Writing, or by a third perſon who carries the Order, or by other ways which explain the Commiſſion or Power that is given: and if the perſon to whom it is given accepts of it, or executes it, the mutual conſent forms at the ſame time the Covenant, and the Engagements which are the conſequences of it[e].

[e] Obligatio mandati, conſenſu contrahentium conſiſtit. *l.* 1. *ff. mand.* Vel per nuntium, vel per epiſtolam. *l.* 1. §. 1. *ff. de procur.*

VI.

6. *The Procuration may be conditional.*

The Procuration may be conditional, and with ſuch Reſtrictions, Limitations, and other Clauſes as one pleaſes, provided only that it contain nothing unlawful, or diſhoneſt[f].

[f] Mandatum & in diem differri, & ſub conditione contrahi poteſt. *l.* 1. §. 3. *ff. mand.* §. 12. *inſt. eod.* Rei turpis nullum mandatum eſt. *l.* 6. §. 3. *eod.* *l.* 22. §. 6. *eod.* §. 7. *inſt. eod.*

VII.

7. *Procuration general, or ſpecial.*

One may conſtitute a Proxy, either for all Affairs in general, or for ſome only, or for one particular Affair. And the Proxy has his Power regulated according to the extent and bounds ſet to it in the Procuration, or Letter of Attorney[g].

[g] Procurator vel omnium rerum, vel unius rei eſſe poteſt. *l.* 1. §. 1. *ff. de procur.* Verius eſt eum quoque procuratorem eſſe, qui ad unam rem datus ſit. *d.* §. *in fine.*

VIII.

8. *Power indefinite, regulated, and limited.*

The Procuration may contain either an indefinite Power to the Proxy to do whatever he thinks proper, or only a Power limited to what ſhall be expreſly mentioned in the Procuration[h]. And the Engagements of the Maſter, and of the Proxy, are different, according to this difference of the Procurations, and according to the Rules which ſhall be explained in the ſecond and third Sections.

[h] Cùm mandati negotii contractum certam accepiſſe legem adſeveres, eam integram, ſecundùm bonam fidem, cuſtodiri convenit. *l.* 12. *C. mand.*

Igitur commodiſſimè illa forma in mandatis ſervanda eſt, ut quoties certum mandatum ſit, recedi à forma non debeat: at quoties incertum vel plurium cauſarum: tunc licet aliis præſtationibus exſoluta ſit cauſa mandati, quàm quæ ipſo mandato inerant, ſi tamen hoc mandatori expedierit, mandati erit actio. *l.* 46. *ff. mand.*

IX.

9. The Function of a Proxy is gratuitous.

Proxies doing commonly an act of Kindneſs, and performing the Office of a Friend, their Function is gratuitous: and if it were agreed to give any Salary, it would be a kind of Letting and Hiring, where the Perſon who ſhould act for another, would give for a certain Price the uſe of his Induſtry, and Labour[i]. But the Reward that is given without Agreement, and as an honourable Acknowledgment of a good Deed, is of another kind, and does not change the Nature of the Procuration[l].

[i] Mandatum niſi gratuitum nullum eſt, nam originem ex officio, atque amicitia trahit. Contrarium ergo eſt officio merces, interveniente enim pecunia, res ad locationem & conductionem potiùs reſpicit. *l.* 1. §. *ult. ff. mand.* §. *ult. inſt. eod.*

[l] Si remunerandi gratia honor intervenit, erit mandati actio. *l.* 6. *eod.*

X.

10. A Proxy for an Affair in which he himſelf is intereſted.

A Proxy may be conſtituted not only for the bare Intereſt of the Perſon who conſtitutes him: but ſometimes alſo for the Intereſt of the Proxy himſelf, where both the one and the other are intereſted in the ſame thing[m]. Thus, in a Contract of Sale, the Seller may conſtitute the Buyer his Proxy, to recover out of the hands of a third perſon the Titles of his Right to the Eſtate that is ſold: and the Purchaſer may appoint the Seller his Proxy, to receive from a Depoſitary, or from a Debtor of the Purchaſer, the Money which he deſtines for the payment of the Price of the Sale.

[m] (Mandatum) tua & mea (gratia.) *l.* 2. §. 4. *ff. mand.* §. 2. *inſt. eod.* Si quis in rem ſuam procuratorio nomine agit, veluti emptor hæreditatis. *l.* 34. *ff. de procur.* *l.* 42. §. 2. *eod.* *l.* 55. *eod.*

XI.

11. A Procuration for the Affair of a third perſon.

One may by a Procuration, a Mandate, or Commiſſion, charge one with the Affair of a third perſon, whether he who gives the Order, or he who accepts it have intereſt in the Affair, or not[n]. And the ſaid Order puts the perſon who gives it under a twofold Engagement; for it obliges him to anſwer to the third perſon for what ſhall have been ill tranſacted by the perſon whom he imploys in his Concerns[o]; and it lays him likewiſe under an Obligation to the perſon whom he has employed in the Concerns of that third perſon, to be accountable to him for all the conſequences of the Engagement into which he makes him enter; ſuch as that of getting what he ſhall have tranſacted well to be ratified by the Party concerned, and of procuring him Reimburſement of all the reaſonable Charges he ſhall have been at[p].

[n] Mandatum inter nos contrahitur ſive mea tantùm gratia, tibi mandem, ſive aliena tantùm, ſive mea & aliena, ſive mea & tua, ſive tua & aliena. *l.* 2. *ff. mand. inſt. de mand.*

Aliena tantùm cauſa intervenit mandatum, veluti ſi tibi aliquis mandet, ut Titii negotia gereres. §. 3. *inſt. de mand.* *l.* 2. §. 2. *ff. eod.*

[o] Mandatu tuo negotia mea Lucius Titius geſſit: quod is non rectè geſſit, tu mihi actione negotiorum geſtorum teneris, non in hoc tantùm ut actiones tuas præſtes, ſed etiam quod imprudenter eum elegeris: ut quidquid detrimenti negligentia ejus fecit, tu mihi præſtes. *l.* 21. §. *ult. ff. de neg. geſt.*

[p] Ne damno afficiatur is qui ſuſcipit mandatum. *l.* 15. *f. eod.*

Impendia mandati exequendi gratia facta, ſi bona fide facta ſunt, reſtitui omninò debent. *l.* 27. §. 4. *ff. mand.* See the following Article.

XII.

12. The effect of a Procuration to manage the Affairs of a third perſon.

Altho' no body can properly contract for another[q], yet if he who has undertaken to the Friend of an abſent perſon to manage an Affair, to cultivate an Eſtate, or to do any other thing for the ſaid abſent perſon, fails, without juſt cauſe, to execute what he has promiſed, he ſhall be liable for the conſequences of his Non-performance of the ſaid Engagement according to the circumſtances. For altho' this abſent perſon have ſtipulated nothing, and that on his part there be no Covenant, yet the Damage which he ſuffers thro' the fault of the perſon who having taken upon him the Care of his Affairs, which otherwiſe he would have intruſted to others, has neglected them, gives him a Right to ſue for Reparation of Damages in the ſame manner as all thoſe perſons have who ſuffer any Loſs thro' the Fault, or Crime of others[r].

[q] Alteri ſtipulari nemo poteſt. *l.* 38. §. 17. *ff. de verb. obl.* See the third Article of the ſecond Section of Covenants.

[r] Mandatum inter nos contrahitur, ſive mea tantùm gratia tibi mandem, ſive aliena tantùm. *l.* 2. *ff. mand.* Aliena tantùm, veluti ſi tibi mandem, ut Titii negotia gereres. *d. l.* §. 2. *l.* 6. §. 4. *eod.* In damnis quæ lege Aquilia non tenetur, in factum datur actio. *l.* 33. *in f. ff. ad leg. Aquil.* Sed ſi non corpore damnum fueritdatum, neque corpus læſum fuerit, ſed alio modo alicui damnum contigerit, cum non ſufficiat neque directa, neque utilis legis Aquiliæ actio, placuit eum qui obnoxius fuerit in

factum actione teneri. §. *ult. inſt. de lege Aquil. l.* 11. *ff. de praſc. verb.*

XIII.

13. *Of Advice and Recommendation.* We muſt diſtinguiſh between Procurations, Mandates, and Commiſſions, wherein one gives an expreſs Charge, with deſign to form a Covenant that obliges, and the ways of engaging by an Advice, by a Recommendation, or by other ways which imply no deſign of forming a Covenant; but which have regard only to the intereſt of the perſon to whom the Advice is given, or of him who is recommended: and which leave the perſon at free liberty to do, or not to do what is adviſed, or recommended. For in theſe caſes there is no Engagement formed, and he who follows an Advice, or who grants any thing upon a Recommendation, does not expect that the Adviſer, or Recommender, ſhould anſwer for the Events[r]. But if the perſon who gave the Advice, or who recommended, was guilty of any Fraud; or if he engages one in ſome Loſs that may be imputed to him, as if he ſhould perſuade one to lend Money to an unknown perſon, to whom one lends barely on the aſſurance which he gives that the Money will be faithfully repaid, he ſhall be bound to make it good[t].

[r] Tua autem gratia intervenit mandatum: veluti ſi mandem tibi ut pecunias tuas potiùs in emptiones prædiorum colloces, quàm fœneres; vel ex diverſo ut fœneres, potiùs quàm in emptiones prædiorum colloces, cujus generis mandatum magis conſilium eſt, quàm mandatum, & ob id non eſt obligatorium, quia nemo ex conſilio obligatur, etiam ſi non expediat ei cui dabatur, quia liberum eſt cuique apud ſe explorare, an expediat ſibi conſilium. *l.* 2. §. *ult. ff. mand.* §. 6. *inſt. eod.* Cùm quidam talem epiſtolam ſcripſiſſet amico ſuo: rogo te commendatum habeas Sextilium Creſcentem amicum meum, non obligabitur mandati: quia commendandi magis hominis, quàm mandandi cauſa, ſcripta eſt. *l.* 12. §. 12. *ff. eod.*

[t] Conſilii non fraudulenti nulla obligatio eſt. Cæterùm ſi dolus & calliditas interceſſit; de dolo actio competit. *l.* 47. *ff. de reg. jur.* Si tibi mandavero quod tua intererat, nulla erit mandati actio, niſi mea quoque interfuit: aut ſi non eſſes facturus, niſi ego mandaſſem, & ſi mea non interfuit, tamen erit mandati actio. *l.* 6. §. 5. *ff. mand. v. l.* 10. §. 7. *eod.* Nam quodammodò cum eo contrahitur, qui jubet. *l.* 1. *ff. quod juſſu.*

SECT. II.

Of the Engagements of the perſon who imploys another as his Proxy, Factor, or Agent, in any Buſineſs.

The CONTENTS.

1. *How the Engagement is formed between the Proxy, and him who appoints him.*
2. *Expences laid out by the Proxy, or Agent.*
3. *If the Proxy has diſburſed more than the Owner would have done.*
4. *The Intereſt of Monies advanced by the Proxy.*
5. *If two or more perſons have appointed a Proxy.*
6. *Of the Loſſes ſuſtained by the Proxy, on account of the Affair which he takes in hand.*

I.

1. *How the Engagement is formed between the Proxy, and him who appoints him.* HE who has given a Procuration, Commiſſion, or other Order, to an abſent perſon, begins to be engaged to him from the moment that he to whom the Order is given has begun to execute it: and his firſt Engagement is to approve and ratify what has been done purſuant to the Power which he has given[a].

[a] Si mandavi tibi, ut aliquam rem mihi emeres——tuque emiſti, utrimque actio naſcitur. *l.* 3. §. 1. *ff. mand.* See the firſt Article of the fourth Section.

II.

2. *Expences laid out by the Proxy, or Agent.* If the Proxy, or other Agent, has been at any Expence in executing the Order with which he was charged, as if he has made a Journey, or advanced a Sum of Money, he who has imployed him ſhall be bound to reimburſe him of the reaſonable Charges which he has laid out in executing the Order; even altho' the Affair had not the deſired ſucceſs, unleſs it miſcarried thro' his fault[b]. But he will not recover the uſeleſs, or ſuperfluous Expences which he has laid out without order[c].

[b] Idem Labeo ait, & verum eſt, reputationes quoque hoc judicium admittere. Et ſicuti fructus cogitur reſtituere, is qui procurat ita ſumptum quem in fructus percipiendos fecit, deducere eum oportet. Sed & ſi ad vecturas ſuas, dum excurrit in prædia ſumptum fecit, puto hos quoque ſumptus reputare eum oportere. *l.* 10. §. 9. *ff. mand. l.* 20. §. 1. *C. eod.* Si nihil culpa tua factum eſt, ſumptus quos in litem probabili ratione feceras, contraria mandati actione petere potes. *l.* 4. *C. eod.*

[c] Si quid procurator citrà mandatum in voluptatem fecit, permittendum ei auferre, quod ſine damno domini fiat; niſi rationem ſumptus iſtius dominus admittit. *d. l.* 10. §. 10. *ff. mand.*

III.

3. If the Proxy has disburſed more than the Owner would have done.

Altho' the Expences laid out by the Proxy ſhould exceed what the Owner of the Thing would have beſtowed on it, if he had looked after it himſelf; yet the Owner will be bound nevertheleſs to refund all that has been diſburſed reaſonably and honeſtly, altho' with leſs Precaution, and leſs Huſbandry than he himſelf would have uſed[d].

[d] Impendia mandati exequendi gratia facta, ſi bona fide facta ſunt, reſtitui omnimodò debent, nec ad rem pertinet, quòd is qui mandaſſet, potuiſſet, ſi ipſe negotium gereret, minus impendere. *l.* 27. §. 4. *ff. mand.*

IV.

4. The Intereſt of Monies advanced by the Proxy.

He whoſe Procuration, or other Order, hath obliged the perſon charged with it to advance Money, whether it be that the Proxy, or other perſon imployed, have borrowed the Money, or advanced it of his own, ſhall refund not only the Money laid out, but alſo the Intereſt of it, according to the circumſtances, whether it be becauſe of the Intereſt which he who hath made the Advance hath paid for the Money himſelf, if he borrowed it; or to indemnify him as to the Loſs which the ſaid Advance may have occaſioned him. For as he ought not to reap any Profit by the good Office which he does, ſo neither ought he to ſuffer Loſs by it[e].

[e] Adverſus eum cujus negotia geſtà ſunt, de pecunia, quam de propriis opibus, vel ab aliis mutuo acceptam, erogaſti, mandati actione pro ſorte, & uſuris potes experiri. *l.* 1. *C. mand.* Nec tantùm id quod impendi, verum uſuras quoque conſequar. Uſuras autem non tantùm ex mora eſſe admittendas, verum judicem æſtimare debere——totum hoc ex æquo & bono judex arbitrabitur. *l.* 12. §. 9. *ff. mand.* *l.* 1. *C. eod.* Ex mandato apud eum qui mandatum ſuſcepit, nihil remanere oportet: ſicuti nec damnum pati debet. *l.* 20. *ff. eod.*

V.

5. If two or more perſons have appointed a Proxy.

If ſeveral perſons have named a Proxy, or Agent, or given any Order, every one of them will be liable for the whole conſequences of the Procuration, Mandate, or Commiſſion: and to reimburſe, indemnify, and ſave harmleſs the Proxy, if there be occaſion for it, as much as if he alone had given the Procuration, or other Order, altho' there be no expreſs mention made in the Contract of every one of them being bound for the whole. For he who hath executed the Order, hath done it on the Engagement of every one of them who gave it: and he may ſay, that he would not have done it without this Security of having every one of them bound, for all the conſequences of the Order which had been given[f].

[f] Paulus reſpondit unum ex mandatoribus in ſolidum eligi poſſe, etiam ſi non ſit conceſſum in mandato. *l.* 59. §. 3. *ff. mand.*

VI.

6. Of the Loſſes ſuſtained by the Proxy, on account of the Affair which he takes in hand.

If a Proxy, or Agent, ſuffers any Loſs, or Damage, on account of the Affair which he has taken in hand, we muſt judge by the circumſtances, whether the Loſs ought to fall on the Proxy, or on the Perſon whoſe Affair he manages. Which will depend on the Quality of the Order which was to be executed, the Danger if there was any, the Nature of the Event which has occaſioned the Loſs, the Connexion between the Event and the Order that was executed, the Relation which the Thing loſt, or the Damage ſuſtained, had to the Affair which was the Occaſion of it, on the Quality of the Perſons, that of the Loſs, the Nature and Value of the Things loſt, the Cauſes of the Engagement between the Perſon who gave the Order, and him who executed it, and on the other Circumſtances which may charge the one or the other with the Loſs, or diſcharge them of it. As to which we muſt caſt into the Balance the conſideration of Equity, and the ſentiments of Humanity which one ought to have, whoſe Intereſt has been the Cauſe or Occaſion of Loſs to another[g].

[g] *See the twelfth and thirteenth Articles of the fourth Section of Partnerſhip, and the Remark on the twelfth Article.*

Non omnia quæ impenſurus non fuit; mandatori imputabit. Veluti quod ſpoliatus ſit à latronibus, aut naufragio res amiſerit, vel languore ſuo ſuorumque apprehenſus, quædam erogaverit. Nam hæc magis caſibus, quam mandato imputari oportet. *l.* 26. §. 6. *ff. mand.* Sed cum ſervus quem mandatu meo emeras, furtum tibi feciſſet, Neratius ait mandati actione te conſecuturum, ut ſervus tibi noxæ dedatur. *d. l.* 26. §. 7. Quod verò ad mandati actionem attinet, dubitare ſe ait, num æquè dicendum ſit, omnimodo damnum præſtari debere. Et quidem hoc amplius quam in ſuperioribus cauſis ſervandum, ut etiamſi ignoraverit is qui certum hominem emi mandaverit, furem eſſe, nihilominus tamen damnum decidere cogetur. Juſtiſſimè enim procuratorem allegare non fuiſſe ſe id damnum paſſurum ſi id mandatum non ſuſcepiſſet. Idque evidentius in cauſa depoſiti apparere. Nam licet alioquin æquum videatur, non oportere cuiquam plus damni per ſervum evenire, quam quanti ipſe ſervus ſit: multo tamen æquius eſſe nemini officium ſuum, quod ejus cum quo contraxerit non etiam ſui commodi cauſa ſuſceperit, damnoſum eſſe. *l.* 61. §. 5. *ff. de furtis.* Nam certè mandantis culpam eſſe, qui talem ſervum emi ſibi mandaverit. *d.* §. 5.

We have not ſet down in this Article any particular Examples, that we might not perplex the Rule. But we ſhall here ſubjoin ſome Inſtances which may be of uſe for making the application of the Rule.

*If he who charges himſelf with the Affairs of another perſon, takes ſuch care of them, as to neglect his own Concerns; the Loſſes which he may ſuffer on this account will lye at his own door, for he ought to have taken proper meaſures for his own Affairs, at the time when he undertook the Management of the Affairs of others *.*

* See the thirteenth Article of the fourth Section of Partnerſhip.

If a perſon undertaking to go for another to a Place where his own Buſineſs obliges him to take ſome Mony along with him, and he imbracing the Occaſion, and carrying the Money, was robbed of it; the perſon who had engaged him to make the Journey, will not be liable for the ſaid Loſs, which does not concern him in any manner whatſoever.

If any one being obliged to make a Journey or Voyage, which Robbers, a hazardous Paſſage by Sea, or other Dangers render perilous, engages another perſon to perform the ſaid Journey, or Voyage, who is willing to expoſe himſelf to the Danger, whether it be thro' Neceſſity, becauſe of the Recompence promiſed him for his pains, or out of pure Generoſity, and that he is robbed, or loſes his Baggage by Shipwrack, or is wounded; the perſon who expoſed him to this Danger that he might free himſelf from it, will he have no ſhare in the Loſs, and ſhall he not be bound to bear either the whole Loſs, or a part of it, according to the circumſtances?

If one Friend lending to another Friend Money which is to be tranſported to the Country in order to pay off a Debt, undertakes likewiſe to carry it to the Country, and as he is going thither with the Money, is robbed of it by the way, muſt he bear the Loſs of this unforeſeen Accident, and will he not recover the ſaid Money, which he had not only promiſed and deſtined for the ſaid Payment, but which he was actually carrying into the Country for that end? †

† See the fourteenth Article of the fourth Section of Partnerſhip.

If the Father of a Son that is given to Debauchery, having engaged one of his Friends to keep him in his Houſe for ſome time, the ſaid Son robs the Friend; ſhall not the Father be bound to make good the Damage done to his Friend by his Son?

If a perſon that is rich, and of Quality, engages one of a lower Rank, and of a ſmall Fortune, to make a Journey for ſome Buſineſs of his, and he chances to be robbed and wounded; will not Juſtice oblige that perſon to make good the ſaid Loſs, which he is bound to do by an indiſpenſible Duty of Humanity?

SECT. III.

Of the Engagements of a Proxy, and other Agents; and of their Power.

The CONTENTS.

1. *Liberty of accepting the Order, Neceſſity of executing it.*
2. *The Order is to be executed in its full extent.*
3. *Extent and Limits of the Power.*
4. *The Care that Proxies, and other Agents are obliged to.*
5. *Bounds of this Care.*
6. *One may better the condition of the perſon who imploys him, but cannot make it worſe.*
7. *If the Proxy buys at a dearer Price than he was impowered to give.*
8. *Proxies and other Agents are bound to give an Account.*
9. *Advocates and Proctors cannot ſtipulate a Share of what ſhall be recovered in a Law-Suit, nor purchaſe Litigious Rights.*
10. *The power of him who has a general Procuration.*
11. *A ſpecial Power is requiſite, for tranſacting, or alienating.*
12. *Non-performance of the Procuration, things remaining ſtill in their former ſtate.*
13. *Two Proxies for the ſame thing.*
14. *When two Proxies are named, and one tranſacts without the knowledge of the other.*

I.

1. Liberty of accepting the Order, Neceſſity of executing it.

AS a Proxy, and other Agents are at liberty not to accept the Order and Power which is given them; ſo they are bound, if they do accept it, to execute it; and if they fail to do it, they will be liable for the Damages which they ſhall have occaſioned by their not acting. Unleſs they have a lawful Excuſe to plead, ſuch as Sickneſs, or ſome other juſt cauſe of Hindrance[a].

[a] Sicut liberum eſt mandatum non ſuſcipere, ita ſuſceptum conſummare oportet. *l.* 22. §. *ult. ff. mand.* Si ſuſceptum non impleverit, tenetur. *l.* 5. §. 1. *eod.* Quod mandatum ſuſceperit, tenetur etſi non geſſiſſet. *l.* 6. §. 1. *eod.* §. 11. *inſt. eod.*

Sanè ſi valetudinis adverſæ, vel capitalium inimicitiarum, ſeu ob inanes rei actiones, ſeu ob aliam juſtam cauſam excuſationes alleget, audiendus eſt. *l.* 23. 24. & 25. *ff. mand.*

II.

2. The Order is to be executed in its full extent.

The Procuration, or other Order, ought to be executed fully, according to the extent or bounds of the Power given[b].

[b] Diligenter fines mandati cuſtodiendi ſunt, nam qui exceſſit, aliud quid facere videtur. *l.* 5. *ff. mand.* Si is qui mandatum ſuſcepit, egreſſus fuerit mandatum, ipſi quidem mandati judicium non competit: at ei qui mandaverit, adverſus eum competit. *l.* 41. *eod.* §. 8. *inſt. eod.*

III.

3. Extent and Limits of the Power.

If the Order, or Power given, marks preciſely what is to be done, he who accepts and executes it ought to keep cloſe to what is preſcribed in it. And if the Order, or Power, be indefinite, he may ſet ſuch bounds to it, or give it ſuch Extent, as may reaſonably be preſumed to be agreeable to the Intention of the perſon who gives it; whether it be with regard to the thing it ſelf that is to be done, or the way of doing it[c].

[c] Diligenter fines mandati cuſtodiendi ſunt. *l.* 5. *ff. mand.* Cùm mandati negotii contractum, certam accepiſſe legem aſſeveres, eam integram ſecundùm bonam fidem, cuſtodiri convenit. *l.* 12. *C. eod.* Igitur commodiſſimè illa forma in mandatis ſervanda eſt, ut quoties certum mandatum fit,

recedi à forma non debeat: at quoties incertum vel plurium cauſarum, tunc licet aliis præſtationibus exoluta ſit cauſa mandati, quam quæ ipſo mandato inerant, ſi tamen hoc mandatori expedierit, mandati erit actio. *l.* 46. *ff. eod.* See the fourth Article of the ſecond Section of Covenants.

IV.

4. The Care that Proxies and other Agents are obliged to.

Proxies, and other Factors, or Agents, are obliged both in Honour and Duty to take care of the Affairs which they have undertaken to look after, and to manage them not only with Integrity, but alſo with Diligence and Exactneſs. And altho' they be negligent in their own Affairs, with impunity, yet they ought to have in the Concerns of others which they undertake to manage, more circumſpection than in their own: and they are accountable for the Damage which their Negligence may have occaſioned; but not for Accidents[d].

[d] Contractus quidam dolum malum dumtaxat recipiunt, quidam & dolum & culpam —— dolum & culpam mandatum. *l.*23. *ff. de reg. jur.* A procuratore dolum & omnem culpam, non etiam improviſum caſum præſtandum eſſe, juris authoritate manifeſte declaratur. *l.* 13. *C. mand. l.* 11. *C. eod. l.* 8. §. 10. *ff. eod. l.* 29. *eod. l.* 9. *C. eod.* In re mandata non pecuniæ ſolùm, cujus eſt certiſſimum mandati judicium, verùm etiam exiſtimationis periculum eſt. Nam ſuæ quidem quiſque rei moderator atque arbiter non omnia negotia, ſed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur. Nec quicquam in eorum adminiſtratione neglectum, ac declinatum culpa vacuum eſt. *l.* 21. *C. eod.*

V.

5. Bounds of this Care.

It cannot be imputed as a fault to a Proxy, or other Agent, if in the diſcuſſion of an Affair committed to him, ſuch as the tranſacting or proſecuting a Law-Suit, he does not ſearch into the niceſt Subtleties for the intereſt of the perſon who has imployed him. But it ſufficeth if he gives a reaſonable Application, and his Conduct be ſuch as good Senſe, and Honeſty may require[e].

[e] Nihil amplius quam bonam fidem præſtare eum oportet, qui procurat. *l.* 10. *ff. mand.* De bona fide enim agitur, cui non congruit de apicibus juris diſputare. *l.* 29. §. 4. *eod.*

Altho' this laſt text relates to a Surety, yet it may be applied to a Proxy. And likewiſe this Law is placed in the Title Mandati, *becauſe the Surety is as it were a Proxy, as has been remarked in the Preamble to this Title.* See the ninth Article of the third Section of Sureties.

VI.

6. One may better the condition of the perſon who employs him, but cannot make it worſe.

The Proxy, or other Agent, may better the condition of the perſon who imploys him, but cannot make it worſe. Thus, he may buy a Thing at a lower Price than what he was impowered to give, but he cannot buy it dearer[f].

[f] Cauſa mandantis fieri poſſit interdum melior, deterior verò nunquam. *l.* 3. *ff. mand. d. l.* §. 2. §. 8. *inſt. eod.* Ignorantis domini conditio deterior per procuratorem fieri non debet. *l.* 49. *ff. de procur.* Diligenter fines mandati cuſtodiendi ſunt. *l.* 5. *ff. mand. v. l.* 3. §. 2. *eod.*

VII.

7. If the Proxy buys at a dearer Price than he was impowered to give.

If he who had power to buy at a certain Price, buys the Thing dearer, and the perſon who had imployed him refuſes to ratify the Bargain; the Proxy, or Factor will be at liberty to confine himſelf to the Recovery of the Price which he was impowered to give: and in this caſe the Ratification cannot be refuſed him[g], if there are no other circumſtances.

[g] Quod ſi pretium ſtatui, túque pluris emiſti, quidam negaverunt te mandati habere actionem, etiam ſi paratus eſſes, id quod excedit remittere. Namque iniquum eſt, non eſſe mihi cum illo actionem, ſi nolit: illi vero, ſi velit, mecum eſſe. Sed Proculus recte eum uſque ad pretium ſtatutum, acturum exiſtimat: quæ ſententia ſane benignior eſt. *l.* 3. §. *ult.* & *l.* 4. *ff. mand.* §. 8. *inſt. eod.*

VIII.

8. Proxies and other Agents are bound to give an Account.

Proxies, and other perſons imployed in the Management and Adminiſtration of any Buſineſs, are bound to give an Account of their Management, and to make Reſtitution honeſtly of what they have received, ſuch as the Fruits, if there were any, and other Profits, and every other thing that may have accrued from the Affair which they managed: and they alſo recover their Expences. And if it has been agreed to give a Salary, or if any be due, as if it is a Factor or Steward, the Salary muſt be paid them. And in this caſe they will not recover the Expences which they are obliged to lay out of their own Salaries[h].

[h] Procurator in cæteris quoque negotiis gerendis, ita & in litibus ex bona fide, rationem reddere debet. Itaque quod ex lite conſecutus fuerit, ſive principaliter ipſius rei nomine, ſive extrinſecus, ob eam rem debet mandati judicio reſtituere. *l.* 46. §. 4. *ff. de procur.* Reputationes quoque hoc judicium admittere, & ſicuti fructus cogitur reſtituere is qui procurat, ita ſumptum quem in fructus percipiendos fecit, deducere eum oportet. Sed etſi ad vecturas ſuas dum excurrit in prædia, ſumptus fecit, puto hos quoque ſumptus reputare eum oportere, niſi ſi ſalariarius fuit, & hoc convenit, ut ſumptus de ſuo faceret, ad hæc itinera, hoc eſt de ſalario. *l.* 10. §. 9. *ff. mand. l.* 20. §. 1. *C. eod.*

XI.

9. Advocates and Proctors cannot ſtipulate a Share of what ſhall be recovered in a Law-Suit, nor

Altho' a Proxy, or Agent, may receive a Salary; yet he who is imployed as a Proctor, or Attorney at Law, in a Law-Suit, cannot ſtipulate a Share of what ſhall be recovered of it; becauſe it is againſt Good Manners for any one to intereſt himſelf by ſuch a Motive in a Law-Suit, in which he is *purchaſe Litigious Rights.*

to ſerve his Client by his Function; and neither Advocates, nor Proctors, can make any Bargain of this kind [l], no more than they can purchaſe Litigious Rights [l].

[l] Sumptus quidem prorogare litiganti honeſtum eſt, paciſci autem, ut non quantitas eo nomine expenſa cum uſuris licitis reſtituatur, ſed pars dimidia ejus quod ex ea lite datum erit, non licet. *l. 53. ff. de pact.* Si qui Advocatorum exiſtimationi ſuæ immenſa atque illicita compendia prætuliſſe, ſub nomine honorariorum, ex ipſis negotiis quæ tuenda ſuſceperint, emolumenta ſibi certæ partis cum gravi damno litigatoris, & deprædatione poſcentes fuerint inventi, placuit ut omnes qui in hujuſmodi ſævitate permanſerint ab hac profeſſione penitus arceantur. *l. 5. C. de poſtul.* Salarium Procuratori conſtitutum ſi extra ordinem peti cœperit, conſiderandum erit, laborem dominus remunerare voluerit, atque ideo fidem adhiberi placitis oporteat, an eventum litium majoris pecuniæ præmio contra bonos mores procurator redemerit. *l. 7. ff. mand.*

It is this Agreement, which is ſo odious, and ſo juſtly condemned, that it is commonly called pactum de quota litis, *of which it is eaſy to perceive the iniquity, and bad conſequences it may have in relation to the Publick.*

[l] Litem te redemiſſe contra bonos mores precibus manifeſte profeſſus es, cùm procurationem quidem ſuſcipere, quod officium gratuitum eſſe debet, non ſit res illicita: hujuſmodi autem officia non ſine reprehenſione ſuſcipiuntur. *l. 15. C. de procur.* Si contra licitum, litis incertum redemiſti, interdictæ conventionis tibi fidem impleri, fruſtra petis. *l. 20. C. mand.*

See the Preamble of the eighth Section of the Contract of Sale.

X.

10. The power of him who has a general Procuration.

He who has a general Procuration for the Adminiſtration of all the Affairs and all the Concerns of another perſon, may call in the Debts, refer a Matter in diſpute to the Oath of the Party, receive the Rents, and pay off what is owing [m]. And in general all Proxies may do whatever is comprehended within the Letter of the Procuration, or Intention of the perſons who have imployed them, and whatever naturally follows from the Power that is given them, or is neceſſary for executing it [n]. Thus, the Power of receiving what is due, implies that of giving a Diſcharge: thus, the Power of demanding a Debt, implies that of diſtraining the Goods of the Debtor.

[m] Procurator cui generaliter libera adminiſtratio rerum commiſſa eſt, poteſt exigere. *l. 58. ff. de procur.* Procurator quoque quod detulit (jusjurandum) ratum habendum eſt: ſcilicet ſi aut univerſorum bonorum adminiſtrationem ſuſtinet, aut ſi id ipſum nominatim mandatum ſit. *l. 17. §. ult. ff. de jurejur.* Sed & id quoque ei mandari videtur, ut ſolvat creditoribus. *l. 59. eod.*

[n] Ad rem mobilem datus Procurator, ad exhibendum rectè aget. *l. 56. ff. de Procur. v. l. ult. §. ult. ff. mand.*

XI.

11. A ſpecial Power is requiſite, for tranſacting, or alienating.

A general Procuration is not ſufficient to impower one to demand in another's name the Reſciſſion of a Contract, or Reſtitution of things to their former ſtate and condition; for to do this, a change of Will is neceſſary, which ought to be expreſſed. Neither is ſuch a general Power ſufficient for tranſacting, or alienating, but a ſpecial Power is requiſite for that purpoſe. For to tranſact and to alienate, is commonly to diminiſh the Goods. And it is only the Owner of them who can diſpoſe of them in this manner. But a Proxy, or Agent, who has only a general Power, may ſell the Fruits, and other Things which may eaſily be ſpoiled, and which a good Huſband ought not to keep [o].

[o] Si talis interveniat juvenis cui præſtanda ſit reſtitutio: ipſo poſtulante præſtari debet, aut procuratori ejus, cui id ipſum nominatim mandatum ſit. Qui verò generale mandatum de univerſis negotiis gerendis alleget, non debet audiri. *l. 25. §. 1. ff. de min.* Mandato generali non contineri etiam tranſactionem. *l. 60. ff. de procur.* Procurator totorum bonorum cui res adminiſtrandæ mandatæ ſunt, res domini neque mobiles, vel immobiles, neque ſervos, ſine ſpeciali domini mandatu alienare poteſt, niſi fructus aut alias res quæ facile corrumpi poſſunt. *l. 63. eod.*

XII.

12. Non-performance of the Procuration, things remaining ſtill in their former ſtate.

If the Proxy, or other Agent hath failed to execute the Order which he had received, the things being in ſuch a condition that there ariſes no prejudice from thence to the perſon who imployed him, the bare Non-performance of the Order engages him to nothing [p].

[p] Mandati actio tunc competit, cùm cœpit intereſſe ejus qui mandavit. Cæterùm ſi nihil intereſt, ceſſat mandati actio, & eatenus competit, quatenus intereſt. *l. 8. §. 6. ff. mand.*

XIII.

13. Two Proxies for the ſame thing.

If two perſons have been made Proxies, or intruſted with the direction of the ſame Affair; and both the one and the other undertake it, they will be anſwerable each of them for the whole, unleſs the power that is given them regulate it otherwiſe. For the Affair is intruſted both to the one and the other: and each of them makes himſelf anſwerable for it, when he accepts the Order [q].

[q] Duobus quis mandavit negotiorum adminiſtrationem. Quæſitum eſt, an unuſquiſque mandati judicio in ſolidum teneatur? Reſpondi, unumquemque pro ſolido conveniri debere; dummodò ab utroque non amplius debito exigatur. *l. 60. §. 2. ff. mand.*

XIV.

14. When two Proxies are named, and one tranſacts without the knowledge of the other.

If two perſons being named Proxies for doing a thing which one of them might do without the other, ſuch as receiving payment of a Debt, or proſecuting a Law-Suit, one of them has done the buſineſs by himſelf; he has conſummated the Power of both: and the ſecond has no more power in what is already done [r]. But if the two were named to treat jointly about an Affair, and not one without the other; nothing would oblige the perſon who imployed them, except what has been tranſacted jointly by them both together. For they could not divide the Power which they had, but in conjunction with one another. Thus, for Inſtance, if two perſons had an indefinite Power to tranſact a Law-Suit of the perſons who employed them, and one tranſacts it without the other, the Tranſaction may be diſavowed by the Party concerned. For he had not the power to tranſact the buſineſs all alone; and the preſence of the other might have helped to better the condition of their Principal[f].

SECT. IV.

In what manner the Power of the Proxy, or other Agent, expires.

The CONTENTS.

1. *The Power of the Proxy ends by Revocation.*
2. *The naming of a ſecond Proxy revokes the Power given to the firſt.*
3. *The Proxy may diſcharge himſelf after having accepted the Procuration.*
4. *He ought to acquaint his Principal with the change of his reſolution.*
5. *If the Proxy is not able to acquaint his Principal with the impediment that hinders him to execute his Order.*
6. *Procurations and other Orders, expire by the death, either of the Giver, or Accepter.*
7. *A Proxy who continues to act, being ignorant of the death of the perſon who imployed him.*
8. *If the Heir, or Executor, of the deceaſed Proxy acts after his death.*

I.

1. The Power of the Proxy ends by Revocation.

THE Power, and Charge of a Proxy, or other Agent, expire by the change of the Will of the perſon who made choice of him. For this choice is free, and he may revoke his Order whenever he thinks fit, provided he makes known his Revocation to the perſon whom he revokes; and that all things be ſtill entire. But if the Proxy, or other Agent, had already executed the Order, or begun to execute it, before he knew any thing of the Revocation, it would be without effect as to what had been already executed: and he will be indemnified as to any Obligation into which the ſaid Order may have engaged him[a].

II.

2. The naming of a ſecond Proxy revokes the Power given to the firſt.

He who having appointed one to be his Proxy, or Agent, does afterwards name another for the ſame Buſineſs; revokes by that the Power which he had given to the firſt[b]. But if the firſt had already executed the Order, before he knew of the Revocation, he who had appointed him, could not diſavow what he had done.

III.

3. The Proxy may diſcharge himſelf after having accepted the Procuration.

The Proxy, or other Agent, may rid himſelf of his Engagement, after having accepted the Procuration, or Commiſſion, whether it be that he has particular reaſons ſo to do, ſuch as being ſeized with a Diſtemper, or that ſome buſineſs has fallen out that hinders him: or that he had no other reaſon for his Refuſal, but his own Will and Pleaſure. But it is neceſſary, if he refuſes to execute the Order which he took in hand, that his Refuſal be without fraud, and that he leave all things entire, and in ſuch a condition as that the Maſter may be able to do the buſineſs himſelf, or by another. And if the Proxy, or other Agent, abandons and leaves the thing in danger, he ſhall be bound to make good the Damage that enſues thereupon[c], according to the Rules which follow.

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[e] Pluribus Procuratoribus in ſolidum ſimul datis, occupantis melior conditio erit. Ut poſterior non ſit in eo, quod prior petit Procurator. *l.* 32. *ff. de procur.*

[f] Diligenter fines mandati cuſtodiendi ſunt. *l.* 5. *ff. mand.*

[a] Si mandavero exigendam pecuniam, deinde voluntatem mutavero, an ſit mandati actio, vel mihi, vel hæredi meo? Et ait Marcellus ceſſare mandati actionem, quia extinctum eſt mandatum, finitâ voluntate. *l.* 12. §. 16. *ff. mand.* §. 9. *inſt. eod.* Si mandaſſem tibi ut fundum emeres, poſtea ſcripſiſſem ne emeres: tu, antequam ſcias me vetuiſſe emiſſes, mandati tibi obligatus ero ne damno afficiatur is, qui ſuſcipit mandatum. *l.* 15. *eod.* See the firſt Article of the ſecond Section.

[b] Julianus ait eum qui dedit diverſis temporibus Procuratores duos, poſteriorem dando, priorem prohibuiſſe videri. *l.* 31. §. *ult. ff. de procur.*

[c] Sicut autem liberum eſt mandatum non ſuſcipere, ita ſuſceptum conſummari oportet: niſi renuntiatum ſit. Renuntiari autem ita poteſt: ut integrum jus mandatori reſervetur, vel per ſe, vel per alium eamdem rem commode explicandi. *l.* 22. §. *ult. ff. mand.* Hoc ampliùs tenebitur ſi per fraudem renuntiaverit. *d.* §. *in fine.* Qui mandatum ſuſcepit, ſi poteſt id explere, deſerere promiſſum officium non debet. Alioquin quanti mandatoris interſit, damnabitur. *l.* 27. §. 2. *eod.* Si valetudine, vel majore re ſua diſtringatur. *l.* 20. *ff. de procur.*

cur. V. l. 17. §. *ult. & ll. ſeq. ff. eod. l.* 22. *& ſeq. ff. mand.*

See the following Articles.

IV.

4. He ought to acquaint his Principal with the change of his reſolution.

If the Proxy, or other Agent, will throw up the Procuration, or Commiſſion which he had accepted, he cannot do it but by making it known to the perſon who imployed him. And if he fails to do that he ſhall be bound to make good all Damages and Loſſes. For having taken charge of his Affair, it would be a cheating of him, to abandon it without acquainting him beforehand[d].

[d] Si verò intelligit explere ſe id officium non poſſe, id ipſum, cùm primùm poterit, debet mandatori nuntiare: ut is, ſi velit, alterius opera utatur. *l.* 27. §. 2. *ff. mand.* Quod ſi, cùm poſſit nuntiare, ceſſaverit, quanti mandatoris interſit, tenebitur. *d.* §. *See the following Article.*

V.

5. If the Proxy is not able to acquaint his Principal with the impediment that hinders him to execute his Order.

If he who had accepted a Commiſſion, or other Order, is not able to execute it becauſe of ſome Obſtacle that has happened, and which he could not know, as if in a Journey which he had undertaken, he falls ſick by the way, and can give no advice of it, or that the advice proves uſeleſs, coming too late; the Loſſes which may follow from the Non-performance of the Order in ſuch caſes, will fall on the perſon who gave it. Becauſe they are unforeſeen Accidents, which regard the Maſter[e].

[e] Si aliqua ex cauſa non poterit nuntiare, ſecurus erit. *l.* 27. §. 2. *in fin. ff. mand*

VI.

6. Procurations, and other Orders, expire by the death, either of the Giver, or Accepter.

Procurations, and other Orders, expire by the death of the perſon who gave the Order, or of him who accepted it. But this is to be underſtood according to the Rules which follow[f].

[f] Si adhuc integro mandato mors alterius interveniat, id eſt, vel ejus qui mandaverit, vel illius qui mandatum ſuſceperit, ſolvitur mandatum. §. 10. *inſt. de mand. l.* 26. *l.* 27. §. 3. *l.* 58. *ff. eod. l. ult. ff. de ſolut.* Mandatum re integra domini morte finitur. *l.* 15. *C. mand.* See the following Articles.

VII.

7. A Proxy who continues to act, being ignorant of the death of the perſon who imployed him.

If the Proxy, or other Agent, being ignorant of the death of the perſon who had employed him, continues to execute the Order, what he has done honeſtly and fairly under that Ignorance ſhall be ratified. For his good Intention gives to what he has tranſacted, the effect of the Power which the deceaſed had given him[g].

[g] Utilitatis cauſa receptum eſt, ſi eo mortuo qui tibi mandaverat, tu ignorans eum deceſſiſſe executus fueris mandatum, poſſe te agere mandati actione. Alioqui juſta & probabilis ignorantia, tibi damnum afferret. §. 10. *inſt. de mand. l.* 26. *ff. eod.* Si præcedente mandato Titium defenderas, quamvis mortuo eo cùm hoc ignorares, ego puto mandati actionem adverſus hæredem Titio competere: quia mandatum morte mandatoris, non etiam mandati actio ſolvitur. *l.* 58. *ff. mand.* Mandatum re integra domini morte finitur. *l.* 15. *C. eod.*

But if a Proxy, or other Agent, were charged with an Affair which could not admit of delay, ſuch as the care of gathering in Harveſt, or any other preſſing and important Affair, and that juſt as he is going to execute the Order, or after he has already begun it, he learns the death of the perſon from whom he received his Order, and that he could not give notice of it to the Heirs, or Executors, who happen to be abſent, might not he, and even ought not he to execute the Order?

VIII.

8. If the Heir, or Executor, of the deceaſed Proxy acts after his death.

If the Proxy, or other Agent, happens to die before he began to execute the Order, and his Heir, or Executor, being ignorant that the power was at an end by the ſaid death, takes upon himſelf to execute the Order, whatever he does will be of no prejudice to the Maſter, and will be annulled. For this Ignorance does not give this Heir, or Executor, a Right which he had not, and which went no farther than the Perſon who was made choice of[h].

[h] (Cùm non) oporteat, eum qui certi hominis fidem elegit, ob errorem aut imperitiam hæredum affici damno. *l.* 57. *ff. mand.*

But if the Heir, or Executor of the Proxy knowing the Order that was given him, and ſeeing that the abſent Maſter could not look after his own Affair, and that there would be danger of ſome Loſs if he did not take care of it; would not he be obliged to do what were in his power, ſuch as to continue to till the Lands, or to gather in the Harveſt.

TITLE XVI.

Of Perſons who drive any Publick TRADE, of their FACTORS and AGENTS, and of BILLS of EXCHANGE.

The Matters contained in this Title.

THE Covenants of which we have ſpoken hitherto, except that of a Neceſſary *Depoſitum*, are tranſacted by the mutual conſent of the perſons who are willing to treat together: and the Engagements which are formed by thoſe Covenants, are preceded by a reciprocal Liberty which the Parties contracting have to treat with one another, and to make choice of one another; that is to ſay, if they do not like of one perſon, they may treat with another, or keep from treating and engaging themſelves at all. But there are other Covenants in which one has not the Choice of the Perſons with whom he is to treat, nor is he at liberty to abſtain from all manner of Engagement: and where Neceſſity obliges him to have to do with certain perſons who drive publick Trades, of which the Laws, for this reaſon, have ſettled the Conditions; on purpoſe that theſe Perſons may not make a bad uſe of the Neceſſity which people are under to treat with them, and to truſt them.

Thus, Travellers are obliged to truſt their Cloaths and Baggage in Inns; which produces an Engagement between them and the Inn-keepers.

Thus they who having any Journey, or Voyage, to make to Places, to which they may have the conveniency of going in a Stage-Coach by Land, in a Ship by Sea, or in a Boat on a River, and having no travelling Equipage of their own, are obliged to make uſe of thoſe publick Conveyances both for their Perſons, their Cloaths, and their Goods. And this forms a reciprocal Engagement between them and the Maſters of thoſe publick Conveyances. And it is the ſame thing with reſpect to thoſe who, without travelling themſelves, have Cloaths, or Goods, to ſend from one place to another.

Altho' it may ſeem as if the Engagements of Inn-keepers and Carriers were only the ſame with thoſe of Letting and Hiring, and of a *Depoſitum*, it being by a kind of Letting and Hiring that we treat with them, and that they become Depoſitaries of what is committed to their charge; and that therefore there ſeems to be need of no other Rules for them than what we have in theſe two kinds of Contracts; yet the conſequence of the Fidelity that is required in theſe kinds of Profeſſions, ſubjects them to other Rules that are peculiar to them. And there is this beſides particular in theſe kinds of Commerces, that the perſons who drive them not being able of themſelves to manage their whole Buſineſs, becauſe of the multitude of perſons who have to deal with them, and that at all hours of the day, they are neceſſitated to imploy other perſons to look after their Concerns, and this obliges them to anſwer for the deed of thoſe Factors, or Agents, whom they imploy under them. And altho' this Engagement, with reſpect to theſe Factors, or Agents, have many Rules which are common to it, and to Procurations and Commiſſions, yet it has ſome that are peculiar to it. Thus, all the Rules which relate particularly to Inn-keepers, Maſters of Ships, Coach-men and Carriers, ought neceſſarily to be diſtinguiſhed from the others, and they ſhall be explained under this Title.

Bank, Remittance of Money, and other Commerces.

There are likewiſe Commerces of other kinds, which the Publick Advantage and Conveniency render neceſſary: and which have this in common with thoſe of which we have been juſt now ſpeaking, that the perſons who drive theſe Commerces contract by themſelves, and by their Factors, or Agents, Engagements in the ſecurity of which the Publick is concerned; ſuch as the Commerce of a Bank, Remittance of Money, and others which are drove by Bankers and other Traders. Which requires that we ſhould inſert in this Title ſome Rules which relate in general to all theſe kinds of Commerces, and the Engagements that are peculiar to them. And becauſe one of theſe Commerces, which is that of Bills of Exchange, is a kind of Covenant diſtinct from all the others; we ſhall explain the Nature of it, and the Principles that are eſſential to it, together with its Rules that are common to the *Roman* Law, and to our Practice, without entring into the particular Regulations made in this matter by the Ordinances of the Kingdom.

Remark on ſome Laws quoted in this Title.

It is to be obſerved in relation to the Laws quoted in this Title, that the greateſt part of the Rules of the Engagements of Inn-keepers, Carriers, and others which we ſhall have occaſion to mention here, are ſcattered up and down in the ſeveral Titles of the *Roman* Law which treat of theſe Maters; ſo that ſome of them which relate, for Inſtance, to Inn-keepers, are applied only to Carriers, and others which are common not only to Inn-keepers and Carriers, but alſo to all other ſorts of Engagements which ſhall be treated of under this Title, are only applied to ſome of them in particular. So that we have been obliged to apply the Rules of one of theſe Matters to the others, wherever they ſuit with them.

* * *

SECT. I.

Of the Engagements of Inn-keepers.

The CONTENTS.

1. *Engagements of Inn-keepers.*
2. *A Covenant either expreſs or tacit with the Inn-keeper.*
3. *In what manner the Inn-keeper is made accountable for the Things by the deed of his Domeſticks.*
4. *Care of the Inn-keeper.*
5. *Inn-keepers anſwerable for Thefts.*
6. *They are accountable for the deed of any of their Family or Domeſticks.*
7. *They anſwer for their Servants, only for what they do in the Inn.*

I.

1. *Engagements of Inn-keepers.* THere is formed between the Inn-keeper and Traveller an Agreement, by which the Inn-keeper obliges himſelf to the Traveller to lodge him, and to take care of his Baggage, Horſes, and other Equipage[a]; and the Traveller on his part binds himſelf to pay his Charges.

[a] Ait prætor, nautæ caupones, ſtabularii, quod cujuſque ſalvum fore receperint, niſi reſtituant, in eos judicium dabo. *l.* 1. *ff. naut. caup. ſtab.*

II.

2. *A Covenant either expreſs or tacit with the Inn-keeper.* This Engagement is formed uſually without any expreſs Covenant, by the Traveller's bare entring into the Inn, and his depoſiting his Baggage, and other Things, into the hands of the Maſter of the Inn, or of thoſe whom he appoints to take care of it[b].

[b] Sunt quidam qui cuſtodiæ gratia navibus præponuntur, ut ναυφύλακες, id eſt, navium cuſtodes & diætarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem, quia is qui eos hujuſmodi officio præponit, committi eis permittit. *l.* 1. §. 3. *ff. naut. caup.*

III.

3. *In what manner the Inn-keeper is made accountable for the Things, by the deed of his Domeſticks.* The Inn-keeper is accountable for the fact of thoſe of his Family, and of his Domeſticks, according to the Functions in which they are employed. Thus when a Traveller gives to the Servants who have the Keys of the Chambers, a Cloke-Bag, or other Things, or when he puts his Horſe into the Stable, under the Care of the Hoſtler, the Maſter of the Inn is anſwerable for them. But if the Traveller, upon his arrival, delivers a Bag of Money to a Child, a Scullion, out of the Maſter's and Miſtreſs's ſight, the Inn-keeper will not be anſwerable for a Bag of this conſequence, depoſited in ſuch a manner[c].

[c] Caupo præſtat factum eorum qui in ea caupona ejus cauponæ exercendæ cauſa ibi ſunt. *l.* 1. §. *ult. ff. furt. adv. naut. caup.*

Quia is, qui eos hujuſmodi officio præponit, committi eis permittit. *l.* 1. §. 3. *ff. naut caup. ſtab.* Caupones autem, & ſtabularios, æquè eos accipiemus, qui cauponam vel ſtabulum exercent: inſtitoréſve eorum. Cæterum, ſi quis opera mediaſtini fungitur, non continetur: ut puta atriarii, & focarii, & his ſimiles. *d. l.* 1. §. 5.

IV.

4. *Care of the Inn-keeper.* The Maſter of the Inn is obliged to watch, or cauſe to be watched by others, with all poſſible care, all the Things that the Traveller brings and depoſites in the Inns, whether it be in the preſence, or abſence of the Maſter. Thus, he is anſwerable, not only for his own Faults, but even for the leaſt Neglect, either in himſelf, or Servants; and he is only diſcharged from what may happen by ſuch Accidents as the greateſt care could not have prevented[d].

[d] In locato conducto culpa, in depoſito dolus dumtaxat præſtatur. At hoc edicto omnimodo qui recepit tenetur, etiamſi ſine culpa ejus res perierit vel damnum datum eſt. Niſi, ſi quid damno fatali contingit. *l.* 3. §. 1. *ff. naut. caup.* See the following Article.

He ought to take more care than one who is a bare Depoſitary. See the third Section of a *Depoſitum.*

V.

5. *Inn-keepers anſwerable for Thefts.* Altho' Inn-keepers are not paid in particular for watching or keeping what is depoſited in the Inn, but only for the Lodging, and for other things which they furniſh to Travellers; yet they are nevertheleſs bound to take the ſame care as if they were expreſly paid for watching the Goods. For this is an Acceſſory to the Commerce which they drive: and it is for the Intereſt of the Publick, conſidering the neceſſity under which Travellers are to truſt Inn-keepers, that they be bound to an exact and faithful Care of the Things committed to their Cuſtody; and that they be made anſwerable even for Thefts. For otherwiſe they might with impunity commit the Thefts themſelves[e].

[e] Maxima utilitas eſt hujus edicti: quia neceſſe eſt plerumque eorum fidem ſequi, & res cuſtodiæ eorum committere. Neque quiſquam putet graviter hoc adversùs eos conſtitutum: nam eſt in ipſorum arbitrio, ne quem recipiant, & niſi hoc eſſet ſtatutum, materia daretur cum furibus, adversùs eos quos recipiunt, coëundi: cùm ne nunc quidem abſtineant hujuſmodi fraudibus. *l.* 1. §. 1. *ff. naut. caup. ſtabul.* Nauta, & caupo, & ſtabularius mercedem accipiunt, non pro cuſtodia, ſed nauta ut trajiciat vectores: caupo, ut viatores manere in

caupona patiatur: Stabularius, ut permittat jumenta apud eum ſtabulari. Et tamen cuſtodiæ nomine tenentur. Nam & fullo, & ſarcinator non pro cuſtodia, ſed pro arte mercedem accipiunt: & tamen cuſtodiæ nomine ex locato tenentur. *l. 5. ff. naut. caup.* Cùm in caupona vel navi res perit, ex edicto prætoris obligatur exercitor navis, vel caupo: ita ut in poteſtate ſit ejus cui res ſubrepta ſit, utrum mallet cum exercitore, honorario jure, an cum fure, jure civili experiri. *l. un. §. 3. ff. furt. adv. naut. caup. ſtab.* See the third Article of the eighth Section of Letting and Hiring.

VI.

6. They are accountable for the deed of any of their Family, or Domeſticks.

If any one of the Domeſticks, or of the Family of the Inn-keeper, cauſes any Loſs to a Traveller; as if he ſteals from him even that which was not ſpecially intruſted with any of the people of the Inn, or if he damages his Goods, the Maſter of the Inn ſhall be accountable for the Value of the Thing loſt, or of the Damage done[f].

[f] In eos qui naves, cauponas, ſtabula exercent, ſi quid à quoquo eorum, quoſve ibi habebunt, furtum factum eſſe dicetur, judicium datur, ſive furtum ope conſilio exercitoris factum ſit, ſive eorum cujus qui in ea navi navigandi cauſa eſſet: navigandi autem cauſa accipere debemus eos qui adhibentur ut navis naviget, hoc eſt nautas. *l. 1. ff. furti adv. naut.*

Caupo præſtat factum eorum, qui in ea caupona, ejus cauponæ exercendæ cauſa, ibi ſunt: item eorum qui habitandi cauſa ibi ſunt: viatorum autem factum non præſtat. Namque viatorem ſibi eligere caupo, vel ſtabularius non videtur: nec repellere poteſt iter agentes. Inhabitatores verò perpetuos, ipſe quodammodo elegit, qui non rejecit, quorum factum oportet eum præſtare. *d. l. 1. §. ult. ff. furti adv. naut. caup. l. 6. §. 3. ff. naut. caup.*

Quæcumque de furto diximus, eadem & de damno debent intelligi. Non enim dubitari oportet, quin is, qui ſalvum fore recipit: non ſolum à furto, ſed etiam à damno recedere videatur. *l. 5. §. 1. ff. naut. caup. v. l. 1. §. 2. ff. de exercit. act.*

Item exercitor navis, aut cauponæ aut ſtabuli, de dolo aut furto quod in navi, aut caupona aut ſtabulo factum erit, quaſi ex maleficio, teneri videtur, ſi modo ipſius nullum eſt maleficium, ſed alicujus eorum, quorum opera navem, aut cauponam, aut ſtabulum exercet. *§. ult. inſt. de obl. quæ quaſ. ex dol. naſc.*

VII.

7. They anſwer for their Servants, only for what they do in the Inn.

The Engagement of the Inn-keeper, for the fact of his Domeſticks, is limited to what is done in the Inn; and if any of his Servants ſteals any thing, or does any Damage in another place, the Maſter is not accountable for it[g].

[g] Non alias præſtat factum nautarum ſuorum, quàm ſi in ipſa nave damnum datum ſit. Cæterum ſi extra navem, licet à nautis, non præſtabit. *l. ult. ff. naut. caup. ſtab.*

* * *

SECT. II.

Of the Engagements of Maſters of Ships, Coachmen, and Carriers.

IN this Section we ſhall treat only of thoſe Engagements which relate to the Care that Maſters of Ships, Coachmen, and Carriers are bound to take of the Baggage and Goods which they take the charge of. As for their other Engagements, the Reader may have recourſe to the eighth Section of Letting and Hiring, and to the tenth and eleventh Articles of the ſecond Section of Engagements that are formed by Accidents.

The CONTENTS.

1. *Engagements of Maſters of Ships, and their Care.*
2. *They are accountable for the deed of their Servants.*
3. *Perſons that deal in Land and Water Carriage.*
4. *The Faults of Maſters of Ships, and Land Carriers.*

I.

1. Engagements of Maſters of Ships, and their Care.

THE Maſter of a Ship, or other Veſſel, who undertakes to carry by Sea, Perſons, Baggage, or Merchandize, is anſwerable for what is received on board his Veſſel, either by himſelf, or by his Agents. Which is not to be underſtood of the Rowers, for inſtance, in a Galley; for it is none of their buſineſs to look after the Lading. And he is accountable for all the Loſs, or Damage, that ſhall happen, either on board his Ship, or on the Key, if the Baggage and Goods are received there. In the ſame manner that Inn-keepers are reſponſible, as has been ſaid in the foregoing Section.

[a] Qui ſunt igitur qui teneantur, videndum eſt. Ait prætor nautæ, nautam accipere debemus eum qui navem exercet: quamvis nautæ appellantur omnes qui navis navigandæ cauſa in nave ſint. Sed de exercitore ſolummodo prætor ſentit; nec enim debet, inquit Pomponius, per remigem, aut meſonautam obligari: ſed per ſe, vel per navis magiſtrum. Quamquàm, ſi ipſe alicui è nautis committi juſſit, ſine dubio debeat obligari. Et ſunt quidam in navibus, qui cuſtodiæ gratia navibus præponuntur, ut ναυφύλακες, id eſt, navium cuſtodes, & dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem. Quia is, qui eos hujuſmodi officio præponit, committi eis permittit. *l. 1. §. 2. & 3. ff. naut. caup.* Idem ait, etiamſi nondum ſint res in navim receptæ, ſed

in littore perierint, quas ſemel recepit, periculum ad eum pertinere. *l.* 3. *ff. naut. caup.*

II.

2. *They are accountable for the deed of their Servants.*

The Maſter of the Veſſel is anſwerable for the deed of his Mates, and other Agents, and of the perſons imployed in the ſervice of the Ship, and for navigating her. And if any one of them cauſes any Loſs or Damage on board the Veſſel, the Maſter muſt anſwer for it[b].

[b] Si cum quolibet nautarum ſit contractum, non datur actio in exercitorem: quamquàm ex delicto cujuſvis eorum qui navis navigandæ cauſa in nave ſint, detur actio in exercitorem. Alia enim eſt contrahendi cauſa, alia delinquendi. Si quidem, qui magiſtrum præponit, contrahi cum eo permittit qui nautas adhibet, non contrahi cum eis permittit. Sed culpa, & dolo carere eos curare debet. *l.* 1. §. 2. *ff. de exercit. act.* Debet exercitor omnium nautarum ſuorum, ſive liberi, ſive ſervi factum præſtare. Nec immeritò factum eorum præſtat cùm ipſe eos ſuo periculo adhibuerint: ſed non alias præſtat, quàm ſi in ipſa nave damnum datum ſit. Cæterum ſi extra navem, licet à nautis, non præſtabit. *l. ult. ff. naut. caup.* See the ſixth and ſeventh Articles of the preceding Section.

III.

3. *Perſons that deal in Land and Water Carriage.*

Thoſe who undertake the Carriage of Goods, by Land or Water, are anſwerable for the Baggage and Goods which they take charge of; according to the Rules explained in this and the foregoing Section[c].

[c] Quia neceſſe eſt plerumque eorum fidem ſequi, & res cuſtodiæ eorum committere. *l.* 1. *ff. naut. caup.*

IV.

4. *The Faults of Maſters of Ships, and Land Carriers.*

All Carriers by Sea, Land, or freſh Water, are bound to that Care, Induſtry, and Experience, which their Profeſſion requires. Thus, the Maſter of a Ship who ſhould ſail up a River without a Pilot, and a Land Carrier who ſhould be robbed travelling in the night-time, or out of the common Road in a dangerous place, would be liable for the Accidents that ſhould happen, if ſuch Faults had given occaſion to them[d].

[d] Imperitia culpæ adnumeratur. §. 7. *Inſt. de lege Aquil. l.* 8. §. 1. *ff. eod.* Culpa autem abeſt, ſi omnia facta ſunt, quæ diligentiſſimus quiſque obſervaturus fuiſſet. *l.* 25. §. 7. *ff. locat.* Si magiſter navis ſine gubernatore in flumen navem immiſerit, & tempeſtate orta temperare non potuit, & navem perdiderit, vectores habebunt adverſus eum ex locato actionem. *l.* 13. §. 2. *ff. loc.* (Si) quo non debuit tempore, aut ſi minus idoneæ navi impoſuit, tunc ex locato agendum. *d. l.* §. 1. Culpa non intelligitur, ſi navem petitam, tempore navigationis trans mare miſit, licet ea perierit: niſi ſi minus idoneis hominibus eam commiſit. *l.* 16. §. 1. *ff. de rei vind.* Culpæ reus eſt poſſeſſor qui per inſidioſa loca ſervum miſit, ſi iis periit. *l.* 36. §. 1. *eod.* Et qui navem à ſe petitam adverſo tempore navigatum miſit, ſi ea naufragio perempta eſt. *d.* §. *in f.* See the fifth Article of the eighth Section of Letting and Hiring; and the fourth Article of the fourth Section of Damages, occaſioned by Faults.

SECT. III.

Of the Engagements of thoſe who carry on any other Publick Trade, by Land, or by Sea.

The CONTENTS.

1. *Engagement of Maſters, by the deed of their Factors, or Agents.*
2. *The bounds of the Power of Factors, and other Overſeers.*
3. *Of him who is ſubſtituted by the perſon chiefly intruſted with the Ship, or Cargo.*
4. *When a Minor, or Woman, is imployed as a Factor.*
5. *Of Women and Minors that drive thoſe Trades.*
6. *The ſeveral Partners in a Commerce, are all of them anſwerable in the whole for what their Factor does.*
7. *When ſeveral Partners drive any of theſe Publick Trades, the deed of one Partner binds all the others for the whole.*
8. *The Factor is not obliged in his own Name.*
9. *In what manner the Power of a Factor or Agent expires.*

I.

1. *Engagement of Maſters, by the deed of their Factors or Agents.*

Thoſe who keep Merchant-Ships, for ſome Trade; thoſe likewiſe who for ſome Commerce have Warehouſes, Shops, or Publick Offices; as alſo Bankers, and in general, all thoſe who in their Buſineſs, by Land or Sea, make uſe of Factors, Agents, and other Overſeers, are repreſented in what relates to that Buſineſs, by the perſons whom they ſet over it, in ſuch a manner that the deed of their Factors, or Agents, is their own proper deed. Thus, they are obliged to ratify what has been concluded with their Factors, or Agents. Thus, they muſt anſwer for the fact, fraud, or deceit of the perſons whom they have ſet over their Buſineſs[a].

[a] Inſtitor appellatus eſt, ex eo quod negotio gerendo inſtet. Nec multùm facit, tabernæ ſit præpoſitus, an cuilibet alii negotiationi. *l.* 3. *ff. de inſt. act.* Inſtitor eſt qui tabernæ locóve ad emendum, vendendúmve præponitur. Quique ſine loco ad eundem actum proponitur. *l.* 18. *ff. eod.*

Cuicumque igitur negotio præpoſitus ſit inſtitor, rectè appellabitur. *l. 5. eod.* Quem quis ædificio præpoſuit vel frumento coëmendo, pecuniis fœnerandis, agris colendis, mercaturis, redempturiſque faciendis. *l. 5. §. 1. & 2. eod.* Magiſtrum navis accipere debemus, cui totius navis cura mandata eſt. *l. 1. §. 1. ff. de exercit. act.*

Æquum prætori viſum eſt, ſicut commoda ſentimus, ex actu inſtitorum, ita etiam obligari nos ex contractibus ipſorum, & conveniri. *l. 1. ff. de inſt. act.*

Utilitatem hujus edicti patere, nemo eſt qui ignoret. Nam cùm interdum ignari cujus ſint conditionis, vel quales, cum magiſtris, propter navigandi neceſſitatem contrahamus, æquum fuit, eum qui magiſtrum navi impoſuit, teneri ut tenetur qui inſtitorem tabernæ, vel negotio præpoſuit. *l. 1. ff. de exercit. act.* Sed, etſi in prætiis rerum emptarum fefellit magiſter, exercitoris erit damnum, non creditoris. *l. 1. §. 10. ff. de exercit. act.* Sed, etſi in menſa habuit quis ſervum præpoſitum, nomine ejus tenebitur. *l. 5. §. 3. ff. de inſt. act.* See the fifth Article of the ſecond Section of Covenants.

II.

2. The bounds of the Power of Factors, and other Overſeers.

Factors and Overſeers oblige by their deed thoſe who have imployed them, only in what relates to the Commerce, or Buſineſs over which they are placed. Thus he who is appointed Super-cargo of a Ship, in order to traffick, to buy, ſell, or barter, engages his Maſter, or Principal, in every thing relating to thoſe Affairs. Thus he who is put in Maſter of a Ship, in order to tranſport Perſons and Goods, engages the Owner, as to what concerns the ſaid Tranſportation. And both the one and the other bind likewiſe their Maſter, or Conſtituent, for all the conſequences of the ſaid Commerce, and Tranſportations; ſuch as the neceſſary Expences for equipping, and refitting the Ship. Thus, all other Factors and Overſeers have their Power regulated by the quality of their Commiſſion [b].

III.

3. Of him who is ſubſtituted by the perſon chiefly intruſted with the Ship, or Cargo.

If he who is ſet over a Ship, whether it be as Maſter of her, for Tranſporting Goods and Paſſengers, or as Super-cargo, for Trading, ſubſtitutes another in his place, to do his Office; the deed of this Subſtitute, imployed by the perſon who was firſt intruſted with the Ship, or Cargo, will oblige the Owner of the Ship, or the Merchant, in the ſame manner as the deed of the perſon whom he firſt intruſted; altho' the ſaid perſon had no power to ſubſtitute another in his place. For the neceſſity of treating with him who ſeems to have the Charge of the Ship, or Cargo, together with the power which he has received from the perſon that was firſt intruſted, and the reaſonable Preſumption, that it is by order of the Owner of the Ship, or Lading, that he exerciſes the ſaid Office, give to what he does the ſame force, as if the thing were done by the Owner of the Ship, or Cargo, himſelf. Otherwiſe particular perſons would be liable to be cheated upon the Publick Faith. But this Rule is not to be extended indifferently to Factors, and others ſet over any Commerce, or Buſineſs at Land, where the neceſſity of treating with them is not the ſame, and where it is eaſier to learn who is the perſon imployed as Factor, and how far his Power extends [c].

IV.

4. When a Minor, or Woman, is employed as a Factor.

If the Factor, or Overſeer, be a Minor, his Engagements will oblige the Maſter, as much as if he were of Age. For he who has made choice of him, ought to blame himſelf for the conſequences of the Choice which he has made. And it would be the ſame thing, if a Woman were appointed Factor, or ſet over any Commerce which ſhe is capable of managing[d].

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[b] Non tamen omne, quod cum inſtitore geritur, obligat eum qui præpoſuit: ſed ita, ſi ejus rei gratia cui præpoſitus fuerit, contractum eſt. Id eſt, dumtaxat ad id, quod eum præpoſuit. Proinde ſi præpoſui ad mercium diſtractionem, tenebor nomine ejus, ex empto actione. Item, ſi fortè ad emendum eum præpoſuero, tenebor dumtaxat ex vendito, ſed neque ſi ad emendum & illi vindiderit, neque ſi ad vendendum, & ille emerit, debebit teneri. Idque Caſſius probat. *l. 5. §. 11. & 12. ff. de inſt. act.* Non autem ex omni cauſa prætor dat in exercitorem actionem, ſed ejus rei nomine cujus ibi præpoſitus fuerit. Id eſt, ſi in eam rem præpoſitus ſit: ut putà, ſi ad onus vehendum locatus ſit, aut aliquas res emerit utiles naviganti: vel ſi quid, reficiendæ navis cauſa, contractum vel impenſum eſt. Vel ſi quid nautæ, operarum nomine petent. *l. 1. §. 7. ff. de exercitoria actione.* Sed etiam ſi mercibus emendis, vel vendendis fuerit præpoſitus, etiam hoc nomine obligat exercitorem. *l. 1. §. 3. ff. de exercit. act.* Igitur præpoſitio certam legem dat contrahentibus. Quare ſi eum præpoſuit navi ad hoc ſolùm, ut vecturas exigat, non ut locet, quod fortè ipſe locaverat, non tenebitur exercitor, ſi magiſter locaverit: vel ſi ad locandum tantùm, non ad exigendum idem erit dicendum: aut ſi ad hoc ut vectoribus locet, non ut mercibus navem præſtet, vel contra. Modum egreſſus, non obligabit exercitorem. *d. l. §. 12.*

[c] Magiſtrum autem accipimus non ſolùm quem exercitor præpoſuit, ſed & eum quem magiſter. Et hoc conſultus Julianus in ignorante exercitore reſpondit: cæterùm ſi ſcit, & paſſus eſt eum in nave magiſterio fungi, ipſe eum impoſuiſſe videtur. Quæ ſententia mihi videtur probabilis. Omnia enim facta magiſtri debet præſtare, qui eum præpoſuit. Alioquin contrahentes decipientur. Et facilius hoc in magiſtro, quàm inſtitore admittendum, propter utilitatem. Quid tamen, ſi ſic magiſtrum præpoſuit, ne alium ei liceret præponere? An adhuc Juliani ſententiam admittimus, videndum eſt. Finge enim, & nominatim eum prohibuiſſe, ne Titio Magiſtro utaris? Dicendum tamen erit, eouſque producendam utilitatem navigantium. *l. 1. §. 5. ff. de exercit. act.* Cùm ſit major neceſſitas contrahendi cum magiſtro, quàm inſtitore. Quippe res patitur ut de conditione quis inſtitoris diſpiciat, & ſic contrahat; in navis magiſtro non ita. Nam interdum locus, tempus non patitur plenius deliberandi conſilium. *d. l. 1.*

V.

5. *Of Women and Minors that drive thoſe Trades.* Women and Minors may enter into all the Engagements that have been ſpoken of in this Title. And if they keep a Bank, or drive any other Trade, their Engagements in any thing relating to the ſaid Trade will be as valid as if they were of Age[e].

VI.

6. *The ſeveral Partners in a Commerce, are all of them anſwerable in the whole for what their Factor does.* If ſeveral Partners concerned in the ſame Commerce, or other Affair that is in common among them, imploy one and the ſame Factor, his deed will oblige every one of the Partners for the whole of what he does or contracts. For every one of them has ſet him over the Buſineſs: and the perſon who has contracted with the Factor, has perhaps had in his view only one of the Partners, and has tranſacted with the Factor purely in conſideration of the Security which he propoſed to himſelf by having that Partner bound for what the Factor promiſed[f].

VII.

7 *When ſeveral Partners drive any of theſe Publick Trades, the deed of one Partner binds all the others for the whole.* If two, or more perſons manage by themſelves in Partnerſhip any of theſe Publick Trades, he who has treated with one of the Partners, in the name of the Company, ſhall have all the other Partners bound in the whole for what he has contracted[g].

VIII.

8. *The Factor is not obliged in his own Name.* Factors and Agents who treat only in this quality, are not bound in their own Names by the Engagements which they contract, on account of the Buſineſs which is intruſted to them, and in the Name of their Maſters[h].

IX.

9. *In what manner the Power of a Factor, or Agent, expires.* The Power of Factors and Agents is determined by their Revocation. But if after they are recalled, they treat with perſons who knew nothing of their being recalled, what they ſhall have tranſacted will oblige the Maſter; unleſs the Revocation has been publiſhed, if it was the Cuſtom ſo to do; or that by other circumſtances the perſon who treated with the Factor, might have known that he ought not to have treated with him[i].

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[d] Pupillus inſtitor obligat eum qui eum præpoſuit inſtitoria actione. Quoniam ſibi imputare debet qui eum præpoſuit. Nam & plerique pueros, puellaſque tabernis præponunt. *l. 7. §. ult. l. 8. ff. de inſt. act.* Nec cujus ætatis ſit, intererit, ſibi imputaturo qui præpoſuit. *l. 1. §. 4. ff. de exercit. act.* Parvi autem refert quis ſit inſtitor, maſculus, an fœmina—— nam & ſi mulier præpoſuit competet inſtitoria, exemplo exercitoriæ actionis. Et ſi mulier ſit præpoſita tenebitur etiam ipſa. *l. 7. §. 1. ff. de inſt. act. l. 1. §. 16. ff. de exerc. act. l. 4. C. de exerc. & inſt. act.*

[e] Si mulier præpoſuit, competet inſtitoria, exemplo exercitoriæ actionis. Et ſi mulier ſit præpoſita, tenebitur etiam ipſa. *l. 7. §. 1. ff. de inſt. act. l. 1. §. 16. ff. de exercit. act.* Et ſi à muliere magiſter navi præpoſitus fuerit, ex contractibus ejus ea exercitoria actione, ad ſimilitudinem inſtitoriæ, tenetur. *l. 4. C. de exerc. & inſt. act.* Sed & ſi minor viginti quinque annis erit qui præpoſuit, auxilio ætatis utetur non ſine cauſæ cognitione. *l. 11. §. 1. ff. de inſt. act. By the Ordinance of the year* 1673, *in the Title of Apprentices, Traders,* &c. *Art.* 6. *all Traders and Merchants, by Wholeſale or Retail, as alſo Bankers, are reputed to be of full Age, as to any thing done by them in the way of their Commerce and Bank; and they cannot be reſtored againſt any Damage they may have ſuffered under pretext of Minority.*

[f] Paulus reſpondit, unum ex mandatoribus in ſolidum eligi poſſe, etiamſi non ſit conceſſum in mandato. *l. 59. §. 3. ff. mand. v. l. 2. ff. de duobus reis conſt.* Si duo plureſve tabernam exerceant: & ſervum quem ex diſparibus partibus habebant, inſtitorem præpoſuerint, utrum pro dominicis partibus teneantur, an pro æqualibus, an pro portione mercis, an verò in ſolidum? Julianus quærit, & verius eſſe ait, exemplo exercitorum, & de peculio actionis in ſolidum unumquemque conveniri poſſe. *l. 13. §. 2. ff. de inſtor. act. l. 6. §. 1. eod.* Si plures exerceant, unum autem de numero ſuo magiſtrum fecerint, hujus nomine in ſolidum poterunt conveniri. Sed ſi ſervus plurium navem exerceat, voluntate eorum, idem placuit quod in pluribus exercitoribus. Planè ſi unius ex omnibus voluntate exercuit in ſolidum ille tenebitur. Et ideò puto & in ſuperiore caſu in ſolidum omnes teneri. *l. 4. §. 1. & 2. ff. de exercit. act.* See the ſixteenth Article of the fourth Section of Partnerſhip.

[g] Si plures navem exerceant, cum quolibet eorum in ſolidum agi poteſt. Ne in plures adverſarios diſtringatur, qui cum uno contraxerit. *l. 1. §. ult. & l. 2. ff. de exercit. act.* See the ſeventh Article of the Title of Partnerſhips in the Ordinance of 1673, quoted at the end of the Preamble.

[h] Lucius Titius menſæ numulariæ, quam exercebat, habuit libertum præpoſitum. Is Gaïo Seio cavit in hæc verba Octavius Terminalis, rem agens Octavii Felicis Domitio Felici, ſalutem. Habes penes menſam patroni mei, denarios mille, quos denarios vobis numerare debeo pridie Kalendas Maias. Quæſitum eſt, Lucio Titio defuncto ſine hærede, bonis ejus venditis, an ex epiſtola jure conveniri Terminalis poſſit? Reſpondit, nec jure his verbis obligatum, nec æquitatem conveniendi eum ſupereſſe. Cum id inſtitoris officio, ſed fidem menſæ proteſtandam ſcripſiſſet. *l. ult. ff. de inſt. act.*

[i] De quo palàm proſcriptum fuerit, ne cum eo contrahatur, is præpoſiti loco non habetur. Non enim permittendum erit, cum inſtitore contrahere. Sed ſi quis nolit contrahi, prohibeat. Cæterùm qui præpoſuit, tenebitur ipſa præpoſitione. *l. 11. §. 2. & ſeq. ff. de inſt. act.*

SECT. IV.

Of Bills of Exchange.

Explanation of the Nature of Bills of Exchange.

THE Commerce of changing Money for Money, is carried on two ways. The firſt is, by changing the Species of Money for others of the ſame Value; ſuch as Pieces of Silver for Gold, and the Coin of one Country, for that of another. The ſecond is, where one gives Money to a Banker, or other Perſon, in one Place, that he may remit it to another place; whether it be within or without the Kingdom. And it is only this ſecond Kind of Commerce that we ſhall treat of here. For the other is only a bare ſort of Exchange, which is a Contract of which we have explained the Rules in its proper place. This Commerce of Remitting Money from one place to another, is carried on by the means of Bills of Exchange. And in order to the right underſtanding of the Nature and Rules of this Matter, we muſt conſider in this Commerce the ſeveral perſons concerned in it, and what paſſes with regard to every one of them.

There are commonly in the Commerce of Bills of Exchange, three perſons concerned, whom we ought to diſtinguiſh. There is he who wants to have his Money remitted from one place to another: Then he who receives it, as the Banker does, who undertakes to remit the Money: And thirdly, there is the perſon who delivers the Money in the place to which it is to be remitted, ſuch as the Banker's Correſpondent. And there is often a fourth perſon concerned, *viz.* he to whom the perſon who paid in the Money ſends his Order to receive it: And this fourth perſon may likewiſe transfer his Right to others, to whom he gives his Order. It may alſo ſo happen that there are only two perſons concerned, he who gives the Money, and he who receiving it in one place delivers it back in another place, to the ſame perſon who gave it him on that condition. We muſt in the next place conſider the different Covenants that paſs between thoſe Perſons.

The Covenant which paſſes between the perſon who gives the Money, and him who undertakes to remit it to another place, hath in it ſome particular Characters which diſtinguiſh it from all other Kinds of Covenants that may ſeem to have ſome reſemblance with it. It is not a Sale; for no body ſells or buys in it: and in the Contract of Sale there is a Seller, who gives ſomething elſe than Money, as there is a Buyer, who gives nothing but Money. It is not an Exchange; for thoſe who barter, or exchange any thing, give ſomething different from what they receive: and each party takes for his own uſe a Thing which he ſtands in need of, and gives away another Thing which he can ſpare; but in the Commerce of Bills of Exchange, he who gives his Money takes nothing in counter-change, and does not give one Thing, that he may receive another of a different kind; ſince he who received the Money may reſtore the ſame Individual Species which he received. It is not a *Depoſitum*; for he who has received the Money remains anſwerable for it, altho' it ſhould be loſt by an unforeſeen Accident. It is not a Loan; becauſe he who receives the Money does not borrow it. It would be a Letting and Hiring, if he who receives the Money did nothing elſe but barely carry it to the place whither it ought to be remitted, having a certain Allowance for carrying it, as is uſual for Meſſengers, Carriers, and Maſters of Stage-Coaches to do, who take the Charge of a Bag of Money, to carry it from one place to another, without anſwering for Accidents, and according to the Rules that have been explained in the Title of Letting and Hiring; but when he who receives the Money engages himſelf by a Bill of Exchange to remit it to another place; the Money remains in his hands, at his peril, and is no longer the Money of the perſon who gave it. Thus, it is not a Letting and Hiring; and conſequently, it is a Covenant, different from all the others, which conſiſts in the Commerce of tranſmitting Money belonging to a perſon, from one place to another: and which is diſtinguiſhed from all theſe other kinds of Covenants, by the Characters which we have juſt now remarked.

The Covenant that paſſes between the perſon who has received the Money, whether Banker or other perſon, and him to whom he gives Order to pay it in another place, is a Partnerſhip, if they are Partners and Correſpondents with one another: Or it is a Procuration, or Commiſſion, if the Correſpondent be only the Factor or Agent of the perſon who has received the Money. Thus, this Covenant hath its Rules, have been explained in the Title of Partnerſhip, and in that of Proxies, or Letters of Attorney.

The Covenant between the perſon who has paid the Money, and him to whom he gives his Order to receive it, is either an Aſſignment, if he ſubſtitutes him in his place, and transfers his Right to him; or it is a Procuration, if he gives him barely the power to receive the Money for his uſe. Thus, this Covenant hath its Rules in the Title of the Contract of Sale, where mention hath been made of Transfers and Aſſignments; or in that of Proxies.

There is laſtly another Covenant, which paſſes between him who paid down the Money, and the perſon who is ordered to anſwer the Bill of Exchange, when he accepts the Bill. And this Covenant is the ſame with that which paſſed between him who paid in the Money, and him who received it; for it only adds the Obligation of him who accepts the Bill, to that of the perſon who drew it: and it obliges the perſon who accepts the Bill, to pay it on the day, and in the place ſpecified in the Bill.

It will be eaſy to gather from theſe Remarks, what is the Nature of Bills of Exchange, and what are the Rules which we are to take from the other kinds of Contracts, in order to apply them to what is tranſacted in this. What remains therefore, would only be to explain the Rules that are proper and peculiar to Bills of Exchange. But ſince the detail of this matter is regulated by the Ordinance of 1673, under the Title of Bills of Exchange, and that of the Intereſt of Change and Rechange, it will be ſufficient to add to the Remarks already made, one ſingle Rule, which comprehends all that is in the *Roman* Law, touching this Matter, and that is agreeable both to the Law of Nature, and to our Practice.

We have not thought fit to make uſe here of the peculiar words that are uſed in the Commerce of Bills of Exchange, ſuch as the words *Drawer*, *Indorſer*, and *Accepter*, that we might make the things which we had to ſay, the more intelligible to beginners, by ſubſtituting in the room of theſe Terms of Art, which the Dealers in this Commerce are well enough acquainted with, the things themſelves which they ſignify.

The CONTENTS.

1. *The Engagement of thoſe who receive Money, in order to pay the ſame Sum in another place.*

I.

1. The Engagement of thoſe who receive Money, in order to pay the ſame Sum in another place.

BAnkers, and others, who receive Money on condition to deliver the ſame Sum at a certain time, and in another place, either themſelves, or by their Correſpondents, are obliged to pay the ſame, or cauſe it to be paid by others, at the time and place appointed: and if they fail to do it, they are anſwerable for all the Loſs and Damage which ſhall accrue thereby to him who gave the Money on this condition, according as the ſaid Damage is regulated by Law, or Cuſtom[a].

TITLE XVII.

Of BROKERS, or Drivers of BARGAINS.

Uſe of Brokers.

WE may add to all the different kinds of Covenants, a Matter which is as it were an Acceſſory to them; that is, the Uſe of Brokers, or Drivers of Bargains, whoſe Profeſſion is to bring Dealers together, and to mediate Bargains between thoſe who, according to their reſpective Wants, are deſirous, the one to ſell, and the other to buy; or to exchange, to let, or to hire, and to deal in any other Commerce, or Affair, of what nature ſoever it be.

This Uſe of Brokers is principally neceſſary in the Sea-Ports, and in Trading-Towns, to facilitate to Strangers, and others, the Commerce which they deal in, by addreſſing them to the perſons with whom their buſineſs is, making known the Intentions of the one to the other; ſerving as Interpreter, if there be occaſion: and rendring them the other Services which they are capable of doing by their Mediation. And there are even Publick Officers, whoſe

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[a] Si certo loco traditurum ſe quis ſtipulatus ſit, hac actione utendum erit. *l.* 7. §. 1. *ff. de eo quod cert. loc.* Is qui certo loco dare promittit, nullo alio loco, quàm in quo promiſit, ſolvere invito ſtipulatore poteſt. *l.* 9. *eod. v. l.* 1. *C. ubi conv. qui cert. loc. d. p.* See the Titles of the Ordinance of 1673, quoted at the end of the Preamble.

Functions oblige them to deal in this ſort of Buſineſs; ſuch as Brokers licenſed by Publick Authority.

This Matter belongs to this place, not only as a conſequence of Covenants, but alſo becauſe it contains a kind of Covenant which paſſes between Brokers, and thoſe who employ them, by which they regulate among themſelves the Conditions of the Uſe, and Conſequences of their Mediation in driving the Bargains.

SECT. I.

Of the Engagements of Brokers.

The CONTENTS.

1. *The Office of a Broker.*
2. *The lawful uſe of Brokage.*
3. *The Engagement of Brokers.*

I.

1. The Office of a Broker. THE Engagement of a Broker is like to that of a Proxy, a Factor, and other Agent; but with this difference, that the Broker being employed by perſons who have oppoſite Intereſts to manage, he is as it were Agent both for the one and the other, to negotiate the Commerce and Affair in which he concerns himſelf. Thus, his Engagement is twofold, and conſiſts in being faithful to all the Parties, in the Execution of what every one of them intruſts him with. And his Power is not to treat, but to explain the Intentions of both Parties, and to negotiate in ſuch a manner, as to put thoſe who employ him in a condition to treat together perſonally[a].

[a] Sunt enim hujuſmodi hominum ut tam in magna civitate officinæ. Eſt enim proxenetarum modus qui emptionibus, venditionibus, commerciis, contractibus licitis utiles, non improbabili more ſe exhibent. *l.* 3. *in f. ff. de proxenet.* Vel cujus alterius hujuſcemodi proxeneta fuit. *d. l.*

II.

2. The lawful uſe of Brokage. All Brokers have their Functions limited to ſuch Commerce and Affairs, as are lawful and honeſt, and to the ways allowed for treating them, and bringing them to a good Iſſue. And all Brokage in ſuch Commerce, and other Things as are unlawful, or by unlawful ways in ſuch Things as are permitted, forms no other Engagement than that of repairing the Harm that has followed upon it, and of undergoing the Penalties which ſuch unlawful Dealing may have deſerved, according to the quality of the Fact, and the circumſtances[b].

[b] Contractibus licitis, non improbabili more. *l.* 3. *in f. ff. de proxenet.* See the third and fourth Articles of the fourth Section of the Vices of Covenants.

III.

3. The Engagement of Brokers. Brokers are not reſponſible for the Events of the Affairs in which they intermeddle, unleſs they have been guilty of ſome Fraud, or ſome Fault which may be juſtly laid to their charge; neither are they bound to warrant the Sufficiency or Ability of the perſons to whom they procure Money, or any other Thing, to be lent, altho' they receive a Recompence for their pains, and ſpeak a good word in favour of the Borrower; unleſs there had been either an expreſs Covenant by which they are bound to warrant their own fact, or that it ſhould appear that they had been guilty of ſome Fraud in the matter[c].

[c] Si proxeneta intervenerit faciendi nominis, ut multi ſolent, videamus an poſſit quaſi mandator teneri? & non puto teneri. Quia hic monſtrat magis nomen, quam mandat: tametſi laudet nomen. Idem dico, etſi aliquid philanthropi nomine acceperit: nec ex locato conducto erit actio. Planè ſi dolo, & calliditate creditorem circumvenerit, de dolo actione tenebitur. *l.* 2. *ff. de proxenet.*

SECT. II.

Of the Engagements of thoſe who imploy Brokers.

The CONTENTS.

1. *Engagement of thoſe who imploy Brokers.*
2. *Salary of Brokers.*

I.

1. Engagement of thoſe who imploy Brokers. SEeing the perſons who imploy Brokers give them their Orders, they are obliged to ratify whatever is tranſacted purſuant to the Power which they gave; in the ſame manner as thoſe who appoint Proxies, or who give Commiſſions, and other Mandates[a].

[a] *See the firſt Article of the ſecond Section of Proxies.*

II.

2. Salary of Brokers. If the Broker does not give his Service for nothing, he who has imployed him owes him a Salary, either ſuch as has been agreed on, or according as it is regulated, if the Broker be an Officer who has his Salary taxed, or ſuch as ſhall be decreed him by the Judge, if the Parties do not agree the matter by mutual Conſent. For this Function being lawful, it ought to have its Salary, proportionable to the Nature of the Commerce, or other Affair; to the Quality of the Perſons, to the Time imployed about the Buſineſs, and to the Pains taken by the Broker [b].

[b] Proxenetica jure licito petuntur. *l. 1. ff. de proxenet.*

De proxenetico, quod & ſordidum, ſolent præſides cognoſcere. Sic tamen ut in his modus eſſe debeat, & quantitatis, & negotii in quo operula iſta defuncti ſunt, & miniſterium quale accommodaverunt. *l. 3. ff. de proxenet. v. l. 7. ff. mand. l. 1. C. eod. v. l. 15. ff. de præſc. verb.*

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TITLE XVIII.

Of the VICES of COVENANTS.

What are the Vices of Covenants.

By Vices in Covenants, is meant whatever is contrary to their Nature, and to their Eſſential Characters. Thus, it is an eſſential Character of all ſorts of Covenants, that the perſons who make them have ſufficient Reaſon, and Knowledge of what is neceſſary to be done towards forming the Engagement into which they are to enter [a]. And it is a Vice in a Covenant, if one of the Parties contracting has wanted this Knowledge; whether it were thro' a Natural Infirmity, as if he was a Madman, or thro' ſome Error, of the nature of thoſe of which we ſhall have occaſion to ſpeak hereafter.

[a] *See the ſecond Article of the ſecond Section of Covenants.*

Thus, it is an eſſential Character of all Covenants, that they be made with Freedom and Liberty [b]: and it is a Vice in a Covenant, if one of the contracting Parties has been forced to it by any violence.

[b] *See the ſame ſecond Article of the ſecond Section of Covenants.*

Thus, it is another eſſential Character of all Covenants, that the Treaty be carried on with Sincerity and Integrity [c]; and it is a Vice in a Covenant, if one Party cheats the other by ſome Fraud, or Surprize.

[c] *See the eighth Article of the ſame ſecond Section of Covenants, and the twelfth Article of the third Section of the ſame Title.*

Thus, it is alſo an eſſential Character of all Covenants, that they contain nothing that is unlawful, and diſhoneſt [d]; and it is a Vice in a Covenant, if any thing is inſerted in it contrary to Law, or Good Manners.

[d] *See the firſt Article of the ſecond Section of Covenants.*

Thus, in fine, it is an eſſential Character of all Covenants, that the perſons who make them be capable of contracting [e]; and the Covenant is vicious, if one of the contracting Parties was uncapable of the Engagement into which he has entred.

[e] *See the third and ſubſequent Articles of the fifth Section of Covenants.*

The Vices of Covenants have a different effect, according as they are higher or lower in degree.

Theſe Vices of Covenants may be found in them in different degrees; and according as they are in a higher or lower degree, they annul, or do not annul the Covenants, and they engage, or do not engage the Parties to the Conſequences of Damages.

Thus, the want of Knowledge may be ſuch that it annuls the Covenant, or ſuch that it does not hinder it from ſubſiſting. As for Example, if a Legatee, to whom ſomething had been bequeathed by a Codicil which proved to be null, treats about his Legacy, and gives it up to the Executor, not knowing that there was a ſecond Codicil which confirmed the Legacy, and which was valid; this Legatee would not loſe the Right he had by this ſecond Codicil, which he knew nothing of; and the Treaty would be null, becauſe of the want of the Knowledge of this Fact. But if the want of Knowledge does not hinder the perſon from knowing well enough what it is he obliges himſelf to, this defect will not be ſufficient to annul the Covenant. Thus, he who has treated with his Co-heirs, about their Portions of the Inheritance, while they were as yet all of them ignorant of ſome Debts, or other Burdens, that come to be diſcovered afterwards, cannot pretend that this want of Knowledge is ſufficient to annul the Treaty, when thoſe Debts and Burdens come to light. For it was not upon an exact and perfect Knowledge of all the particular Rights and Charges of the Inheritance that his Engagement was founded; but it ſuffices to confirm it, and to make it irrevocable, that he knew that an Inheritance conſiſts of Rights, and of Charges, which are often unknown even to the moſt clear-ſighted Heirs; and that under the Incertainty of more or leſs which could not be known, he has taken his chance of loſing, or gaining, in a thing that was altogether uncertain.

Thus the want of Liberty may be ſuch as that it annuls the Covenant, as if one of the covenanting Parties was carried away by Force, and threatned with death, if he did not engage himſelf. But if he complains only that the Dignity or Authority of the Perſon with whom he treated made ſuch Impreſſions on him, as to oblige him to give a Conſent, which he would not have done without that circumſtance; theſe ſorts of Impreſſions not being accompanied either with Force, or Threatning, leave the Liberty entire, and do not make the Covenant void.

Thus Deceit is not always ſuch that it ſufficeth to annul the Covenants; for it has only this effect when one makes uſe of ſome unlawful means, with a deſign to cheat, and engages thereby the perſon who is cheated to give a conſent which he would not have given, if he had known any thing of the trick that is put upon him. As, if one who has in his cuſtody the Title of a Service due from his own Eſtate, conceals the Title, and tranſacts with the perſon to whom he owes the Service, and gets him to deſiſt from claiming it; this Deceit will annul the Tranſaction. But if the Deceit is not that which engageth the Party to contract, and if he might have guarded himſelf againſt any cheat, it may be ſuch as may not be ſufficient to annul the Covenant; as if he who ſells a Horſe, does not tell the Buyer that he is apt to ſtumble, or does not anſwer the Spur, or has any other ſuch like Faults which are not ſufficient to make the Sale void. For this kind of Deceit is not reſtrained, no more than the Injuſtice of thoſe who ſell dearer, or buy cheaper than the true Value; unleſs the Price were regulated, as it is in ſome Things by the Civil Policy, or by the common Cuſtom of Trade. But theſe caſes excepted, it is not poſſible to fix the juſt Point between what is over, and what is under the true Value. Hence it is, that it is ſaid in a Law of the *Romans*, that it is naturally lawful to ſell dearer, and to buy cheaper than the true Value; and in this manner to cheat one another[f]. So the Law expreſſes it; the meaning of which is, that the Advantage which the Seller, or Buyer, may have one over the other as to the Price, either is not in effect a Cheat, or if it be attended with no other circumſtances, it goes unpuniſhed[g].

Thus, the Incapacity of Perſons may be ſuch that it annuls all the Covenants they engage in, ſuch as that of a Madman; or only ſuch as renders them incapable of ſome Covenants, but not of all without diſtinction; ſuch as that of married Women in ſome Provinces, and of Minors, who cannot engage themſelves, unleſs the Obligation turn to their advantage.

It is only unlawful Covenants, and ſuch as are contrary to Law, and Good Manners, that are wholly null without any Temperament; for this Vice cannot be tolerated in any degree.

The Vices of Covenants which ſuffice to annul them have two effects. One is, to give occaſion for diſſolving the Covenant, if the perſon who complains of it, deſires that it may be diſſolved. And the other is, to oblige him who has uſed ſome unfair means, to repair the Damage which he may have occaſioned, whether the Covenant be diſſolved, or be allowed to ſubſiſt. And ſometimes likewiſe the Vices which are not ſufficient to annul the Covenants, may give occaſion for Reparation of Damages, according to the circumſtances.

We ſhall ſay nothing here of Covenants which are vicious becauſe of Uſury, and which are called Uſurious Contracts; ſuch as the Obligations for the Loan of Money, wherein the Intereſt is accumulated to the Capital; the Contracts which are made only to palliate Uſury, and to give the Enjoyment of Fruits for Money lent, and others of the like nature. For ſeeing, as has been obſerved in the Title of the Loan of Money, that Uſury is not prohibited by the *Roman* Law[h], this matter does not properly come within the deſign of this Work, and it hath its Rules in the Laws of the Church, in the Ordinances, in the Cuſtoms, and in our Uſage.

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[f] Quemadmodum in emendo & vendendo naturaliter conceſſum eſt, quod pluris ſit, minoris, quod minoris ſit, pluris vendere: & ita invicem ſe circumſcribere: ita in locationibus quoque, & conductionibus juris eſt. *l.* 22. §. *ult.* *ff.* *loc.*

[g] *See the Beginning of the third Section, and the fifth Article of the fifth Section of the Contract of Sale, and the ſecond Article of the third Section of this Title.*

[h] *V. l.* 1. §. 3. *l.* 11. §. 1. *ff. de pign. l.* 39. *ff. de pign. act. l.* 14. *C. de uſur.*

As to the other Vices of Covenants, we ſhall reduce ſuch as ſhall be treated of under this Title to four kinds. The firſt is, of thoſe which are oppoſite to the Knowledge that is neceſſary for contracting; the ſecond is of thoſe which encroach on Liberty; the third kind, is of ſuch Vices as are contrary to Sincerity and Integrity; and the fourth, is of ſuch as are contrary to Law, and Good Manners: And theſe ſhall be the ſubject matter of the four Sections into which this Title ſhall be divided.

We ſhall not ſpeak here of the Vice which proceeds from the Incapacity of the Perſons; for as there are different Incapacities, of Minors, of married Women, who in ſome Provinces cannot bind themſelves at all, and in others not without the conſent of their Huſbands, of Prodigals who are debarred from the Management of their own Eſtates, of Mad-men, and others; every one of theſe Incapacities ſhall be explained in its proper place. And as to this Matter, the Reader may conſult the Title of Perſons, the fifth Section of the Title of Covenants, the Title of Tutors, that of Curators, as alſo that of Dowries.

SECT. I.

Of Ignorance, or Error in point of Fact, or Law. *

The CONTENTS.

1. *Definition of Error in Fact.*
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* *See concerning this Matter the firſt Section of the Title of thoſe who receive what is not due to them.*

I.

1. Definition of Error in Fact. ERror, or Ignorance of Fact, conſiſts in not knowing a thing which is. As if one who is named Executor of a Will, knows nothing of the Will: or if he knows of the Will, and is ignorant of the death of the Teſtator[a].

[a] Si quis neſciat deceſſiſſe eum, cujus bonorum poſſeſſio defertur. *l.* 1. §. 1. *ff. de jur. & fact. ign.* Si neſciat eſſe tabulas, in facto errat. *d. l.* §. *ult.*

II.

2. Definition of Error in Law. Error, or Ignorance of Law, conſiſts in not knowing what a Law preſcribes. As if a Donee is ignorant that the Donation ought to be regiſtred: or if an Heir, or Executor, is ignorant of the Rights that belong to him by virtue of that Quality[b].

[b] Si ex aſſe hæres inſtitutus non putet ſe bonorum poſſeſſionem petere poſſe, ante apertas tabulas, (in jure errat.) *l.* 1. §. *ult. ff. de jur. & fact. ign.*

III.

3. One cannot be ignorant of the Law of Nature. Ignorance of Law is to be underſtood only of the Poſitive Law, and not of the Law of Nature, which no body can be ignorant of[c].

[c] Nec in ea re ruſticitati venia præbeatur, *cùm naturali ratione* honor hujuſmodi perſonis *debeatur. l.* 2. *C. de in jus voc.* See the ninth Article of the firſt Section of the Rules of Law.

IV.

4. Difference between him who errs in Fact, and him who errs in Law. He who is ignorant that a certain Right is fallen to him, may be in this Ignorance, either by an Error in Fact, or an Error in Law. For, if for Example, he be ignorant of his Relation to the perſon whoſe Succeſſion is fallen to him, he is ignorant of his Right, but thro' an Ignorance of the Fact: And if knowing that he is related to the deceaſed, he thinks himſelf excluded by a nearer Relation, not knowing that the Right of Repreſentation calls him to the Succeſſion, it is thro' an Error in point of Law that he is ignorant of his Right to ſucceed[d].

[d] Interdùm in jure, interdùm in facto errat. Nam ſi liberum ſe eſſe, & ex quibus natus ſit ſciat, jura autem cognationis habere ſe neſciat, in jure errat. At ſi quis fortè expoſitus, quorum parentum eſſet, ignorat, fortaſſe & ſerviat alicui putans ſe ſervum eſſe, in facto magis quam in jure errat. *l.* 1. §. 2. *ff. de jur. & fact. ign.*

V.

5. Error of Minors, whether in Fact, or Law, does them no prejudice.

Minors not having acquired by Experience ſuch a ſolid and perfect Knowledge, as is neceſſary for diſcerning the conſequences of the Engagements into which they may chance to enter; they are relieved from the Covenants which turn to their prejudice, whether they err in matter of Law, or in Fact[e]. In the ſame manner as they have Relief, when they happen to be aggrieved in any thing by reaſon of their weakneſs, or thro' any want of Conduct; as ſhall be explained in the Title of the Reſciſion of Contracts and Reſtitution of things to their firſt eſtate.

[e] Minoribus viginti quinque annis jus ignorare permiſſum eſt. *l. 9. ff. de juris & facti ign.*

VI.

6. Error of perſons come to full Age, in matter of Fact, or Law, has divers effects.

Perſons come to full Age, who are at liberty to enter into all ſorts of Covenants, even altho' they be to their prejudice, cannot always, as Minors, be relieved againſt the Damage which they may have ſuſtained by their Covenants, thro' Ignorance of the Law, or Error in Fact. But in ſome caſes they may have Relief, and in others they muſt bear with the Loſs[f]. As ſhall be explained in the following Rules.

[f] In omni parte error in jure, non eodem loco quo facti ignorantia haberi debebit. *l. 2. ff. de jur. & fact. ign.*

VII.

7. Of Error in a Fact, which is the only Cauſe of the Covenant.

If the Error in Fact be ſuch, that it is evident, that he who has erred has conſented to the Covenant, only becauſe he was ignorant of the Truth of a Fact, ſo that the Covenant happens to have no other foundation than a Fact contrary to the Truth which was unknown; ſuch an Error will be ſufficient to annul the Covenant, whether the Party covenanting has engaged himſelf in any Loſs, or whether he has neglected to make uſe of a Right that was fallen to him. For not only does the Covenant prove to be without a Cauſe[g], but it has for its Foundation only a falſe Cauſe. Thus, if it happens that the Heir, or Executor of a Debtor, who in his lifetime had paid the Debt, of which the Acquittance cannot be found, obliges himſelf to the Heir, or Executor of the Creditor, he being ignorant of the payment already made; the Obligation will be without effect, whenever the Acquittance is found. Thus, if it happens that two Executors dividing between them a Succeſſion, the one leaves to the other Goods that were bequeathed to him by a Codicil, and that afterwards this Codicil proves to be forged; he may demand a new Partition[h].

[g] *See the fifth Article of the firſt Section of Covenants.*

[h] Non videntur qui errant conſentire. *l. 116. §. 2. ff. de reg. jur.*

Error facti, ne maribus quidem in damnis, vel compendiis obeſt. *l. 8. ff. de jur. & fact. ign.*

Regula eſt, facti ignorantiam non nocere. *l. 9. eod.* Eleganter Pomponius quærit, Si quis ſuſpicetur tranſactionem factam vel ab eo cui hæres eſt, vel ab eo qui procurator eſt: & quaſi ex tranſactione dederit, quæ facta non eſt, an locus ſit repetitioni? & ait repeti poſſe. Ex falſa enim cauſa datum eſt. *l. 23. ff. de condict. ind.*

Si poſt diviſionem factam teſtamenti vitium in lucem emerſerit, ex his quæ per ignorantiam confecta ſunt, præjudicium tibi non comparabitur. *l. 4. C. de jur. & fact. ign. l. 3. §. 1. ff. de tranſ. l. 12. in fine eod. l. 6. eod.* See the following Article.

VIII.

8. If the Error in Fact is not the only Cauſe of the Covenant.

If the Error in Fact has not been the only Cauſe of the Covenant, and if it hath ſome other Cauſe independent on the Fact which was unknown to the Party covenanting, this Error will not hinder the Covenant from having its full effect. Thus, they who tranſact about all their Affairs in general, cannot complain of having erred in the Fact of one of them in particular. Thus the Heir who has ſold the Inheritance, will not be relieved againſt the Sale, becauſe he did not know all the Effects that belonged of the Inheritance[i].

[i] Sub prætextu ſpecierum poſt repertarum generali tranſactione finita, reſcindi prohibent jura. *l. 29. C. de tranſ.*

IX.

9. Ignorance of Facts is preſumed.

Ignorance of Facts is preſumed, when there is no proof to the contrary. But this Preſumption, which is always natural in Facts that do not concern us, does not take place in things which concern us. For every one is preſumed to know what is his own proper act and deed[l].

[l] In alieni facti ignorantia tolerabilis error eſt. *l. ult. in f. ff. pro ſuo. l. 2. ff. de jur. & f. ign.* Plurimum intereſt, utrùm quis de alterius cauſa & facto non ſciret, an de jure ſuo ignorat. *l. 3. eod.*

X.

10. Error cauſed by Fraud.

If it is by the fraud of one of the contracting Parties that the other has been cheated by an Error of Fact; as if one concealed a Title, or Deed, belonging to the other, the Covenant will be made void: and he who has concealed this Title will be liable to make good all the Loſs and Damage that ſhall have enſued upon the ſaid Fraud[m].

[m] Sane ſi per ſe vel per alium ſubtractis inſtrumentis, quibus veritas argui potuit, deciſionem litis extorſiſſe probetur; ſiquidem actio ſupereſt, replicationis auxilio doli mali, pacti exceptio removetur: ſi verò jam perempta eſt, intra conſtitutum tempus tantùm actionem de dolo potes exercere. *l.* 19. *C. de tranſ.*

XI.

11. *We are to judge of the effect of the Error by the circumſtances.*

In all the caſes where one of the contracting Parties complains of an Error in Fact, we may judge of it by the foregoing Rules, according to the circumſtances; ſuch as the quality and conſequence of the Error: the regard which the Contracters have had to the Fact which appeared to them to be true, and which proved to be otherwiſe: the effect which the Truth that was hidden would have produced, had it been known to them: the eaſineſs or difficulty that might have been in finding out the Truth, if it has been concealed by the fraud of one of the Parties: if what one pretends Ignorance of was the fact of the perſon who pleads Ignorance: or if it be a matter which he may very naturally be preſumed not to know: if the Error is ſuch that it was natural for him to fall into it, or if it is ſo groſs that it ought not to be preſumed[n]: and according to the other circumſtances, which may determine the Judge to receive the Complaint of Error, or to reject it.

[n] In omni parte error in jure non eodem loco, quo facti ignorantia haberi debebit. Cum jus finitum & poſſit eſſe, & debeat: facti interpretatio plerumque etiam prudentiſſimos fallat. *l.* 2. *ff. de jur. & f. ign.* Plurimùm intereſt, utrùm quis de alterius cauſa & facto non ſciret, an de jure ſuo ignorat. *l.* 3. *eod.* Quia in alieni facti ignorantia tolerabilis error eſt. *l. ult. in f. ff. pro ſuo.* Nec ſupina ignorantia ferenda eſt factum ignorantis, ut nec ſcrupuloſa inquiſitio exigenda. Scientia enim hoc modo æſtimanda eſt, ut neque negligentia craſſa, aut nimia ſecuritas ſatis expedita ſit, neque delatoria curioſitas exigatur. *l.* 6. *eod. l.* 3. §. 1. *eod. l.* 9. §. 2. *eod.*

XII.

12. *Error of Computation.*

The Error of Computation, is a Miſtake when in reckoning we put one Number inſtead of another which was the true one, and which we ſhould have ſet down, had it not been for that Miſtake. Which is a kind of Error in Fact different from all other Errors, in that it is always repaired[o]. For it is always certain, that the Parties intended only to ſet down the true Number, and they could not make another Number ſupply its place.

[o] Errorem calculi ſive ex uno contractu, ſive ex pluribus emerſerit, veritati non afferre præjudicium, ſæpè conſtitutum eſt. *l. un. C. de err. calc.*

XIII.

13. *Effect of the Error in Law.*

An Error in Law is not ſufficient, as an Error in Fact, to annul Covenants[p]. For the ableſt men alive may be ignorant of Facts[q]; but no body is excuſed from knowing the Laws, and perſons are ſubject to them, altho' they be ignorant of them[r]. This Error, or Ignorance of the Law, hath its different Effects in Covenants, according to the following Rules.

[p] In omni parte error in jure non eodem loco, quo facti ignorantia haberi debebit. *l.* 2. *ff. de jur. & fact. ign.*

[q] Facti interpretatio plerumque etiam prudentiſſimos fallit. *d. l.* 2.

[r] *See the ninth Article of the firſt Section of the Rules of Law.*

XIV.

14. *If the Error in Law be the only Cauſe of the Covenant.*

If the Ignorance, or Error in Law be ſuch that it is the only Cauſe of a Covenant, in which one obliges himſelf to a thing which he was not bound to otherwiſe, and there be no other Cauſe on which the ſaid Obligation can be founded; the Cauſe proving to be falſe, the Obligation will be null. Thus, for Example, if he who purchaſes a Fief ſituated in a Cuſtom where no Fine is payable for the Purchaſe, goes to the Lord of the Mannor, and compounds with him for the Fine, which he ſuppoſed to be due; this Covenant, which has no other foundation beſides this Error alone, will not oblige the Purchaſer to pay the Fine which was not due[ſ].

[ſ] Omnibus juris error in damnis amittendæ rei ſuæ non nocet. *l.* 8. *ff. de jur. & fact. ignor.* See the following Article.

It is to be remarked with reſpect to the Example mentioned in this Article, and that of the ſixteenth Article, that the Ignorance of the Diſpoſitions of the Cuſtoms, is an Ignorance of Law, as much as the Ignorance of the Ordinances and other Laws. For altho' the Diſpoſitions of Cuſtoms be conſidered as Facts, becauſe being only part of the Poſitive Law, and different in different places, it is natural that they be not all known, even to the moſt knowing perſons: yet nevertheleſs they have the force of Laws, which have their effect with regard to thoſe that are ignorant of them, as well as thoſe who know them.

XV.

15. *Another effect of the foregoing Rule.*

The foregoing Rule not only takes place in preſerving the perſon who errs from ſuffering any Loſs, as in the caſe there explained; but it takes place likewiſe to hinder him from being deprived of a Right which he did not know belonged to him. Thus, for Inſtance, if the Nephew of an abſent perſon takes care of his Affairs, and the abſent perſon happening to die, the Brother of the deceaſed, as his Heir, and next of Kin, demands of the Nephew an account of his Intromiſſions with the Effects of the deceaſed; the Nephew gives an Account, and reſtores to his Uncle all that remained in his hands belonging to the ſaid Succeſſion, for want of knowing that he ſucceeded likewiſe to the deceaſed, by the Right of Repreſentation of his Father, who was Brother to the deceaſed; he may afterwards, being informed of his Right, demand his part of the Succeſſion[t].

XVI.

16. A Caſe wherein the Ignorance of the Law is of no avail. If by an Error, or Ignorance, of the Law, one has done himſelf a prejudice, which cannot be repaired without breaking in upon the Right of another perſon; this Error will make no change or alteration to the prejudice of that other perſon. Thus, for Example, if he who has been born and bred in a Country where perſons are reputed to be Majors at the age of Twenty years, treats in another Country, where the Laws continue the Minority to the Age of five and twenty, with one who is under five and twenty years, but whom he knows to be upwards of twenty, and therefore believes him to be Major; or if he lends him Money, this Error will not hinder the ſaid Minor from being reſtored, if there be ground for it. For it is a Right which belongs to him by virtue of a Law, the effect of which is not changed to his prejudice by that other perſon's Ignorance. And if the Money lent has not been profitably laid out, the Error of the Lender will not excuſe him from bearing the Loſs. Thus, he who had given an Eſtate in Land in payment in a Tranſaction, hoping to have it back again, becauſe of his being wronged in more than the half of the real Value, could not under this pretext recover this Eſtate, which his adverſary had acquired by a Title which the Law does not allow to be annulled on account of any ſuch Damage ſuſtained[u].

XVII.

17. If the Error in Law is not the only Cauſe of the Covenant. If the Error in Law has not been the only Cauſe of the Covenant, and that he who has done himſelf ſome prejudice may have had ſome other Motive, the Error will not be ſufficient to annul the Covenant. Thus, for Example, if an Executor treats with a Legatee, and pays him, or obliges himſelf to pay him his whole Legacy, not knowing any thing of the Right which he had to detain part of it, becauſe the Teſtator had bequeathed beyond what he had Right to diſpoſe of, either by Law, or Cuſtom; this Covenant will not be null. For this Executor may perhaps have obliged himſelf to pay the whole Legacies, out of a Motive of executing fully and entirely the Will of the deceaſed to whom he ſucceeds. And it would be the ſame thing with reſpect to the Heir, or Executor of a Donor, who had executed or ratified a Donation, which he did not know to be null for want of being Regiſtred[x].

SECT. II.

Of Force.

The Nature and Effects of Force upon Liberty. TO know what is the Effect of Force in Covenants, and what degree it ought to be of to make them void; it is neceſſary that we know what degree of Liberty is requiſite in the making of Covenants: and that we obſerve, that there is a great difference between the character of the Liberty that ſufficeth for rendring our actions good or bad, and the character of the Liberty that is neceſſary in Covenants.

In the caſe of Liberty to do Good or Evil, to commit a Crime, an Injuſtice, a bad Action, Violence may well weaken, but it does not altogether deſtroy that Liberty. And he who yielding to Force commits a Crime, chuſes to forſake his Duty that he may avoid an Evil of another kind. So that notwithſtanding the Force, he commits the Evil freely, and of choice. But in Covenants, when one of the Parties has been forced to conſent to it, the condition in which his Liberty was, did not leave him the uſe of it that was neceſſary for giving a Conſent which might bind him, and render the Covenant valid.

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[t] Juris ignorantia, ſuum petentibus, non nocet. *l. 7. ff. de jur. & fact. ign.* Condictionem earum rerum, quæ ei ceſſerunt, quem cohæredem eſſe putavit, qui fuit hæres, competere dici poteſt. *l. 36. in f. ff. fam. erciſc.*

[u] Si quis patremfamilias eſſe credidit, non vana ſimplicitate deceptus, *nec juris ignorantia*, ſed quia publicè paterfamilias pleriſque videbatur: ſic agebat, ſic contrahebat, ſic muneribus fungebatur: ceſſabit Senatuſconſultum. *l. 3. ff. de Senatuſc. Maced.*

It appears by this Law, that if this Creditor had erred in Law, he had loſt his Debt. See the Remark on the fourteenth Article.

[x] Is qui ſciens ſe poſſe retinere, univerſum reſtituit, condictionem non habet: quin etiam ſi jus ignoraverit, ceſſat repetitio. *l. 9. C. ad leg. falc.* Si quis jus ignorans, lege falcidia uſus non ſit, nocere ei, dicit Epiſtola Divi Pii. *l. 9. §. 5. ff. de jur & fact. ign.*

The difference of theſe ways in which Force is conſidered with reſpect to the Liberty neceſſary in Actions, and with reſpect to the Liberty which one ought to have when he enters into a Covenant, conſiſts in this, that in Actions, when the caſe is about the not committing of a Crime, either in matters of Faith, or in Morals, he who in ſuch a conjuncture yields to Force, and commits Evil, might and ought rather to have ſuffered the Evils with which he was threatned, than fail in what he owed to Truth, or Juſtice; the Love of which, had he been ſincere in it, would have enabled him to ſtand out againſt all Terrors whatſoever, rather than abandon ſo eſſential a Duty. Thus the Force has not quite deſtroyed his Liberty, but weakening it, has engaged him to make a bad uſe of it, and to chuſe freely to commit an evil Action, that he might avoid ſuffering. But when the caſe is about a Force that does not compel us to the breach of any Duty, but which puts us only under the neceſſity of bearing a Loſs; he who finds himſelf in ſuch a Conjuncture, that he muſt either abandon his Intereſt, or, for the Preſervation of it, expoſe himſelf to the effects of Violence, is in ſuch a condition that he cannot uſe his Liberty in chuſing to preſerve what others have a mind to make him loſe. For altho' it be true, that he might, if he pleaſed, ſuffer the Evil with which he is threatned; yet Reaſon determines his Liberty to the Choice of bearing the Loſs, and freeing himſelf by this leſſer Evil from one much greater, which his Reſiſtance would have drawn upon him. Thus it may be ſaid, that he is not free, and that he is forced[a]; ſeeing it would not be a prudent uſe of his Liberty, if he ſhould chuſe to reſiſt the Violence, and to expoſe himſelf to Death, or other Evils, that he might preſerve his Goods. For in ſhort, whatever is againſt Prudence, is contrary to the right uſe of Liberty; ſeeing the right uſe of it is inſeparable from Reaſon, as the Will is inſeparable from the Underſtanding.

It is eaſie to judge from this Remark on the Liberty neceſſary in Covenants, that if the Violence be ſuch that Prudence and Reaſon oblige him who is aſſaulted to abandon ſome part of his Goods, ſome Right, or other Intereſt, rather than make Reſiſtance; the conſent which he gives to a Covenant that ſtrips him of his Goods, to ward off the Danger that threatens him, has not the Character of the Liberty that is neceſſary for entring into Engagements, and whatever he does in this condition againſt his Intereſt, ought to be annulled.

What Force annuls Covenants.

It is farther to be obſerved on the ſame ſubject of the Effect of Force in Covenants, that all manner of Force, all Violence, all Threatnings, are unlawful: and that the Law condemns not only ſuch as expoſe the Life to Danger, or the Body to any Torment; but alſo all ſorts of bad Treatment, and all forcible means. And in fine it is to be remarked, that ſeeing all perſons have not the ſame Courage to reſiſt Violence and Threatnings, and that many are ſo weak and fearful that they cannot ſtand out againſt the leaſt Impreſſions; we ought not to limit the Protection of the Laws againſt Threatnings and Violence, ſo as to reſtrain only ſuch Acts as are capable to overcome perſons of the greateſt Courage and Intrepidity. But it is juſt likewiſe to protect the weakeſt, and moſt fearful; and it is chiefly on their account that the Laws puniſh all Acts of Violence and Oppreſſion[b]. Thus as the Laws puniſh thoſe who by ſome Deceit, or Surprize, take advantage of the ſimplicity of others, altho' the Deceit does not amount to a direct Forgery, or other Exceſs[c]; ſo likewiſe with much greater reaſon do the Laws chaſtiſe thoſe who by any violent means ſtrike Terror into the minds of weak perſons, altho' the Violence do not go ſo far as to put the Life in danger.

It follows from all theſe Principles, that if a Covenant has been preceded by any Act of Force, any Violence, any Threatning, that may have obliged the perſon who complains of it to give a conſent contrary to Juſtice, and to his own Intereſt; it will not be neceſſary for obtaining a Redreſs, to prove that his Life was in danger, or his Perſon expoſed to any other great Violence. But if it ſhall appear by the circumſtances, of the Quality of the Perſons, of the Injuſtice of the Covenant, of the Condition in which the perſon was who brings the Complaint, of the Acts of Violence, or of the Threatnings, that the Party gave his conſent, barely becauſe of the Force he was under; it will be juſt to annul a Covenant, which has no other Cauſe or Foundation beſides the Force that has been uſed againſt him whom they have engaged in a Covenant, contrary to Juſtice, and to his own Intereſt.

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[a] Quamvis, ſi liberum eſſet, noluiſſem, tamen coactus volui, ſed per prætorem reſtituendus ſum. *l.* 21. §. 5. *ff. quod. met. cauſ.*

[b] Or in a thing taken away by violence, &c. *Levit.* vi. 2. xix. 13.

[c] Ne vel illis malitia ſua ſit lucroſa, vel iſtis ſimplicitas damnoſa. *l.* 1. *ff. de dolo.*

We have made here all theſe Remarks, in order to eſtabliſh the Natural Principles of the Rules relating to this Matter; and to give a reaſon why we have not inſerted among the Rules of this Section, that Rule of the *Roman* Law, which ſays, that we are not to reckon as Violences ſufficient to annul a Conſent, thoſe which can only influence weak and fearful perſons; but that the Violence muſt be ſuch as to ſtrike a Terror capable of intimidating perſons of the greateſt Courage[d]; which another Rule reduces to the Danger of Life, or Torment of the Body[e]: For it is moſt juſt and reaſonable, and likewiſe agreeable to our Practice, that all manner of Violence being unlawful, we ſhould reſtrain even thoſe Acts of it that do not go to ſo great Exceſs, and that Reparation ſhould be made of all the Prejudice occaſioned by acts of Violence which engage the weakeſt perſons to do a thing that is unjuſt, and contrary to their Intereſt. Which is founded likewiſe on ſome Rules of the *Roman* Law, by which all Force is declared unlawful, and all Acts of Violence prohibited, even altho' they are imployed to procure one's ſelf Juſtice[f]. And theſe Rules are ſo eſſential a part of the Law of Nature, that there would be no Order in the Society of Mankind, were not even the leaſt Acts of Violence repreſſed.

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1. *Definition of Force.*
2. *Effect of Force in Covenants.*
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9. *Counſel and Authority do not impoſe Force.*
10. *An Order of a Court of Juſtice is not Force.*

I.

1. Definition of Force.

BY Force is meant all unlawful Impreſſions which move any one againſt his will, for fear of ſome great Evil, to give a conſent which he would not give, if his Liberty were free from the ſaid Impreſſion[a].

II.

2. Effect of Force in Covenants.

All Covenants to which one of the Parties has conſented only thro' Force, are null: and the Party who has made uſe of Force will be puniſhed for it according to the quality of the Fact, and be bound to make good all the Loſs and Damage which he ſhall have occaſioned[b].

III.

3. Diveri ways of uſing Force.

Altho' the Violences offered, and the Menaces that are uſed, do not go to that Extremity as to put the Life in danger, yet it other unlawful means are uſed, ſuch as the keeping one ſhut up till he grants what is demanded of him: if one expoſes another to the hazard of ſome Evil; the reaſonable fear of which obliges him to give a forced Conſent; the ſaid Conſent will be without effect; and the perſon who has uſed ſuch unfair means to obtain it, will be condemned to make good the Damage, and to undergo other Puniſhments which he ſhall have deſerved according to the circumſtances. Thus, if he into whoſe hands were depoſited Papers, or other Things, denies that the ſaid Things were left with him; and threatens to burn what he is bound to reſtore, unleſs the perſon to whom the Things depoſited belong give him a Sum of Money, or other thing, which he unjuſtly demands; whatever ſhall have been conſented to in this manner, will be annulled: and the Depoſitary will be puniſhed for his Treachery, and for this Exaction, according to the circumſtances[c].

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[d] Metum autem non vani hominis, ſed qui meritò & in hominem conſtantiſſimum cadat, ad hoc edictum pertinere dicemus. *l. 6. ff. quod. met. cauſ.*

[e] Nec tamen quilibet metus ad reſcindendum ea quæ conſenſu terminata ſunt, ſufficit: ſed talem metum probari oportet, qui ſalutis periculum, vel corporis cruciatum contineat. *l. 13. C. de Tranſ. l. 8. C. de reſc. vend.*

[f] Extat enim decretum Divi Marci in hæc verba: optimum eſt ut ſi quas putas te habere petitiones, actionibus experiaris. Cùm Marcianus diceret, vim nullam feci: Cæſar dixit: tu vim putas eſſe ſolùm ſi homines vulnerentur? vis eſt, & tunc quoties quis id quod deberi ſibi putat, non per judicem repoſcit. Quiſquis igitur probatus mihi fuerit rem ullam debitoris vel pecuniam debitam, non ab ipſo ſibi ſponte datam, ſine ullo judice temerè poſſidere, vel accepiſſe, iſque ſibi jus in eam rem dixiſſe; jus crediti non habebit. *l. 13. ff. quod met. cauſ.*

[a] Vis eſt majoris rei impetus, qui repelli non poteſt. *l. 2. ff. quod. met. cauſ.* Vim accipimus atrocem, & eam quæ adversùs bonos mores fiat. *l. 3. §. 1. eod.* Metum accipiendum Labeo dicit, non quemlibet timorem, ſed majoris malignitatis. *l. 5. eod.* Propter neceſſitatem impoſitam, contrariam voluntati. *l. 1. eod.*

[b] Ait prætor, quod metus cauſa geſtum erit, ratum non habebo. *l. 1. ff. quod met. cauſ.* Propter neceſſitatem impoſitam, contrariam voluntati. *d. l.* Si quis vi compulſus aliquid fecit, per hoc Edictum reſtituitur. *l. 3. eod.* Violentia factas & extortas metu venditiones, & cautiones, vel ſine pretii numeratione, prohibeat præſes provinciæ. *l. 6. ff. de of. praſ.* Nihil conſenſui tam contrarium eſt, qui & bonæ fidei judicia ſuſtinet, quàm vis atque metus: quam comprobare contra bonos mores eſt. *l. 116. ff. de reg. jur.*

All ſort of Force, all Violence, and Oppreſſion, are prohibited by ſeveral Ordinances.

[c] Si is accipiat pecuniam qui inſtrumenta ſtatus mei interverſurus eſt, niſi dem, non dubitatur quin maximo metu compellat. *l.* 8. §. 1. *ff. quod met. cauſ.* Propter neceſſitatem impoſitam, contrariam voluntati, metus inſtantis, vel futuri periculi cauſa, mentis trepidatione. *l.* 1. *eod.* Qui in carcerem quem detruſit, ut aliquid ei extorqueret, quidquid ob hanc cauſam factum eſt, nullius momenti eſt. *l.* 22. *eod.* Si fœnerator inciviliter cuſtodiendo athletam, & à certaminibus prohibendo, cavere compulerit ultra quantitatem debitæ pecuniæ, his probatis competens judex rem ſuæ æquitati reſtitui decernat. *l. ult.* §. 2. *eod.*

The Laws do not allow private perſons to make uſe of any Violence, or Force whatſoever, not even to do themſelves Juſtice. And therefore much leſs do they permit them to uſe Violence, to threaten, to intimidate, in order to extort a conſent to an unjuſt Pretenſion. See at the end of the Preamble to this Section the Law quoted under the Letter [f]. See alſo the ſeventh Article of this Section; and the ſixteenth Article of the fifth Section of Covenants.

If a ſoul ſin, and commit a treſpaſs againſt the Lord, and lie unto his neighbour in that which was delivered him to keep, or in fellowſhip, *or in a thing taken away by Violence*, or hath deceived his neighbour; Or have found that which was loſt, and lieth concerning it, and ſweareth falſly; in any of all theſe that a man doth, ſinning therein: Then ſhall it be, becauſe he hath ſinned, and is guilty, that he ſhall reſtore that which he took violently away, or the thing which he hath deceitfully gotten, or that which was delivered him to keep, or the loſt thing which he found: Or all that about which he hath ſworn falſly; he ſhall even reſtore it in the principal, and ſhall add the fifth part more thereto, and give it unto him to whom it appertaineth, in the day of his treſpaſs-offering *Lev.* vi. 2, 3, 4, 5.

IV.

4. If a Magiſtrate abuſes his Authority to intimidate one in order to extort a Conſent.

If a Magiſtrate, or other Officer, uſes his Authority contrary to Juſtice, and by Threatnings, or other unlawful ways, whether it be for the Intereſt of others, or his own, engages any perſon to give a Conſent, which is given purely out of fear of the Evil which he is capable of doing; the Conſent extorted by ſuch Violence will be annulled: and the Magiſtrate will be anſwerable for the Damage which he ſhall have cauſed[d], and be liable to the other Penalties which ſuch a Miſdemeanour may have merited.

[d] Si per injuriam quid fecit populi Romani magiſtratus, vel provinciæ præſes, Pomponius ſcribit, hoc Edictum locum habere, ſi fortè, inquit, mortis, aut verberum terrore pecuniam alicui extorſerit. *l.* 3. §. 1. *quod met. cauſ.* Venditiones, donationes, tranſactiones quæ per potentiam extortæ ſunt, præcipimus infirmari. *l. ult. C. de his quæ vi metûſve c. g. ſ.* See the eighth Section of the Contract of Sale, in the Preamble.

Non ement in Ballivia, *doloſa Impreſſione*; quod ſi fecerint contractus reputabitur nullus: & poſſeſſiones dominio noſtro, vel Prælatis, Baronibus & aliis ſubditis applicabuntur, niſi de noſtra proceſſerint voluntate. *Ordinance of* Philip the Fair *in* 1320.

V.

5. Violence upon other perſons than him whom they have a mind to force to a conſent.

If the Violence, the Threats, or other ways of the like nature, are uſed towards other perſons than him from whom they intend to extort a Conſent; and that they intimidate him by the impreſſion which the fear of ſeeing thoſe perſons expoſed to any evil Treatment makes upon him, as if it is his Wife, his Son, or any other perſon whoſe ſufferings ought ſenſibly to affect him, the Conſent obtained by ſuch means will be annulled, and the Party offending be liable to Damages, and other Penalties, according to the circumſtances[e].

[e] Hæc quæ diximus ad Edictum pertinere, nihil intereſt in ſe quis veritus ſit, an liberis ſuis, cum pro affectu parentes magis in liberis terreantur. *l.* 8. §. *ult. ff. quod met. cauſ.* Penè per filii corpus pater magis quàm filius periclitatur. §. *ult. inſt. de noxal. act.*

VI.

6. What is done by Force is null, even with regard to thoſe who did not uſe it.

All that has been done by Force, will not only be null with reſpect to thoſe who have uſed the Force; but alſo with reſpect to all other perſons who pretend to take advantage of it. For what is of it ſelf unlawful, cannot ſubſiſt in favour of any perſon whatſoever; even altho' the perſons who have done the Violence, reap no profit by it[f].

[f] In hac actione non quæritur utrùm is qui convenitur, an alius metum fecit. Sufficit enim hoc docere, metum ſibi illatum, vel vim, & ex hac re eum qui convenitur, etſi crimine caret, lucrum tamen ſenſiſſe. *l.* 14. §. 3. *ff. quod met. cauſ. l.* 9. §. 1. *eod. l.* 5. *C. eod.*

VII.

7. We are to judge of

In all caſes where the queſtion is about annulling a Covenant, or any *the effects of the Force by the circumſtances.* Conſent that is pretended to have been given out of fear of ſome Violence, or other bad Treatment, we are to judge of them by the circumſtances; ſuch as the Injuſtice that has been done to him who pretends to have been forced, the quality of the Perſons, that of the Menaces, or other Impreſſions; as if a Woman has been in danger of her Honour: if perſons of a violent temper have threatened a weak perſon, and expoſed him to ſome danger: if it was in the day or night-time, in a Town, or in the Fields. And it is by theſe kinds of circumſtances, and others of the like nature, and by the conſequence of repreſſing all ſorts of Violence and unlawful Means, that we are to judge of the regard that is to be had to the Fear which the perſon who complains was in, and to the Impreſſion which the Fear was capable of making upon his Reaſon, and his Liberty [g].

VIII.

8. *When Force is uſed to oblige one to comply with a thing that is juſt.* If Violence has been made uſe of inſtead of legal Means, to force one to a compliance with a thing that is juſt, ſuch as a Debtor to pay what he owes; the perſons who have had recourſe to violent Means, will be liable to Damages, and ſuch other Puniſhment as the Violence may have deſerved, and even that of the Loſs of the Debt which ſhall have been exacted by ſuch illegal courſes, according as the quality of the fact may give occaſion thereto [h].

IX.

The ways which have nothing of Violence and Injuſtice in them, but which make only impreſſions to induce people to a compliance by other lawful and honeſt Motives, are not ſufficient to annul Covenants. Thus, the Counſel and Authority of Perſons, the Reſpect due to whom engages people to a Condeſcenſion, ſuch as that of a Father, a Magiſtrate, or other Perſons placed in ſome Dignity, and who intereſt themſelves in perſuading and inducing perſons to enter into ſome Covenant, without uſing any Violence, or Threatning, are Motives of which the Impreſſion has nothing contrary to Liberty, and which does not annul the Covenants. Thus, the Son who, by the Father's perſuaſion, becomes Surety for him, cannot complain as if the Reſpect which he had for the Paternal Authority had engaged him to it by Force. Thus, he who becomes bound to a perſon in great Power, cannot pretend that his Obligation is the leſs valid upon that account [i]. 9. *Counſel and Authority do not impoſe Force.*

X.

Whatever is done in obedience to the Authority of Juſtice, and to the Order of a Judge within the bounds of his Miniſterial Function, cannot be pretended to be done by Violence; for Reaſon demands that we ſhould pay Obedience to thoſe who are in Authority over us [l]. 10. *An Order of a Court of Juſtice is not Force.*

Negantes debitores, non oportet armata vi terreri ——convictos autem condemnari, ac juris remediis ad ſolutionem urgeri convenit. *l.* 9. *C. de oblig. & act.* See the Remark on the third Article of this Section.

[g] Metus autem cauſa abeſſe videtur, qui juſto timore mortis, vel cruciatus corporis conterritus abeſt: & *hoc ex affectu ejus intelligitur.* Sed non ſufficit quolibet terrore abductum timuiſſe: ſed *hujus rei diſquiſitio judicis eſt. l.* 3. *ff. ex quib. cauſ. maj.* Quod ſi dederit ne ſtuprum patiatur, vir ſeu mulier; hoc Edictum locum habet. Cùm viris bonis iſte metus major, quàm mortis eſſe debet. *l.* 8. §. 2. *eod.* Non eſt veriſimile compulſum in urbe, iniquè indebitum ſolviſſe, eum qui claram dignitatem ſe habere prætendebat. Cùm potuerit jus publicum invocare, & adire aliquem poteſtate præditum, qui utique vim eum peti prohibuiſſet. Sed hujuſmodi præſumptioni debet apertiſſimas probationes violentiæ opponere. *l. ult. eod.* Cùm Marcianus diceret vim nullam feci: Cæſar dixit, tu vim putas eſſe ſolùm ſi homines vulnerentur. Vis eſt & tunc quoties quis id quod deberi ſibi putat, non per judicem repoſcit. *l.* 13. *ff. quod met. cauſ.* See the third Article of this Section.

[h] Julianus ait eum qui vim adhibuit debitori ſuo ut ei ſolveret; hoc Edicto non teneri, propter naturam metûs cauſa actionis, quæ damnum exigit: quamvis negari non poſſit in Juliam eum de vi incidiſſe, & jus crediti amiſiſſe. *l.* 12. §. 2. *ff. quod. met. cauſ.* Quiſquis igitur probatus mihi fuerit rem ullam debitoris, vel pecuniam debitam, non ab ipſo ſibi ſponte datam, ſine ullo judice temerè poſſidere, vel accepiſſe, iſque ſibi jus in eam rem dixiſſe: jus crediti non habebit. *l.* 13. *in f. eod.*

[i] Ad invidiam alicui nocere nullam dignitatem oportet. Unde intelligis, quod ad metum arguendum, per quem dicis initum eſſe contractum, Senatoria dignitas adverſarii tui ſola non eſt idonea. *l.* 6. *C. de his quæ vi metúſve c. g. ſ. v. l.* 2. *C. ne Fiſcus vel reſp.* Pater Seio emancipato filio facilè perſuaſit, ut, quia mutuam quantitatem acciperet à Septicio creditore, chirographum perſcriberet ſuâ manu filius ejus, quod ipſe impeditus eſſet ſcribere, ſub commemoratione domus ad filium pertinentis, pignori dandæ. Quærebatur an Seius, inter cætera bona etiam hanc domum jure optimo poſſidere poſſit: cùm patris ſe hæreditate abſtinuerit, nec metuiri, ex hoc ſolo quod mandante patre manu ſuâ perſcripſit inſtrumentum chirographi, cùm neque conſenſum ſuum accommodaverat patri aut ſigno ſuo, aut alia ſcriptura. Modeſtinus reſpondit, cùm ſuâ manu pignori domum ſuam futuram Seius ſcripſerat, conſenſum ei obligationi dediſſe manifeſtum eſt. *l.* 26. §. 1. *ff. de pign.*

We ſee by this Law, that we are not to underſtand indefinitely that other Rule which ſays, that we ought not to take that to be the will of a Son, which he does in obedience to the Will of his Father. Velle non creditur qui obſequitur imperio patris. *l.* 4. *de reg. jur.*

[l] Vim accipimus atrocem, & eam quæ contra bonos mores fiat, non eam quam magiſtratus rectè

intulit, ſcilicet jure licito, & jure honoris quem ſuſtinet. *l.* 3. §. 1. *ff. quod met. cauſ.* See the thirteenth Section of the Contract of Sale, concerning forced Sales.

SECT. III.

Of Fraud, and Stellionate.

Stellionate. Stellionate is diſtinguiſhed from Fraud in general; for altho' it be but a kind of Fraud, yet it hath its proper Name. The word Stellionate hath its riſe in the *Roman* Law, where the *Romans* diſtinguiſhed by the Name of *Stellionatus* all ſuch Cheats, Impoſtures, and other Criminal Frauds which had no proper Name of their own. But they gave chiefly this Name to that kind of Fraud, or Crime, which thoſe perſons are guilty of, who having ſold or mortgaged a thing to one perſon, ſell it to another, without telling him any thing of the firſt Engagement[a].

[a] Stellionatum autem objici poſſe his qui dolo quid fecerunt, ſciendum eſt: ſcilicet, ſi aliud crimen non ſit, quod objiciatur. Quod enim in privatis judiciis eſt de dolo actio: hoc in criminibus ſtellionatus perſecutio. Ubicumque igitur titulus criminis deficit, illic ſtellionatus objiciamus. Maximè autem in his locum habet, ſi quis fortè rem alii obligatam diſſimulata obligatione, per calliditatem alii diſtraxerit, vel permutaverit, vel in ſolutum dederit. Nam hæ omnes ſpecies ſtellionatum continent. *l.* 3. §. 1. *ff. Stellion.*

It is in this laſt meaning that we take the Word Stellionate, reſtraining it to that kind of Fraud, where perſons who having ſold, transferred, or mortgaged a certain Thing, ſell it afterwards, transfer, or mortgage it to another, without acquainting him with the firſt Engagement. Which is ſuch a Character in Fraud, as to make it amount to a Crime, and which is reſtrained by Puniſhments, according to the circumſtances.

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5. *Definition of Stellionate.*
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I.

1. Definition of Fraud. BY Fraud is meant all ſurprize, trick, cunning, diſſembling, and other unfair way that is uſed to cheat any one[a].

[a] Itaque ipſe (Labeo) ſic definit, dolum malum eſſe omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum adhibitam. *l.* 1. §. 2. *ff. de dolo.* Dolo malo pactum ſit, quoties circumſcribendi alterius causâ aliud agitur, & aliud agi ſimulatur. *l.* 7. §. 9. *ff. de pact.*

II.

2. Fraud is judged by the quality of the Fact, and the circumſtances. The ways of cheating being infinite, it is not poſſible to reduce into a Rule, what Fraud is ſufficient to annul a Covenant, or to give occaſion for recovering Damages, and what are the cunning artifices which the Law connives at. For ſome of them go unpuniſhed, and do in no way invalidate Covenants; and others annul them. Thus, in a Contract of Sale, what the Seller ſpeaks at random, to ſet off the Merchandiſe which he ſells, altho' very often contrary to Truth, and conſequently againſt Juſtice, is not reputed to be ſuch a Fraud as is ſufficient to annul the Sale, if they be only ſuch cunning Artifices as the Buyer may eaſily guard himſelf againſt, and on which the Sale doth not depend. But if the Seller declares a Quality of the Thing which he ſells, and thereby engages the Buyer to purchaſe it; as if he ſells a Land or Tenement, with a Right of Service which is not due to it; this will be a Fraud ſufficient to annul the Sale. Thus, in all caſes where the queſtion is to know if there be any Fraud, it depends on the Prudence of the Judge to find it out, and to puniſh it, according to the quality of the fact, and the circumſtances. And as we ought not on the one hand eaſily to annul Covenants, for every thing that may not be within the bounds of a perfect Sincerity; ſo on the other we ought not to ſuffer Simplicity and Honeſty to become a Prey to Double-dealing and Knavery[b].

[b] Quæ dolo malo facta eſſe dicentur, ſi de his rebus alia actio non erit, & juſta cauſa eſſe videbitur, judicium dabo. *l.* 1. §. 1. *ff. de dolo.* Sed an dolo quid factum ſit, ex facto intelligitur. *l.* 1. §. 2. *ff. de doli mali & met. except.* Hoc edicto prætor adversùs varios, & doloſos, qui aliis offuerunt calliditate quâdam, ſubvenit: ne vel illis malitia ſua ſit lucroſa, vel iſtis ſimplicitas damnoſa. *l.* 1. *ff. de dolo.* Quod venditor, ut commendet, dicit: ſic habendum quaſi neque dictum neque promiſſum eſt. Si verò decipiendi emptoris cauſa dictum eſt, æque ſic habendum eſt, ut non naſcatur adversùs dictum, promiſſumve actio, ſed de dolo actio. *l.* 37. *ff. de dolo l.* 19. *ff. de ædil. ed.* See the twelfth Article of the eleventh Section of the Contract of Sale.

III.

3. Fraud is never preſumed, but ought always to be proved.

Seeing Fraud is a kind of Crime, it is never preſumed, unleſs there be proof of it[c].

[c] Dolum ex indiciis perſpicuis probari convenit. *l.* 6. *C. de dolo.*

IV.

4. Difference between Perſonal Fraud, and that which is called Dolus re ipsâ.

We muſt diſtinguiſh the Fraud mentioned here, from the Damage which happens without the deed of the Parties contracting. As if in the Partition of an Eſtate, one of the Parties happens to be aggrieved by an exceſſive Valuation of what falls to his Share, or if a Purchaſer is wronged by ſome Vice in the Thing ſold, altho' the Seller was ignorant of the ſaid Vice. It is this Damage, without the Fraud of any perſon, which is called *dolus re ipsá*, becauſe one of the Contracters happens to be cheated by the Thing it ſelf, without any Fraud on the part of the other[d]. But Perſonal Fraud, which is that treated of under this Title, implies a Deſign of one of the Contracters to cheat the other, and the actual accompliſhment of the Cheat[e]. As if a Son concealing his Father's Teſtament, tranſacts with a Creditor who had loſt the Title, or Voucher of the Debt owing to him, which the Father had owned in his Teſtament to be a juſt Debt, and makes the Creditor by this means loſe his Debt. There is this difference between theſe two kinds of Wrong, that that in which there is no Perſonal Fraud barely annuls the Covenants, and entitles the Party to Damages, if there be room for it[f]; whereas Perſonal Fraud may ſometimes be puniſhed, according to the circumſtances.

[d] Si nullus dolus interceſſit ſtipulantis, ſed *ipſa res in ſe dolum habet*. *l.* 36. *ff. de verb. ob.* See the ninth Article of the ſixth Section of Covenants.

[e] Si eventum fraus habuit. *l.* 10. §. 1. *ff. quæ in fraud. cred.* Fraus cum effectu. *l.* 1. *inſ. ff. de ſtatu lib.* Fraudis interpretatio ſemper in jure civili non ex eventu duntaxat, ſed ex conſilio quoque deſideratur. *l.* 79. *ff. de reg. jur.*

[f] *See the ſixth Article of the eleventh Section of the Contract of Sale.*

V.

5. Definition of Stellionate.

Stellionate is that ſort of Fraud which is practiſed by him who aſſigns, ſells, or mortgages the ſame Thing which he had already aſſigned, ſold, or mortgaged to another, and who conceals the former Engagement[g]. And he likewiſe is guilty of Stellionate who pawns one Thing inſtead of another, if it is of leſs Value, ſuch as Copper inſtead of Gold: Or who pawns a Thing that is not his own.

[g] Maximè in his locum habet *Stellionatus*, ſi quis fortè rem alii obligatam, diſſimulatâ obligatione, per calliditatem alii diſtraxerit, vel permutaverit, vel in ſolutum dederit. Nam hæ omnes ſpecies Stellionatum continent. *l.* 3. §. 1. *ff. Stell.* *l.* 1. *C. eod.*

[h] Si quis in pignore pro auro æs ſubjeciſſet creditori——extra ordinem Stellionatus nomine plectetur. *l.* 36. *ff. de pign. act.*

[i] Sed & ſi quis rem alienam mihi pignori dederit ſciens, vel ſi quis aliis obligatam mihi obligavit, nec me de hoc certioraverit, eodem crimine plectetur. *l.* 36. §. 1. *eod.* See the following Article.

VI.

6. Exception to the former Rule.

If the Thing which is pawned, or mortgaged to a ſecond Creditor, after it has been pawned, or mortgaged to a former, be ſufficient to ſatisfy both, then it will not be reckoned Stellionate[l].

[l] Planè ſi ea res ampla ſit, & ad modicum æris fuerit pignorata, dici debebit, ceſſare non ſolum Stellionatus crimen, ſed etiam pignoratitiam, & de dolo actionem; quaſi in nullo captus ſit qui pignori ſecundo loco accepit. *l.* 36. §. 1. *ff. de pign. act.*

We do not look upon it as Stellionate, where a Debtor mortgages his whole Eſtate to divers Creditors, nor even where the ſame Land or Tenement is mortgaged to ſeveral perſons, provided the Debtor be otherwiſe ſolvent. But we are to judge by the circumſtances which may have engaged the Creditor, whether he be cheated, or not.

VII.

7. The Effects of Stellionate.

Stellionate not only annuls the Covenants in which it is found; but it is moreover reſtrained, and puniſhed according to the circumſtances[m].

[m] Pœna Stellionatus nulla legitima eſt, cùm nec legitimum crimen ſit. Solent autem ex hoc extrà ordinem plecti. *l.* 3. §. 2. *ff. Stell.*

SECT. IV.

Of unlawful and diſhoneſt Covenants.

The CONTENTS.

1. *Two ſorts of unlawful Covenants.*
2. *In what reſpect a Covenant is contrary to Law.*
3. *Unlawful Covenants liable to Puniſhment.*
4. *Effect of unlawful Covenants.*
5. *When one may, or may not recover what is unjuſtly given.*

I.

1. Two ſorts of unlawful Covenants.

UNlawful Covenants are thoſe which are contrary to Law. And as there are two kinds of Laws, the Law of Nature, and the Poſitive Law of Man; ſo there are likewiſe two kinds of unlawful Covenants; to wit, thoſe which are contrary to the Law of

Nature, and Good Manners, and thoſe which tranſgreſs the Poſitive Law of Man. Thus, it is againſt the Law of Nature and Good Manners, to treat about the committing of a Robbery, or a Murder: and theſe ſorts of Covenants are in themſelves Criminal, and always null[a]. Thus, it is againſt the Poſitive Law of Man to ſell to Strangers certain kinds of Merchandizes, when ſuch Commerce is prohibited by ſome particular Law[b].

[a] Pacta quæ contra leges, conſtitutioneſque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris eſt. *l. 6. C. de pact.*

[b] *See the ninth Article of the ninth Section of the Contract of Sale.*

II.

2. In what reſpect a Covenant is contrary to Law. We ought not to place without diſtinction in the number of unlawful Covenants, as being contrary to Law, all thoſe in which the Parties agree on ſome thing contrary to a Law; but only thoſe which are againſt the Spirit and Intention of the Law, and which are ſuch as are forbidden by the Law. Thus, this Covenant, wherein it is agreed that the Seller ſhall only warrant his own Deeds and Promiſes, makes between the Seller and Buyer a Rule contrary to that of the Law, which ordains, that the Seller ſhall warrant the Thing ſold againſt all Evictions whatſoever. But that Agreement is neverthele∫s lawful; for this Law being made only in favour of the Purchaſer, he may renounce what the Law hath enacted for his Benefit: and this the Laws do not prohibit[c].

[c] Omnes licentiam habent his quæ pro ſe introducta ſunt, renuntiare. *l. 29. C. de pact.*

Nec eſſe periculum, ne pactio privatorum, juſſui prætoris anteposita videatur. Quid enim aliud agebat prætor, quam hoc ut controverſias eorum dirimeret? à quibus ſi ſpontè receſſerunt, debebit id ratum habere. *l. 1. §. 10. ff. de oper. nov. nunt.*

See the twenty ſeventh Article of the ſecond Section of the Rules of Law in General.

III.

3. Unlawful Covenants liable to Puniſhment. Unlawful Covenants are not only null, but are alſo liable to Puniſhment, according as they tranſgreſs the Prohibition, and Spirit of the Law[d].

[d] Legis virtus hæc eſt imperare, vetare, permittere, punire. *l. 7. ff. de legib.*

IV.

4. Effect of unlawful Covenants. Unlawful Covenants oblige to nothing, except to make good the Damage which they occaſion, and to ſuffer the Puniſhments which the perſons may have deſerved who made them[e].

[e] *This is a Conſequence of the foregoing Article.*

V.

5. When one may, or may not recover what is unjuſtly given. If the Covenant is unlawful only on the part of him who receives, and not of him who gives, as if a Depoſitary demands Money for reſtoring the Thing depoſited with him, or a Thief for giving back what he has ſtollen, he who has given Money on ſuch an account may demand it back, altho' the Receiver have performed his Agreement[f]. But if the Covenant be unlawful both on the part of the Giver and Receiver, as if one who has a Law-Suit depending, gives Money to the Judge to engage him to give Judgment in his favour; or, if one perſon gives Money to another to engage him to do an evil Action; he who has given the Money is juſtly ſtripped of what he has laid out on ſuch an account, and he cannot recover it. And he who has received the Money cannot reap the profit of the Price of his Crime: but both the one and the other will be chaſtiſed by making Reſtitution, and undergoing the Puniſhments which they ſhall have deſerved[g].

[f] Quod ſi turpis cauſa accipientis fuerit, etiam ſi res ſecuta ſit, repeti poteſt. Ut puta dedit tibi, ne ſacrilegium facias, ne furtum, ne hominem occidas, in qua ſpecie Julianus ſcribit: ſi tibi dedero ne hominem occidas, condici poſſe. Item ſi tibi dedero, ut rem mihi reddas depoſitam apud te, vel inſtrumentum mihi redderes. *l. 1. §. ult. & l. 2. ff. de condict. ob turpem vel injuſt. cauſ.* Ob reſtituenda ea quæ ſubtraxerat accipientem pecuniam, cùm ejus tantum interveniat turpitudo, condictione conventum hanc reſtituere debere convenit. *l. 5. C. eod.*

[g] Ubi autem & dantis & accipientis turpitudo verſatur, non poſſe repeti dicimus. Veluti ſi pecunia detur ut malè judicetur. *l. 3. ff. eod.*

We do not inſert in this Article what is ſaid in ſome Laws, that in the caſes where the Covenant is unlawful on both ſides, the condition of the Receiver is better than that of the Giver; the meaning of which is, that the Receiver is not made to reſtore what he has received, and that in this Senſe his condition is the moſt advantageous. Si & dantis & accipientis turpis cauſa ſit, poſſeſſorem potiorem eſſe. Et ideo repetitionem ceſſare. *l. 8. in f. de condict. ob turp. cauſ. l. 2. C. eod. l. 9. ff. de dol. mal. & met. except. It is neither Juſtice nor Reaſon that makes the Receiver's condition better: on the contrary, it is both juſt and reaſonable, that he ſhould be chaſtiſed, not only by depriving him of ſuch a Gain, but likewiſe by the other puniſhments which he may have deſerved. And we ſee likewiſe that in the ſame Body of the* Roman *Law where theſe Laws are found, there is another Law which enacts, that thoſe who receive Money to create Trouble to one, to bring an Action againſt them, or to accuſe them of a Crime, or to deſiſt from ſo doing, ſhall be made to reſtore four-fold what they have received.* V. l. 1. in prin. ff. de calumniat. d. l. §. 1.

THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK II.

Of Engagements which are formed without a Covenant.

The ſubject matter of this ſecond Book.

WE have explained in the Treatiſe of Laws[a], the Origine and Nature of the ſeveral ſorts of Engagements which God produces among Men, the better to link them together in Society: and we have endeavoured to diſcover in thoſe Sources the Principles and Spirit of the Laws which relate to the ſaid Engagements. For ſince God hath made the Society of Mankind eſſential to their Nature, that he might imploy them in the Duties of mutual Love, which he enjoins them by the ſecond Law; it is by the Engagements under which he puts them, that he determines every one to the particular Duties which he has a mind to preſcribe to him. So that it is from the Nature of thoſe ſeveral Engagements, that we muſt diſcover their reſpective Rules, and particularly the Rules of ſuch Engagements as are the ſubject Matter of the Civil Law.

In order to a more particular Enquiry into the ſeveral Matters treated of in the Civil Law, we have made a Plan of them[b], in which we have diſtinguiſhed two Kinds of Engagements. One, is of thoſe which are formed by the mutual Will of two or more Perſons in Covenants; and it is this Kind which has been the Subject Matter of the Firſt

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[a] *Chap.* 1. *n.* 8. *ch.* 2. *n.* 3. *ch.* 3. *ch.* 4

[b] *The Treatiſe of Laws, Chap.* 14.

Book. The other, is of thoſe Engagements which are formed without the mutual Will of the Parties, but only either by the deed of him who engages himſelf without the participation of the Perſon to whom he is engaged; or even without the Will of either of the Parties, and by a bare Effect of the Divine Providence: And it is this ſecond Kind of Engagements without a Covenant, which we ſhall treat of in this Second Book.

It will be eaſy to diſcern, by the bare reading of the Table of the Titles of this Book, the Engagements which are formed by the Will of one Perſon alone, from thoſe which God produces independently of the Will of both Parties.

The Engagements which are formed by the Will of the Perſon alone who engages himſelf, have this in common with the Engagements that are formed by Covenants, that both the one and the other Sort having for their Cauſe the Will of Perſons, there may be ſome of them which may not be juſt, and which may be contrary to Law, or Good Manners; and in theſe Engagements, the Parties lay themſelves under no other Obligation than that of repairing the Evil that is done by them[c]. But the Engagements which have only for their Cauſe the Divine Providence, and which are independent on our Wills, ſuch as Guardianſhips, Publick Offices, and thoſe which are formed by Accidents, and by Events brought to paſs by God, without our Participation, can have nothing in them that is unjuſt: And it is the Hand of God, by which they are formed, that points out in every one of them what is the Duty they oblige us to. Thus, whereas the greateſt part of Men looking on theſe Engagements, when they are painful and unprofitable, as being only a grievous and heavy Yoke, contrary to their Intereſts, and Inclinations, ſhake them off as much as they can with Impunity; they ought, on the contrary, to reverence in them that Order of God which is a Law to us, and to execute it with that Fidelity and Carefulneſs which we owe to whatever he commands.

Of all the Engagements which are formed without a Covenant, that of the greateſt Importance, which comprehends in it the greateſt number of Duties, and which demands the greateſt Fidelity, is the Engagement of Tutors; and it is alſo a Matter that is amply diſcuſſed in the *Roman* Laws; wherefore we have thought fit to make it the firſt Title of this Second Book; and we ſhall afterwards treat of the other Engagements in their Order.

TITLE I.

Of TUTORS.

Neceſſity of Guardianſhips.

IT is equally for the Benefit of Religion and Civil Government, that thoſe who are deſtitute of their Fathers before they come to an Age in which they may be capable of governing themſelves, ſhould be put, till they arrive at ſuch Age, under the Conduct of ſome Perſon, who may be to them inſtead of a Father, as much as is poſſible, and who may take upon himſelf the Care of their Education, and the Management of their Eſtates. And it is to the Perſons who are called to this Office, that we give the Name of Tutors, or Guardians.

It is not neceſſary to explain here what that State is, which we call Minority, during which Perſons are under Tuition or Guardianſhip, and how long it laſts: The Reader may have recourſe to what has been ſaid on this Subject in the Treatiſe of Laws, the 11th Chap. n. 9. and in the Title of Perſons, Sect. 1. Art. 16. and Sect. 2. Art. 8. and 9.

The Nature of this Engagement.

The Engagement of Tutors, or Guardians, is among the number of thoſe which are formed without a Covenant: For it obliges thoſe who are called to that Office whether they will or not, by a juſt Effect of the Order of Society among Men, which does not permit that Orphans ſhould be abandoned. Thus, this Duty naturally falls on thoſe that are their Neareſt of Kin, both becauſe the Relation engages them to it more ſtrictly, and becauſe the Care of the Eſtates of Minors belongs properly to thoſe whom the Law calls to ſucceed them, if there are no Cauſes which may excuſe them from accepting the ſaid Office, or if they are under no Incapacities which may exclude them from it. As the Tutor is obliged without his will, to take care of the Perſon and Eſtate of the Minor; ſo it is likewiſe juſt that the Minor, on the other hand, ſhould be reciprocally bound to the Tutor, to ratify, after he is come to Age, whatever the Tutor ſhall have rightly managed, and to allow him the Expences which he ſhall have reaſonably laid out. So that the Guardianſhip makes a reciprocal Engagement between the Tutor or Guardian, and the Pupil, in the ſame manner as if they had contracted with one another. And it is for this reaſon, that this Engagement is called in the *Roman* Law a *Quaſi-Contractus*, that is, like to an Engagement produced by a Contract between Perſons who treat together[a].

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[c] *See the Preamble of the Title of the Vices of Covenants, and the third and fourth Sections of the ſame Title.*

Difference between our Uſage, and the Roman *Law, as to Tutorſhips, or Guardianſhips.*

Before we proceed to the Explanation of the Rules relating to Tutorſhips, or Guardianſhips, it is neceſſary to remark on this Subject ſome Differences between our Uſage and the *Roman* Law; for without the knowledge of theſe Differences, the Reader would be perplexed in many Articles, about the application of the Rules which are here quoted.

The firſt of theſe Differences conſiſts in this, that by the *Roman* Law Tutors were given only to Males under the Age of Fourteen years, and to Females under the Age of Twelve; and not to Perſons that were above that Age: and the Tutorſhip ended, when the Pupils attained to the ſaid reſpective Ages of Twelve and Fourteen; which were called Puberty. As to Adult Perſons, or thoſe who were arrived at the Age of Puberty, they had only Curators aſſigned them till they accompliſhed the Age of Five and Twenty Years, which was the full Majority, according to the *Roman* Law. And even the ſaid Curators were given only in two caſes; one, when the Minors themſelves agreed to it[b]; and the other, when the Perſons who had matters to ſettle and adjuſt with the Minors, procured Curators to be aſſigned them, that they might proſecute againſt the ſaid Curators the Actions which they had againſt the Minors[c]. But the Tutor was diſcharged by the Puberty of his Pupil, and could not ſo much as be named his Curator, if he declined it[d]. He was obliged only, after his Tutorſhip was at an end, to put the Minor in mind to aſk for a Curator, and if he had Affairs of the Minor in his hands that were not finiſhed, he was to take care of them, till there was a Curator appointed to ſucceed him[e]. In *France* the Tutorſhip laſts till the Perſons have fully compleated the Age of Five and Twenty Years. For according to our Uſage, as well as by the *Roman* Law, it is only after the completion of this Age that Perſons are held to be capable of all ſorts of Engagements, without hopes of being relieved againſt them in conſideration of their Age. So that in this Title therefore we ſhall only make uſe of the Name *Tutor*, both for thoſe Minors who are under the Age of *Puberty*, and thoſe who are above it, and who are called *Adults*, altho' that in the Laws which ſhall be quoted, the words *Tutor* and *Curator* muſt be underſtood in the ſenſe which they had in the *Roman* Law.

We muſt obſerve as a ſecond difference between our Uſage and the *Roman* Law; that by the *Roman* Law certain perſons were called to Tutorſhips preferably to all others, ſuch as thoſe who had been named by the Father in his Teſtament, and for want of ſuch Nomination the Next of Kin[f], and if there were many in the ſame degree of Kindred, they were all called together. But in *France* the Uſage is, that the Relations of the Minor are called to appear before the Judge who has the Appointment and Nomination of the Tutor, in order to ſee ſuch Tutor aſſigned, and they do not implicitly follow the Will of the Father who had nominated a Tutor by his Teſtament, nor the order of the Proximity of Blood. But the Relations are at liberty to make another choice, if they think there is occaſion for it. And this Liberty takes place not only in the caſes where the Perſons whom the Proximity of Blood would call to the Tutorſhip ſhould have juſt grounds of being excuſed from it, or ſhould be incapable of it; but it is made uſe of to diſcharge very often the Next of Kin, who have no legal Excuſes to offer why they ſhould be exempted from it. And it is for this reaſon, that in *France* all Tutorſhips are ſaid to be *Dative*; and altho' this Uſage is founded on a Principle of Equity, becauſe in reality it may ſo happen that the Next of Kin, who has not, perhaps, ſufficient Excuſes to exempt him from the Tutorſhip, may not have the qualifications that are neceſſary to make a good Tutor; yet this Liberty is very often turned to a bad uſe, and the neareſt Relations, who often have not the Good of the Minors ſo much in their view, as to get themſelves delivered from the burthen of the Tutorſhip, contrive, by their intrigues, to get it ſettled on the remoteſt Relations; which is an Abuſe that ought to be corrected, by ſome proper Regulation for that purpoſe.

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[a] *V. l.* 5 §. 1. *ff. de oblig. & act.* §. 2. *Inſtit. de obl. quæ ex quaſi contr. See in the ſame places other kinds of Quaſi-Contracts, among Co-Heirs, or Co-Executors: between the Executor and the Legatee: between him who manages the Affair of an abſent perſon, and the ſaid abſent perſon: between thoſe who happen to have any Thing belonging to them in common, without a Covenant: and between him who receives that which is not his due, and the perſon to whom he muſt reſtore it. All theſe Matters ſhall be treated of in their proper places.*

[b] §. 2. *Inſtit. de curat.*

[c] *d.* §. 2. *l.* 2. §. 3. *ff. qui petant tutores. l.* 1. *Cod. eod.*

[d] *L.* 20. *Cod. de excuſ. tut.*

[e] *L.* 5. §. 5. *ff. de adm. & per tut. l. un. Cod. ut cauſ. poſt. pub. adſit. tut.*

The third difference between our Uſage and the *Roman* Law, conſiſts in the manner of appointing Tutors to Minors. For ſeeing there was not in *Rome* any Publick Officer who did the Functions which in this Kingdom are performed by the King's Proctors in the reſpective Juriſdictions; it was required that the Mothers of the Minors, their Relations, their Friends, or their *Libertines*, that is, thoſe who have been ſet at Liberty from Slavery by the Anceſtors of the Minors, ſhould apply to the Magiſtrates, to have Tutors aſſigned them[g]. But in *France* it is the duty of the King's Proctors, and of thoſe who perform the Functions of that Office in the inferior Courts of Lords of Mannors, to ſee that Minors have Tutors aſſigned them; and the Mothers, or Relations, who have a mind to ſee that due care be taken of it, may apply to the ſaid Officers for their aſſiſtance in this matter.

As to the other differences which may happen to be between our Uſage and the *Roman* Law, they ſhall be taken notice of in their proper places, and it is not neceſſary to ſay any thing of them here.

[It may not be improper to obſerve here, that in the Law of *England*, there are three manner of Guardianſhips, *viz.* by the Common Law, by Statute Law, and by Cuſtom[h]. By the Common Law, there are four ſorts of Guardians. There is a Guardian in Chivalry; who is the Lord of whom the Infant doth hold his Lands, and who, ſo ſoon as the Father dieth, hath the Wardſhip and Keeping of the Heir; and thereby may ſeize upon the Body of the Ward, and his Lands, till he arrive at full Age[i]. But this Guardianſhip in Chivalry, is now aboliſhed by Act of Parliament, 12 *Car.* II. *cap.* 24. And there is a Guardian by Nature, ſuch as the Father is of his Son; who as to the Wardſhip of the Body of the Heir, was preferred even to the Lord who was Guardian in Chivalry, and upon that account was intitled to the Wardſhip of the Land[k].]

[There is likewiſe a Guardian in Socage, who is the Next of Blood to whom the Inheritance cannot deſcend; and he is intitled to the Wardſhip of the Land, and of the Heir, until the age of fourteen years. And alſo a Guardian by reaſon of Nurture, all frequent in our Books[l].]

[As to Guardianſhips by Statute, it is enacted in the 4th and 5th *Phil. & Mar. cap.* 8. in relation to the taking away of Women Children, under ſixteen years of age, without the conſent of Parents, that the Father, or Mother, or ſuch perſon as the Father ſhall have appointed by any Act in his Lifetime, or by his laſt Will and Teſtament, ſhall have the Cuſtody of ſuch Woman Child. And by *Stat.* 12 *Car.* II. *cap.* 24. §. 8. it is more fully enacted, That it ſhall be lawful for the Father of a Child unmarried, and under One and Twenty years of Age, (whether Born or Poſthumous, or whether the Father be One and Twenty years, or not) by Deed in his Lifetime, or by his laſt Will in writing, in the preſence of two or more Witneſſes, to diſpoſe of the Cuſtody and Tuition of ſuch Child till full Age, or for a leſſer time. And that ſuch Diſpoſition ſhall be good and effectual againſt all perſons claiming the Cuſtody or Tuition of ſuch Child, or Children, as Guardian in Socage, or otherwiſe. And the perſons ſo appointed Guardians, may take into their Cuſtody and Tuition, to the uſe of ſuch Child, or Children, all their Lands and Perſonal Eſtate, and manage the ſame, until their reſpective Ages of One and Twenty years, or leſſer time, according to ſuch Diſpoſition of the Father.]

[By Cuſtom, the Tuition and Cuſtody of Orphans, Children of Citizens and Freemen, belongs to the Mayor and

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[f] *L.* 1. *ff. de teſtam. tut. Inſtit. de leg. agn. tut. l.* 1. *& l.* 6. *ff. de leg. tut. Nov.* 118. *cap.* 5. See the eighth Article of the firſt Section,

[g] *Tit. ff. qui petant tutores.*

[h] *Coke* 1. *Inſtit. fol.* 88. *b.*

[i] *Littleton, Sect.* 133.

[k] *Littleton, Sect.* 114. *Cowel's Inſtit. lib.* 1. *tit.* 18.

[l] *Coke* 1. *Inſt. f.* 88. *b. Cowel's Inſtit. lib.* 1. *tit.* 14.

and Aldermen of the City, Town, or Borough of which they are Inhabitants[m].]

[m] *Coke* 1 *Inſt. fol.* 88. *b.*

[If there be no Teſtamentary Tutor, nor other Appointment of a Tutor by the Father, and the Child be not Ward, then may the Ordinary commit the Tuition of the Child to his Next Kinſman, who demands the ſame, as in the caſe of Adminiſtration to one dying Inteſtate[n]. According to our Uſage in *England*, if the Child is paſt Seven years of Age, it muſt be at his own requeſt, and nomination, that the Judge appoints him a Tutor, or Guardian. But if he is under Seven Years, then the Judge may do it *ex officio*[o].]

[n] *Swinburn of Wills, Part* 3. §. 9.

[o] *Clarke's Prax. tit.* 208, 209.

[Our Laws in *England*, ſpeak nothing of the Excuſes of Tutors, or Guardians; becauſe, according to our Uſage, no one is put upon this Office againſt his will[p]. Altho' the *Roman* Law, and the Laws of other Countries, extend the Age of Minority to Five and Twenty Years; yet in *Great Britain*, we carry it no farther than Twenty One Years compleat; at which Age our Laws look upon all Perſons to be capable of having the Conduct of their own Affairs[q].]

[p] *Cowel's Inſtit. Lib.* 5. *tit.* 25.

[q] *Coke* 1 *Inſtit. fol.* 78. *b.*

SECT. I.

Of Tutors, and of their Nomination.

The CONTENTS.

1. *Definition of Tutorſhip.*
2. *Duration of the Tutorſhip.*
3. *The neareſt Relations ought to be appointed Tutors, if there is no reaſon to the contrary.*
4. *Nomination of the Tutor by the Father, or Mother.*
5. *One or more Tutors may be named.*
6. *Tutors Honorary, and Tutors Onerary.*
7. *Tutors ought to be confirmed by the Judge.*
8. *Tutors with Surety, or without it.*
9. *Preference of the Tutor who offers to give Security.*
10. *The Father, or Grandfather, Tutor.*
11. *Who may be Tutors.*
12. *The Tutor takes an Oath of faithful Adminiſtration.*

I.

1. Definition of Tutorſhip. THE Tutor is he to whom is committed the Care of the Perſon and Eſtate of the Minor. And this Office is called Tutorſhip, or Guardianſhip[a]; that is, an Engagement to take that Care[b].

[a] Appellantur tutores quaſi tuitores, atque defenſores. §. 2. *Inſt. de tutel. l.* 1. §. 1. *ff. eod.*

[b] Eſt tutela, ut Servius definit, vis ac poteſtas in capite libero, ad tuendum eum, qui propter ætatem ſe defendere nequit, jure civili data, ac permiſſa. Tutores autem ſunt, qui eam vim ac poteſtatem habent. §. 1. & 2. *inſt. de tut. l.* 1. *ff. eod. d. l.* §. 1. Tutor perſonæ non rei datur. *l.* 14. *ff. de teſt. tut.* Cùm tutor non rebus dumtaxat, ſed etiam moribus pupilli præponatur. *l.* 12. §. 3. *ff. de adm. & per. tut.*

II.

2. Duration of the Tutorſhip. The Minor is he who has not as yet Five and Twenty years compleat[c]. And thoſe who are under the ſaid Age when their Fathers die, being in that State which is called Infancy, or Minority, are put under Tuition, while the ſaid State laſts[d].

[c] Minorem autem viginti quinque annis natu, videndum eſt an etiam die natalis ſui adhuc dicimus, ante horam qua natus eſt: ut ſi captus ſit reſtituatur, cùm nondum compleverit, ita erit dicendum, ut à momento in momentum tempus ſpectetur. Proinde & ſi biſſexto natus eſt, ſive priore, ſive poſteriore die Celſus ſcribit, nihil referre. Nam id biduum pro uno habetur, & poſterior dies Kalendarum intercalatur. *l.* 3. §. 3. *ff. de minor.* See touching the Biſſextile, the twentieth Article of the firſt Section of the Reſciſſion of Contracts.

[d] Maſculi puberes, & fœminæ viripotentes uſque ad vigeſimum quintum annum completum curatores accipiunt. Quia licet puberes ſint, adhuc tamen ejus ætatis ſunt, ut ſua negotia tueri non poſſint. *Inſt. de curat.* See the Remark in the Preamble to this Title, concerning the difference between thoſe who are under Puberty, and thoſe who are Adult, and the Duration of the Tutorſhip.

[*It has been already obſerved, that the Age of Majority, which the* Romans *ſettled at Five and Twenty Years compleat, is by the Laws of* Great Britain *fixed to One and Twenty Years compleat.* Coke 1 Inſt. fol. 78. b.]

III.

3. The neareſt Relations ought to be appointed Tutors, if there is no reaſon to the contrary. Altho' it be natural to name for the Tuition of a Minor, him whom the Nearneſs of Blood calls to be the Minor's Heir and Succeſſor[e]; yet ſeeing it may often happen that the neareſt Relations are either incapable of being Tutors, or have lawful Excuſes for declining the ſaid Office, we may name for Tutors, Relations of a remoter degree[f], or in default of Relations, thoſe who are allied by Marriage, and even Strangers, if there be no Relations, or Allies, who can be named, that is, who are capable of being Tutors, and who have no lawful Excuſe for declining the Office. And if in the Place where the

Pupil reſides, there be no Perſon fit to be Tutor, one may be choſen out of the Neighbouring Places[g].

[e] Legitimæ tutelæ lege duodecim tabularum agnatis delatæ ſunt, & conſanguineis, id eſt, his qui ad legitimam hæreditatem admitti poſſunt, hoc ſumma providentia, ut qui ſperant hanc ſucceſſionem, iidem tuerentur bona; ne dilapidarentur. *l.* 1. *ff. de leg. tut.*

[f] Interdùm alibi eſt hæreditas, alibi tutela; ut puta; ſi ſit conſanguinea pupillo: nam hæreditas quidem ad agnatam pertinet, tutela autem ad agnatum. *l.* 1. §. 1. *ff. de legit. tut.*

[g] Si, quando deſint in civitate, ex qua pupilli oriundi ſunt, qui idonei videantur eſſe tutores, officium ſit magiſtratuum inquirere ex vicinis civitatibus honeſtiſſimum quemque, & nomina præſidi provinciæ mittere, non ipſos arbitrium dandi ſibi vindicare. *l.* 24. *ff. de tut. & cur. datis. l.* 1. §. 10. *ff. de mag. conv.* Quæro an non ejuſdem civitatis cives teſtamento quis tutores dare poſſit? Paulus reſpondit, poſſe. *l.* 32. *ff. de teſtam. tut.* See the twenty fifth Article of the ſeventh Section.

[*By the Law of* England, *the next Relation of the Minor, to whom the Inheritance cannot deſcend, ſhall have the Wardſhip of the Land, and of the Heir, until he be fourteen years of Age; As if the Land deſcend to the Heir of the part of the Father, then the Mother, or other next Couſin on the Mother's ſide, ſhall have the Wardſhip; or the Father, or next Friend on the Father's ſide, if the Land deſcend to the Heir of the part of the Mother.* Littleton, Sect. 123.]

IV.

4. Nomination of the Tutor, by the Father or Mother. Fathers[h] and Mothers[i] may name Tutors to their Infant Children. But altho' their Choice be a preſumption of the Capacity, and Solvency of the Perſon whom they have named; yet others may be named in their place, if there be any cauſe which requireth the making of another Choice. For it may happen, either that the Father has made a bad Choice, or that ſome change hath afterwards happened, either in the Morals, or Subſtance of the Perſon whom he had named[l].

[h] Lege duodecim tabularum permiſſum eſt parentibus, liberis ſuis ſive fœminini ſive maſculini ſexûs, ſi modò in poteſtate ſint, tutores teſtamento dare. *l.* 1. *ff. de teſtam. tut.*

[i] Sed & inquiri in eum, qui matris teſtamento datus eſt tutor, oportebit. *l.* 4. §. 1. *eod.*

[l] Utilitatem pupillorum prætor ſequitur, non ſcripturam teſtamenti, vel codicillorum. Nam patris voluntatem prætor ita accipere debet, ſi non fuit gnarus ſcilicet eorum quæ ipſe prætor de tutore comperta habet. *l.* 10. *ff. de conf. tut.* Quamvis autem ei potiſſimum ſe tutelam commiſſurum prætor dicat, cui teſtator delegavit, attamen nonnunquam ab hoc recedet: ut puta, ſi pater minùs penſo conſilio hoc fecit: fortè minor 25. annis: vel eo tempore fecit, quo iſte tutor bonæ vitæ vel frugi videbatur, deinde poſteà idem cœpit malè converſari, ignorante teſtatore: vel ſi contemplatione facultatum ejus res ei commiſſa eſt, quibus poſteà exutus eſt. *l.* 3. §. 3. *ff. de adm. & per. tut.*

V.

5. One or more Tutors may be named. We may name to one only Minor, one or more Tutors, if his Condition, and the largeneſs of his Eſtate, require the Adminiſtration of ſeveral Perſons[m]. And the Tutors manage either jointly together the whole Eſtate of the Minor, or each of them apart, that which is ſeparately committed to his Charge, according to the Rule which ſhall be explained in its proper place[n].

[m] Pupillo qui tam Romæ quàm in provincia facultates habet, rerum quæ ſunt Romæ, prætor: provincialium, præſes tutorem dare poteſt. *l.* 27. *ff. de tut. & cur. dat. l.* 3. *ff. de adm. & per. tut. d. l.* §. 1. *l.* 24. §. 1. *eod.*

[n] *See the twenty eighth Article of the fifth Section.*

VI.

6. Tutors Honorary, and Tutors Onerary. Beſides the Tutors who are commonly given to Minors of all Conditions, for the Management of their Affairs, ſometimes others are named, who are called *Honorary* Tutors, when the Condition of the Minor deſerves it: And their Function is, to watch over the Adminiſtration of thoſe Tutors who act, and to adviſe them; and, for diſtinction's ſake, the Tutors who have the Burthen of the Actual Management of the Minor's Concerns, are called *Onerary* Tutors[o].

[o] Sunt quidam tutores qui honorarii appellantur ——ſunt qui ad hoc dantur ut gerant. *l.* 14. §. 1. *ff. de ſolut. l.* 26. §. 1. *ff. de teſt. tut. l.* 3. §. 2. *ff. de adm. & per. tut.* Cæteri igitur tutores non adminiſtrabunt; ſed erunt hi quos vulgò honorarios appellamus—— dati ſunt quaſi obſervatores actus ejus qui geſſerit & cuſtodes *l.* 3. §. 2. *ff. de adm. & per. tut.* See the thirty firſt Article of the third Section.

VII.

7. Tutors ought to be confirmed by the Judge. All Tutors, whether they be named by the Father, or Mother of the Minor, or whether they be called to the Office by Proximity of Blood, or be otherwiſe choſen, ought to be Judicially confirmed by the Judge of the Guardianſhip; that is, the Judge of the Place where the Minor hath his Reſidence[p].

[p] Magiſtratus ejus civitatis unde filii tui originem per conditionem patris ducunt, vel ubi eorum ſunt facultates, tutores vel curatores his quamprimùm ſecundùm formam perpetuam dare curabunt. *l. un. C. ubi per. tut. v. Toto tit. ff. de confirm. tutor. & tit. inſt. de Atil. tut. In* France *the Judge does not name the Tutor, nor confirm him whom the Father has named, but by the Advice of the Friends and Relations.* V. l. ult. §. 1. & 2. C. de adm. tut. *where mention is made of taking the Advice of the Relations, in naming a Curator for a Law-Suit.*

VIII.

8. Tutors with Surety, or without it. The Nomination of Tutors may be made two ways, as to what concerns the ſafety of the Minors Eſtates. One is, when thoſe who name them, inform themſelves well of the Solvency of the

Tutors, without obliging them to give Security: And the other is, when the Tutors are not admitted to the Tutorſhip, or Guardianſhip, without giving Security[q]. Which takes place only with reſpect to thoſe who are willing to accept the Tutorſhip, or Guardianſhip, on that condition.

[q] (Legitimos tutores) cogi ſatiſdare certum eſt. *l.* 5. §. 1. *ff. de legit. tut.* Nonnunquam ſatiſdatio ab eis non petitur. *d. l.* §. 3. *Theſe Texts reſpected only the Tutors who were called by Proximity of Blood. For the Tutors who were named in the Father's Teſtament, were not obliged to give Security.* l. 17. ff. de teſt. tut. *It is an eaſy matter to perceive the reaſon of this Difference which the* Roman *Law made between theſe two ſorts of Tutors. According to our Uſage, no Tutor is obliged to give Security. But it may ſometimes happen in a competition about the Tutorſhip, or Guardianſhip, that thoſe who put in for it, altho' they were not bound to give Security, do nevertheleſs offer it of their own accord, becauſe of the Intereſt which they may have in the preſervation of the Effects belonging to the Eſtate; the ſaid Offer giving them the preference before others who might be called to the Tutorſhip, and who might be leſs ſolvent.* See the following Article, and the thirtieth Article of the third Section.

[*By the Law of* England, *he that is conſtituted Tutor, or Guardian, by the Magiſtrate, or Ordinary, is bound to put in Security. Cowel* Inſtit. lib. 1. tit. 24. *But in Practice, this Law is not now obſerved, to the great detriment of many Minors, where inſolvent Perſons get Poſſeſſion of their Effects, and are never able to account for them.*]

IX.

9. Preference of the Tutor who offers to give Security. If of two or more Perſons, who are named Tutors, one offers to give Security, and the others make no ſuch Offer; he who offers to give Security, ſhall be preferred[r], if there is no reaſon for preferring another, either on the account of Morals, or for other Cauſes.

[r] Non omninò autem is qui ſatiſdat præferendus eſt, quid enim ſi ſuſpecta perſona ſit, vel turpis, cui tutela committi nec cum ſatiſdatione debeat— nec ſatis non dantes temerè repelluntur, quia plerumque bene probati & idonei atque honeſti tutores etiam ſi ſatis non dent, non debent rejici. Quinimò nec jubendi ſunt ſatiſdare. *l.* 17. §. 1. *ff. de teſt. tut.* Fides inquiſitionis pro vinculo cedet cautionis. *l.* 13. *in fine. ff. de tut. & curat. dat.* Cum reliquis oportet magiſtratum & mores creandorum inveſtigare. Neque facultates enim, neque dignitas ita ſufficiens eſt ad fidem, ut bona electio, vel voluntas, & benigni mores. *l.* 21. §. 5. *ff. eod.* See the thirtieth Article of the third Section.

X.

10. The Father, or Grandfather, Tutor. The Father hath the Adminiſtration of the Goods of his Children; with reſpect to which he is to them inſtead of a Tutor by Law[ſ].

[ſ] Si ſuperſtite patre per emancipationem tui juris effecta, matri ſucceſſiſti rebuſque tuis per legitimum tutorem patrem, eumdemque manumiſſorem adminiſtratis, &c. *l.* 5. *C. de dolo. Inſt. de leg. par. tut.* Quis enim talis affectus extraneus inveniatur, ut vincat paternum: vel cui alii credendum eſt res liberorum gubernandas, parentibus derelictis. *l.* 7. *C. de cur. fur.* See the fifth Article of the firſt Section of Curators.

XI.

11. Who may be Tutors. All perſons may be named Tutors, who are not under ſome Incapacity, or who have not ſome lawful Excuſe for being exempted from the ſaid Office[t]; So that it is only neceſſary to know who are the Perſons that are by Law declared incapable of the Office of Guardianſhip, or exempted from it. And this ſhall be the Subject Matter of the ſeventh Section.

[t] Dicendum primùm eſt quos creari non oportet. *l.* 1. §. 3. *ff. de excuſ.*

XII.

12. The Tutor takes an Oath of faithful Adminiſtration. The Tutor being named, he takes an Oath in Court, faithfully and truly to execute the ſaid Office, and to procure on all occaſions the Good of the Minor[u].

[u] Volumus, dum celebratur decretum quod tradit curam ei qui ad eam accedit, etiam jusjurandum eum dicere, ſacroſancta Dei evangelia tangentem, quia per omnem pergens viam, utilitatem adoleſcentis aget. *Novell.* 72. *c. ult. v. l.* 7. §. 5. *C. de curat. fur.* See the firſt Article of the ſecond Section of Curators.

[*This is another Abuſe that has crept into our Practice in* England, *that Tutors are not ſworn to the faithful Execution of their Office. Whereas heretofore when any Perſon was admitted Tutor, or Guardian, he was obliged, before his Admiſſion, to make* Oath *to adminiſter the Affairs of the Minor to his profit and benefit, to exhibit a true and faithful Inventory of all the Goods, and to render an exact and true Account of his Office, whenſoever thereto required by the Judge. Which is the ſame* Oath *that is adminiſtred to all Executors, and Adminiſtrators. Cowel's* Inſt. lib. 1. tit. 21.]

SECT. II.

Of the Power of Tutors.

Tutorſhip, or Guardianſhip, is a General Engagement. IT is to be remarked in general, on this and the following Sections, that the Office of a Tutor extending to all that concerns the Government of the Perſon, or Management of the Eſtate of the Minor; it comprehends all that variety of Engagements, which the Affairs of all kinds which may fall out render neceſſary. And this diſtinguiſhes Tutorſhip, or Guardianſhip, from the particular Engagements that are formed; for Example, either by a Sale, by Letting to Hire, by a Loan, by a *Depoſitum*, and others of the like nature. For whereas thoſe Engagements have their limits regulated by their Nature, the variety of Things that fall under the Adminiſtration of Tutors makes their Engagement to be general and indefinite[a]. We ſhall explain in this and the following Sections, the Rules which relate to the Adminiſtration of Tutors, their Engagements, and the Power which they have by Law.

[a] Sive generalia ſunt, (bonæ fidei judicia) veluti pro ſocio, negotiorum geſtorum, *Tutelæ*; ſive ſpecialia, veluti mandati, commodati, depoſiti. *l.* 38. *ff. depoſ.* See the laſt Article of the firſt Section of Partnerſhip.

Tutors ought to take advice of the Relations of their Minors.

It may not be amiſs to obſerve here, how proper it is for Tutors to conſult with the Relations of their Minors, as to the manner and method of their Education, the laying out of their Money, the Management of their Affairs, the regulating their Expences of all kinds, and in every thing elſe in the Exerciſe of their Tutorſhip, that may admit of any difficulty.

In *France*, it is the conſtant Cuſtom and Uſage, to name a certain number of Relations of the Minor, or other Perſons, whoſe advice the Tutor is obliged to take, and to govern himſelf by their Counſel; and it is upon the Deliberations and Counſels of the ſaid Perſons, that the Judge examines into the Conduct of the Tutors, and that he allows, or diſallows their Expences which may be liable to any exception. And in Matters of the greateſt importance, ſuch as the Marriage of a Minor, the Alienation of their Immoveables, and other Affairs of conſequence, it is uſual in *France* to aſſemble before the Judge, either the Perſons who are appointed for the Ordinary Council of the Tutor, or a greater number of Relations, to give their Advice in ſuch matters, which may ſerve as a Rule to the Tutor.

We ſee ſome Footſteps of this in the *Roman* Law it ſelf, that in certain caſes the Magiſtrate did, of his own accord, and by vertue of his Office, take the advice of the Relations, either touching the Education of the Minor, when there happened to be any difficulty in it, or concerning the Alienation of any part of his Eſtate[b]: And there is likewiſe in the *Roman* Law an Example of a Council appointed to the Tutor by the Father of the Minor[c]. But our Uſage, with reſpect to the Council of the Tutor, is different, and extends in general to his whole Adminiſtration; and it is according to this Uſage that we are to interpret the Rules which relate to the Power of Tutors.

[b] *L.* 1. *C. ubi pup. educ. debeat. l.* 5. §. 11. *ff. de reb. eor. qui ſub. tut.*

[c] *L.* 5. §. 8. *ff. de adm. & per. tut.*

The CONTENTS.

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2. *The Power and Authority of the Tutor.*
3. *The Expences which the Tutor may lay out.*
4. *Adminiſtration of Affairs.*
5. *The Extent and Limits of the Power of the Tutor.*
6. *Of the Tutor who makes a bad uſe of his Power.*
7. *If the Father has ordered the Tutor to follow the Mother's Advice.*
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I.

THE Tutor being named to be in the place of a Father to the Minor, his Office implies two general Obligations; One relates to the Government and Education of the Perſon of the Minor; and the other concerns the Adminiſtration and Care of his Eſtate. Thus the Law gives to the Tutor the Power and Authority that is neceſſary for theſe Functions[a], and obliges them likewiſe to diſcharge them with that exactneſs and fidelity which ſuch a Truſt requires[b].

1. The Function of a Tutor.

[a] Tutela eſt vis ac poteſtas ad tuendum eum, qui propter ætatem ſe defendere nequit. *l.* 1. *ff. de tut.* §. 1. *inſt. eod.*

[b] *See the Rules of this and the two following Sections.*

II.

The Power and Authority of the Tutor extend to every thing that may be neceſſary for the right uſe of his Adminiſtration; and the Laws conſider him as a Father of a Family, and even give him the Name of Maſter. But he is only to adminiſter as a good and careful Huſband, and is bound to give an Account of the Uſe which he ſhall have made of the Power that is given him[c].

2. The Power and Authority of the Tutor.

[c] Generaliter quotieſcumque non fit nomine pupilli, quod quivis paterfamilias idoneus facit, non videtur defendi. *l.* 10. *ff. de adm. & per. tut.* Tutor qui tutelam gerit, quantùm ad providentiam pupillarem domini loco haberi debet. *l.* 27. *ff. de adm.*

adm. & per. tut. l. 157. *ff. de reg. jur.* Tutor in re pupilli tunc domini loco habetur, cùm tutelam adminiſtrat, non cùm pupillum ſpoliat. *l.* 7. §. 3. *ff. pro emptore.*

III.

3. The Expences which the Tutor may lay out. The Tutor may lay out all Expences that are neceſſary, uſeful, or decent, for the Affairs of the Minor, for Repairs, for the Charges of Law-Suits, for a Journey, and on other ſuch like Occaſions, according as the Quality of the Minor's Eſtate, the Nature of the Affairs and the circumſtances may require. And in caſe there be any doubt about the uſefulneſs or neceſſity of the Expences, he ought to get them regulated by the Judge[d]. But the Expences cannot exceed the Revenue or Income, unleſs it be in Caſes of great neceſſity, for the Good of the Minor[e].

[d] Sumptus in pupillum tuum neceſſariò & ex juſtis honeſtiſque cauſis judici qui ſuper ea re cogniturus eſt, ſi probabuntur facti, accepto ferentur, etiam ſi prætoris decretum, de dandis eis non ſit interpoſitum. Id namque quod à tutoribus, ſive curatoribus bona fide erogatur, potius juſtitia quàm aliena auctoritate firmatur. *l.* 3. *C. de adm. tut.* Item ſumptus litis tutor reputabit, & viatica, ſi ex officio neceſſe habuit aliquò excurrere, vel proficiſci. *l.* 1. §. 9. *ff. de tut. & rat. diſtr. l.* 1. §. 4. *ff. de contr. tut. & ut. act.*

[e] Quid ergo ſi plus in eum impendit, quàm ſit in facultatibus? videamus, an poſſit hoc conſequi? & Labeo ſcribit, poſſe. Sic tamen accipiendum eſt, ſi expedit pupillo ita tutelam adminiſtrari: cæterùm ſi non expedit, dicendum eſt, abſolvi pupillum oportere. Neque enim in hoc adminiſtrantur tutelæ, ut mergantur pupilli. Judex igitur qui contrario judicio cognoſcit, utilitatem pupilli ſpectabit, & an tutor ex officio ſumptus fecerit. *l.* 3. *ff. de cont. tut. & ut. act.* See the two following Articles.

IV.

4. Adminiſtration of Affairs. The Adminiſtration of the Tutor reaches to every thing that is neceſſary, or uſeful to the Minor. Thus he may pay off the Debts owing by the Minor, if they be clear and liquidated, he may acquit the Charges, call in the Debts that are due to him, and make the neceſſary Repairs. But he cannot alienate the Immoveable Goods of the Minor except for neceſſary cauſes, ſuch as the diſcharging of Debts, if they are preſſing, or burdenſome; and that only when the ready Money, the Rents, the Debts owing to the Minor, and his other Moveable Effects, are not ſufficient to diſcharge what he owes. In which caſe, the Alienation is to be made after a Judicial Enquiry into the matter, by the advice of the Relations, after that the Tutor has given in a State of the Minor's Effects, by a ſhort Inventory and Account, and after that the Sale has been Judicially decreed, in which the Formalities preſcribed in ſuch ſort of Sales are to be obſerved[f].

[f] Tutor qui tutelam gerit, quantum ad providentiam pupillarem domini loco haberi debet. *l.* 27. *ff. de adm. & per. tut.* Tutoribus rectè ſolvi. *l.* 14. §. 1. *ff. de ſolut. l.* 46. §. *ult. ff. de adm. & per. tut.* Minorum poſſeſſionis venditio, per procuratorem, delato ad prætorem vel præſidem provinciæ libello, fieri non potuit: cùm ea res confici rectè aliter non poſſit, niſi apud acta, cauſis probatis quæ venditionis neceſſitatem inferant, decretum ſolemniter interponatur. *l.* 6. *C. de præd. & al. red. min. ſ. d. n. al. l.* 1. §. 2. *ff. de red. eor. qu ſub. tut. l.* 11. *eod.* Imprimis hoc convenit excutere, an aliundè poſſit pecunia ad extenuandum æs alienum expediri. Quærere ergò debet, an pecuniam pupillus habeat vel in numerato, vel in nominibus quæ conveniri poſſunt, vel in fructibus conditis, vel etiam in redituum ſpe atque obventionum. Item requirat; num aliæ res ſint præter prædia, quæ diſtrahi poſſunt, ex quorum pretio æri alieno ſatisfieri poſſit. Si igitur deprehenderit non poſſe aliunde exolvi, quam ex prædiorum diſtractione, tunc permittet diſtrahi, ſi modo urgeat creditor, aut uſurarum modus parendum æri alieno ſuadeat. *l.* 5. §. 9. *ff. de reb. eor. qui ſub. tut.* Requirat ergo neceſſarios pupilli—— jubere debet edi rationes. Itemque ſynopſin bonorum pupillarium. *d. l.* 5. §. 11. See the twenty fourth and the following Articles of the ſecond Section of the Reſciſſion of Contracts.

V.

5. The Extent and Limits of the Power of the Tutor. The Tutor may always make the Minor's condition better, may accept in his Name Gifts that will not be burdenſome to him, may tranſact in ſuch a manner, that the Minor, if he be a Creditor, may preſerve his Debt, and if he be Debtor, may find his account either in the diminution of the Debt, or in the eaſe of Payment. But the Tutor cannot give away the Goods of the Minor, nor tranſact ſo as to loſe, or diminiſh any Right belonging to him, nor lay new Burdens, ſuch as Services, on the Lands or Tenements, neither can he begin or proſecute a Law-Suit that is not well grounded, nor refer a Debt to the Debtor's Oath, unleſs there be no poſſible way of proving the Debt, and that this be the only Remedy that is left: and in a word, he cannot in any thing make his Pupil's condition worſe[g].

[g] Tutoribus conceſſum eſt à debitoribus pupilli pecuniam exigere, ut ipſo jure liberentur: non etiam donare, vel etiam diminuendi cauſa cum iis tranſigere. Et ideo eum qui minus tutori ſolvit, à pupillo in reliquum conveniri poſſe. *l.* 40. §. *ult. ff. de adm. & per. tut.* Tutor ad utilitatem pupilli & novare, & rem in judicium deducere poteſt. Donationes autem ab eo factæ, pupillo non nocent. *l.* 22. *eod.* Simili modo dici poteſt nec ſervitutem imponi poſſe fundo pupilli vel adoleſcentis, nec ſervitutem remitti. *l.* 3. §. 5. *ff. de reb. eor. q. ſ. t.* Non eſt ignotum tutores vel curatores adoleſcentum, ſi nomine pupillorum vel adultorum ſcientes calumnioſas inſtituant actiones, eo nomine condemnari oportere. *l.* 6. *C. de adm. tut.* Tutor pupilli, omnibus probationibus aliis deficientibus,

juſjurandum deferens audiendus eſt: quandoque enim pupillo denegabitur actio. *l.* 35. *ff. de jurejur. v. l.* 17. §. 1. *&* 2. *eod.* See the fifth Article of the ſecond Section of Covenants. See the tenth Article of this Section. See the ſecond Article of the ſecond Section of Novations.

VI.

6. Of the Tutor who makes a bad uſe of his Power.

If the Tutor abuſes his Power, whether it be thro' Fraud and Knavery, or thro' ſome Fault, he ſhall be anſwerable for it; as if he omits to take counſel in an Affair that requires it, if he makes a bad purchaſe, being prevailed on by Bribery and Favour, or if he commences, or carries on a Suit that is ill founded[h].

[h] Competet adverſùs tutores tutelæ actio, ſi malè contraxerint: hoc eſt, ſi prædia comparaverint, non idonea, per ſordem, aut gratiam. *l.* 7. §. 2. *ff. de adm. & per. tut. l.* 57. *eod.* Si nomine pupillorum vel adultorum ſcientes calumnioſas inſtituant actiones, eo nomine condemnari oportere. *l.* 6. *C. eod.* See the ninth and eleventh Articles of the third Section.

VII.

7. If the Father has ordered the Tutor to follow the Mother's Advice.

If the Minor's Father had ordered the Tutor to govern himſelf, in the Management of his Son's Concerns, wholly by the Advice of the Mother, and that in that caſe he ſhould not be accountable for the Event; he would nevertheleſs be made anſwerable for what he had wrongfully tranſacted by the Mother's Advice, if the ſame was imprudent. But if the Advice was reaſonable, nothing could be laid to the Tutor's charge for having followed it[i].

[i] Pater tutelam filiorum conſilio matris geri mandavit, & eo nomine tutores liberavit: non idcirco minus officium tutorum integrum erit: ſed viris bonis conveniet ſalubre conſilium matris admittere. Tametſi neque liberatio tutoris, neque voluntas patris, aut interceſſio matris, tutoris officium infringat. *l.* 5. §. 8. *ff. de adm. & per. tut.*

VIII.

8. In what manner the Tutor acts for the Minor.

The Tutor exerciſes his Power in the Affairs of the Minor two ways; One is, by authorizing his Minor to act, when he is preſent; and the other is, by acting as Tutor, whether the Minor be preſent or not. In both which caſes he is reſponſible, both for what he authorizes, and for what he does[l].

[l] Sufficit tutoribus ad plenam defenſionem, ſive ipſi judicium ſuſcipiant, ſive pupillus ipſis auctoribus. *l.* 1. §. 2. *ff. de adm. & per. tut. v. d. l.* §. 3. *&* 4. See the ninth Article of the third Section.

IX.

9. Effects of the Tutor's Authority.

The Power and Authority of the Tutor have this effect, that whatever he does is conſidered as the proper deed of the Minor. And whether he obliges himſelf for the Minor as his Tutor, or whether others oblige themſelves to him in this Quality; and whether he obtains Judgment againſt others, or that Judgment paſſes againſt him, it is the Minor that becomes thereby Creditor or Debtor, and the Obligations and Condemnations have their effect for or againſt him[m].

[m] Si tutor condemnavit, ſive ipſe condemnatus eſt, pupillo & in pupillum potius actio judicati datur. *l.* 2. *ff. de adm. & per. tut. l.* 7. *ff. quando ex fac. tut.* Si in rem minoris pecunia profecta ſit, quæ curatori vel tutori ejus, nomine minoris mutuo data eſt meritò perſonalis in eundem minorem actio danda eſt. *l.* 3. *C. quando ex fac. tut.* Tutor, qui & cohæres pupillo erat, cùm conveniretur fideicommiſſi nomine, in ſolidum ipſe cavit. Quæſitum eſt, an in adultum pupillum pro parte danda ſit utilis actio, reſpondit dandam. *l.* 8. *ff. quando ex fact. tut.* See the following Article.

X.

10. Reſtitution of the Minor, notwithſtanding the Tutor's Authority.

If the Minor has ſuffered conſiderable Loſs by what the Tutor has tranſacted even honeſtly and uprightly, whether with, or without the Minor's concurrence, the Authority of the Tutor will be no hinderance, why the Minor may not have Relief in this caſe, if there be ground for it[n], according to the Rules which ſhall be explained in the Title of Reſtitution of Things to their firſt ſtate. For the Tutor has only Power to preſerve the Eſtate of the Minor, and not to waſte it.

[n] Tutor in re pupilli tunc domini loco habetur, cùm tutelam adminiſtrat, non cùm pupillum ſpoliat. *l.* 7. §. 3. *ff. pro emp.* Nulla differentia eſt, non interveniat auctoritas tutoris, an perperam adhibeatur. *l.* 2. *ff. de auct. & conſ. tut.* Majoribus annis viginti-quinque etiam in his quæ præſentibus tutoribus vel curatoribus in judicio vel extra judicium geſta fuerint, in integrum reſtitutionis auxilium ſupereſſe, ſi circumventi ſunt, placuit, *l.* 2. *C. ſi tut. vel cur. interv.* See the nineteenth Article of the ſecond Section of Reſciſſions.

XI.

11. In an Affair between the Tutor and the Minor, another Tutor is ſubſtituted.

If the Tutor hath in his own Name any Claim againſt his Minor, he cannot authorize him in any thing relating to his own Concern. But in this caſe, a Curator, or Subſtitute Tutor, is given to the Minor, who is to defend him againſt the Pretenſions of his Tutor. If the Minor has two or more Tutors, then one of the Tutors ſhall defend him againſt the other. But if the Buſineſs were to authorize the Minor to accept, for Inſtance, an Inheritance that is not burdenſome, to which the Tutor happens to be a Creditor, the Tutor may authorize his Minor to accept of the Inheritance, altho' by a conſequence of the Engagements which he enters into, by taking upon him the Quality of Heir, he becomes Debtor to his Tutor[o].

[o] In rem ſuam tutorem auctorem fieri non poſſe. *l. 1. ff. de auth. & conſ. l. 5. eod.* Si pupillus pupillave cum juſto tutore, tutorve cum eorum quo litem agere vult, & curator in eam rem petitur, &c. *l. 3. §. 2. ff. de tutel. l. 1. C. de in lit. dand. tut. V. Nov. 72. C. 2.* Si plures tutores ſint, à prætore curatorem poſci litis cauſa ſupervacuum eſt: quia altero auctore cum altero agi poteſt. *l. 24. ff. de teſt. tut.* Quanquam regula ſit juris civilis, in rem ſuam auctorem tutorem fieri non poſſe, tamen poteſt tutor proprii ſui debitoris hæreditatem adeunti pupillo auctoritatem accommodare, quamvis per hoc debitor efficiatur, prima enim ratio auctoritatis ea eſt, ut hæres fiat; per conſequentias contigit, ut debitum ſubeat. *l. 1. ff. de auct. & conſ. tut. l. 7. eod.*

XII.

12. The Tutor cannot accept an Aſſignment to a Debt owing by his Minor.

The Tutor cannot accept an Aſſignment to a Debt owing by his Minor; and if he does, he ſhall loſe the Debt that is aſſigned; unleſs the circumſtances juſtify what he does, as if the Tutor pays a Debt with his own Money, that he may put a ſtop to, or prevent an Attachment of the Goods of the Minor[q].

[p] Cadat ab eis qua ex hoc ſunt quæſita propter tranſgreſſionem noſtræ legis. *Nov. 72. C. 5.*

[q] Non ſit contra ſenatuſconſultum, ſi cujus tutor creditori patris pupilli exolvit, ut ejus loco ſuccedat. *l. 21. ff. de reb. eor. qui ſub tut.*

SECT. III.

Of the Engagements of Tutors.

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I.

1. The Tutor is obliged to act.

HE who has been named Tutor, and who has no Excuſe, is obliged to accept and execute the Tutorſhip. And he ſhall be accountable not only for what he has managed ill, but alſo for what he has omitted to do[a].

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[a] Gerere atque adminiſtrare tutelam, extra ordinem tutor cogi ſolet. *l. 1. ff. de adm. & per. tut.* Ex quo ſcit ſe tutorem datum, ſi ceſſet tutor, ſuo periculo ceſſat. *d. l. §. 1.* In omnibus quæ fecit

tutor cum facere non deberet, item in his quæ non fecit, rationem reddet hoc judicio. *l.* 1. *ff. de tutelæ & rat.* Tam de adminiſtratis, quàm de neglectis. *l.* 6. *C. de teſt. tut.* Ex quo innotuit tutori ſe tutorem eſſe, ſcire debet periculum tutelæ ad eum pertinere. *l.* 5. §. *ult. ff. de adm. & per. tut.* See the ninth Article of this Section.

II.

2. The firſt Engagement of the Tutor, is to look after the Minor's Education.

The firſt Engagement of the Tutor, is to take care of the Perſon of his Minor, to look after his Education and Conduct, and to lay out on it the neceſſary and reaſonable Charges, according as the Quality and Eſtate of the Minor may require[b].

[b] Cùm tutor non rebus dumtaxat, ſed etiam moribus pupilli præponatur, imprimis mercedes præceptoribus, non quas minimas poterit, ſed pro facultate patrimonii, pro dignitate natalium conſtituet. *l.* 12. §. 3. *ff. de adm. & per. tut.* See the fifth and following Articles.

III.

3. The Minor's Mother is intruſted with his Education, if it is not otherwiſe provided.

The Mothers of Minors are intruſted with their Education, altho' they have not the Guardianſhip; unleſs there be juſt reaſons to deprive them of it; which, in caſe of doubt, ought to be determined by the Judge, with the advice of the Relations[c].

[c] Educatio pupillorum tuorum nulli magis quàm matri eorum, ſi non vitricum eis induxerit, committenda eſt. Quando autem inter eam & cognatos & tutores ſuper hoc orta fuerit dubitatio, aditus præſes provinciæ, inſpecta perſonarum qualitate & conjunctione, perpendet ubi puer educari debeat. *l.* 1. *C. ubi pup. educ. deb. Nov.* 22. *c.* 38.

We have not inſerted in this Rule, that the Mother, by marrying a ſecond Husband, forfeits the Education of her Children by the firſt Marriage, as the Law quoted on this Article ſeems to determine. For altho' this conſideration ought ſometimes to have this effect, yet, by our Cuſtom, the Mother is not deprived of the Education of her Children, by the bare effect of her marrying a ſecond Husband. See the following Article.

IV.

4. Of the Mother who marries a ſecond Huſband.

If the Mother of the Minor has married a ſecond Huſband, the Education of her Children may be taken from her, or left to her in her married ſtate with her ſecond Huſband, according as the circumſtances may require[d].

[d] *This is a conſequence of the foregoing Article, and of the fourth Article of the ſeventh Section; where it is ſaid, that the Father in Law may be Tutor.*

V.

5. Expences of Education.

The Education of the Minor comprehends his Food and Raiment, his Lodging, Medicines, Salaries to Preceptors, Charges laid out on his Studies and other Exerciſes: and in general, all neceſſary and reaſonable Expences, according to the Quality and Eſtate of the Minor[e].

[e] Officio judicis, qui tutelæ cognoſcit, congruit reputationes tutoris non improbas admittere. Ut puta, ſi dicat impendiſſe in alimenta pupilli vel diſciplinas. *l.* 2. *ff. ubi pup. educ.* Mercedes præceptoribus. *l.* 12. §. 3. *ff. de adm. & per. tut.* Veſtem & tectum. *l.* 3. §. 2. *ff. ubi pup. educ. v. l. ult. C. de aliment. pup. præſt.*

VI.

6. How theſe Expences a regulated.

The Expences of Education ought to be regulated in ſuch a manner, that nothing decent or neceſſary be wanting to the Minor, according to his Condition and his Revenue: and likewiſe that his whole Income be not laid out on his Education[f]. And even as to Minors who have the greateſt Eſtates, the Expences of their Education ought to be moderated[g]. And if the Eſtate of the Minor increaſes, or is diminiſhed, the Expences of Education may be augmented or diminiſhed in proportion, if it be neceſſary[h].

[f] Modus autem, ſi quidem prætor arbitratus eſt, is ſervari debet, quem prætor ſtatuit. Si verò prætor non eſt aditus, pro modo facultatum pupilli debet arbitrio judicis æſtimari. *l.* 2. §. 1. *ff. ubi pup. educ.* Modum autem patrimonii ſpectare debet (prætor) cùm alimenta decernit. Et debet ſtatuere tam moderatè, ut non univerſum reditum patrimonii in alimenta decernat, ſed ſemper ſic, ut aliquid ex reditu ſuperſit. *l.* 3. §. 1. *eod. Nov.* 72. *c.* 7.

[g] In amplis tamen patrimoniis poſitis, non cumulus patrimonii, ſed quod, exhibitioni frugaliter ſufficit, modum alimentis dabit. *d. l.* 3. §. 3.

[h] Si forte poſt decreta alimenta ad egeſtatem fuerit pupillus perductus, diminui debent quæ decreta ſunt: quemadmodum ſolent augeri, ſi quid patrimonio acceſſit. *d. l.* 3. §. *ult.*

VII.

7. The W of the Father about the Minor Education

If the Father of the Minor has regulated what concerns his Education, either as to the Place where he ſhould be educated, or the Manner, or Expences of his Education; his will ought to be obſerved in this matter, unleſs there be juſt cauſe for regulating theſe things in another manner. Thus, for Example, if the Father believing himſelf to be richer than he really was, had ordered too expenſive an Education for his Son, it may be moderated: as, on the contrary, it may be augmented, if what the Father has appointed be not ſufficient, according to the Condition and Eſtate of the Minor. Thus, one might commit the Education to other Perſons than thoſe named by the Father, if it ſhould be found that the Conduct of the ſaid Perſons would expoſe either the Life or Manners of the Minor to any danger. And if the Father had intruſted the Education of his Son to the Perſon whom he had ſubſtituted to ſucceed him in the Eſtate, the Judge ought in

Prudence, with the advice of the Minor's Relations, to prevent both the Danger, and even the Suſpicion of it, if there ſhould appear to be any ground for it. Thus, in other Difficulties of the like nature, it will be prudent to follow, or not to follow the directions of the Father, according as the conſideration of the Advantages of the Minor may require[l].

[l] Si pater ſtatuit alimenta liberis, quos hæredes ſcripſerit, ea præſtando tutor reputare poterit: niſi fortè ultra vires facultatium ſtatuerit: tunc enim imputabitur ei, cur non adito prætore deſideravit alimenta minui. *l.* 2. §. *ult. ff. ubi pup. educ.* Solet prætor frequentiſſimè adiri, ut conſtituat, ubi filii vel alantur vel morentur, non tantum in poſtumis, verùm omnino in pueris. *l.* 1. *ff. eod.* Si diſceptetur, ubi morari, vel ubi educari pupillum oporteat, causâ cognitâ id præſidem ſtatuere oportebit. In cauſæ cognitione evitandi ſunt qui pudicitiæ impuberis poſſunt inſidiari. *l.* 5. *eod.* Et ſolet ex perſona, ex conditione, & ex tempore ſtatuere ubi potius alendus ſit. Et nonnunquam à voluntate patris recedit prætor. Denique cùm quidam teſtamento ſuo caviſſet, ut filius apud ſubſtitutum educaretur, Imperator Severus reſcripſit, prætorem æſtimare debere, præſentibus cæteris propinquis liberorum. Id enim agere prætorem oportet, ut ſine ulla maligna ſuſpicione alatur, & educetur. *l.* 3. §. 1. *eod.* See the eighteenth Article.

VIII.

8. A Minor without an Eſtate.

If the Minor have no Eſtate, or has not ſufficient for his Maintenance, the Tutor is not obliged to contribute any thing of his own towards it. For the Office of a Tutor conſiſts only in taking ſuch care as the Adminiſtration of the Minor's Concerns may demand[l].

[l] Si egeni ſunt pupilli, de ſuo eos alere tutor non compellitur. *l.* 1. §. *ult. ff. ubi pup. educ.*

IX.

9. The ſecond Engagement of the Tutor, is the Adminiſtration of the Eſtate.

The ſecond Engagement of the Tutor concerns the Adminiſtration of the Eſtate of the Minor. And this Engagement obliges him to take the ſame care of the Goods, and Affairs of his Minor, as a careful Maſter of a Family takes of his own. Thus, the Tutor muſt anſwer for any Fraud, and for Faults that are contrary to this Care; but not for the bad Succeſs of what ſhall have been rightly managed, nor for Accidents[m].

[m] A tutoribus & curatoribus pupillorum eadem diligentia exigenda eſt circa adminiſtrationem rerum pupillarium, quam paterfamilias rebus ſuis ex bona fide præbere debet. *l.* 33. *ff. de adm. & per. tut.* Generaliter quotieſcumque non ſit nomine pupilli, quod quivis paterfamilias idoneus facit, non videtur defendi. *l.* 10. *eod.* Præſtando dolum, culpam, & quantam in ſuis rebus diligentiam. *l.* 1. *ff. de tutelæ & rat.* Quidquid tutoris dolo, vel latâ culpâ, aut levi, ſeu curatoris minores amiſerint, vel cùm poſſent non acquiſierint, hoc in tutelæ ſeu negotiorum geſtorum utile judicium venire non eſt incerti juris. *l.* 7. *C. arb. tut.* Sufficit tutori bene & diligenter negotia geſſiſſe, etſi eventum adverſum habuit quod geſtum eſt. *l.* 3. §. 7. *ff. de cont. tut. & ut. act.* Tutoribus vel curatoribus fortuitos caſus, adverſus quos caveri non potuit, imputare non oportere, ſæpe reſcriptum eſt. *l.* 4. *C. de per. tut.* See the thirty fourth Article.

X.

10. Inventory of the Goods of the Minor.

The firſt Duty of the Tutor, as to the Adminiſtration of the Goods of the Minor, is to make an Inventory of them, as the Judge ſhall direct, before he enter upon the Management of the Eſtate; that he may know what he is charged withal, and that he may be able to give an Account of it when his Tutorſhip is at an end. But if before the making of the Inventory, there happens any Affair which does not admit of delay, the Tutor may give order about it, according as neceſſity ſhall require[n].

[n] Tutores vel curatores, mox quàm fuerint ordinati, ſub præſentia publicarum perſonarum, inventarium rerum omnium & inſtrumentorum ſolemniter facere curabunt. *l.* 24. *C. de adm. tut.* nihil itaque gerere, ante inventarium factum, cum oportet, niſi id, quod dilationem nec modicam expectare poſſit. *l.* 7. *ff. de adm. & per. tut. l. ult.* §. 1. *C. arbit. tut.*

XI.

11. The Inventory being made, the Writings and Effects are put into the hands of the Tutors.

The Inventory of the Goods being made, all the Deeds and Writings are delivered over into the hands of the Tutor, that he may take care of the Affairs, call in the Debts, uſe all neceſſary diligence in Law-Suits, and give order about every thing wherein the Intereſt of the Minor is concerned[o]. But as to Law-Suits, he ought neither to commence any for the Minor, nor defend any that are brought againſt him, without the advice of the Perſons of whom he is to take counſel in the matter. And he ought likewiſe to govern himſelf by their Advice, in ſuing the Debtors of the Minor, that he may not engage him in any fruitleſs Law-Suits againſt Debtors who are not ſolvent. And in fine, in all things doubtful, the Tutor ought to govern himſelf according to the Advice of the Relations of the Minor.

[o] Inventario publicè facto ſecundùm morem ſolitum res ei tradantur. *l. ult.* §. 1. *C. arb. tut.* Nomina paternorum debitorum, ſi idonea fuerint initio ſuſceptæ tutelæ, & per latam culpam tutoris minus idonea tempore tutelæ eſſe ceperant: judex qui ſuper ea re datus fuerit, deſpiciet: etſi palam dolo tutoris, vel manifeſtâ negligentiâ ceſſatum eſt, tutelæ judicio damnum quod ex ceſſatione accidiſſet, pupillo præſtandum eſſe, ſtatuere curabit. *l.* 2. *C. arbit. tut. l.* 57. *ff. de adm. & per. tut.* See the ninth Article.

XII.

12. The Tutor is put

All the Immoveables belonging to the Minor, are likewiſe put into the power *into poſſeſſion of all the Goods.* power and poſſeſſion of the Tutor, that he may take care of them, reap the Fruits, and gather in the Revenues[p].

[p] Tutores poſſeſſorum loco habentur. *l.* 15. §. 5. *ff. qui ſatiſd. cog.*

According to the Uſage in France, *the Lands of Minors are farmed out to the higheſt bidder, after publick Notice given, and that by the advice of the Relations: and the Tutor is not allowed to keep the Lands in his own hands, except no perſon can be found to take them to Farm, and even in that caſe he is to hold them on the conditions which he and the Minors Relations agree on.*

XIII.

13. *The Tutor ought to ſell the Moveables belonging to the Minor.* Seeing Moveables are liable to periſh, or to be loſt, and that beſides they yield no Revenue, the Tutors ought to ſell them without delay, and put out the Money to Intereſt, or imploy it in the Purchaſe of Lands. But if there ſhould happen to be any juſt cauſe of Delay, as in that caſe the Tutor ought not to be blamed for not uſing too precipitate a Diligence, ſo likewiſe he ought not to be excuſed if he has been guilty of any Negligence on his part[q].

[q] Si tutor ceſſaverit in diſtractione earum rerum quæ tempore depereunt, ſuum periculum facit. Debuit enim confeſtim officio ſuo fungi. Quid ſi contutores expectabat vel differentes, vel etiam volentes ſe excuſare, an ei ignoſcatur? Et non facilè ignoſcetur: debuit enim partibus ſuis fungi, *non quidem præcipiti feſtinatione, ſed nec moratoriâ cunctatione. l.* 7. §. 1. *ff. de adm. & per. tut. l. ult.* §. *ult. C. eod.* Animalia ſupervacua. *l.* 22. *in fine C. eod. l. ult. C. quando decreto opus non eſt.* Si res pupillares quas in horreo conditas habere, aut etiam vendere debuiſti, in hoſpitio tuo, ut aſſeveras, vi ignis aſſumptæ ſunt: culpam ſeu ſegnitiem tuam non ad tuum damnum, ſed ad pupilli tui ſpectare diſpendium, minus probabili ratione depoſcis. *l.* 3. *C. de peric. tut.* Ut ex mobilibus prædia idonea comparentur. *l.* 24. *C. de adm. tut.*

By the ancient Law of the Romans, *the Tutor was not only obliged to ſell the Moveables, but even the Houſes, becauſe of the danger of Fire;* domus vel aliæ res periculo ſubjectæ, l. 5. §. 9. ff. de adm. & per. tut. l. 22. C. de adm. tut. *The Emperor* Conſtantine *forbad the Sale of any Immoveable, or even Moveable Goods, without a Judicial Enquiry into the matter, and a Decree of the Judge; except Cloaths, and ſuch Living Creatures as were not of neceſſary uſe to the Minor, which the Tutor was permitted to ſell without any previous Order from the Judge.* d. l. 22. *In* France, *by the Ordinance of* Orleans, *Article* 102d, *Tutors are obliged, as ſoon as they have made an Inventory, to ſell by Authority of a Court of Juſtice, all the Moveable Goods that are not periſhable, and to put out the Money to Intereſt, or to imploy it in the Purchaſe of Lands, or Houſes, by the advice of the Relations and Friends.* See the fifteenth Article.

XIV.

14. *The Tutor cannot purchaſe the Goods of the Minor.* The Tutor cannot purchaſe the Goods of his Minor, neither directly in his own Name, nor by the interpoſition of a third perſon. For beſides that he cannot be Seller and Buyer of the ſame Thing, he might eaſily cheat, and purchaſe at an under rate what he has the Sale of[r].

[r] Idem ipſe tutor & emptoris & venditoris officio fungi non poteſt. *l.* 5. §. 2. *ff. de auct. & conſ. tut.* Sed ſi per interpoſitam perſonam rem pupilli emeret, in ea cauſa eſt, ut emptio nullius momenti ſit. *d. l.* §. 3. *l.* 9. *ff. de reb. eor. q. ſ. t.*

XV.

15. *Exception to the Rule for the Sale of Moveables.* If among the Moveable Things there be ſome which are of neceſſary uſe to the Eſtate of the Minor, ſuch as Cattle in a Farm, Wine-Preſſes, or Veſſels for the Vintage, and others of the like nature; theſe kinds of Moveables are to be kept[s].

[s] Animalia quoque *ſupervacua* quamvis minorum, quin veneant non vetamus. *l.* 22. *in fine C. de adm. tut.* See the ſeventeenth Article.

XVI.

16. *Another Exception.* If the Guardianſhip is to laſt but a ſhort time, the Minor being near at Age, and it be found more uſeful to keep the Moveables that may be neceſſary to him when he comes to be of Age, ſince if he has them not of his own, he muſt neceſſarily purchaſe them of others, the Tutor may be excuſed from ſelling them[t].

[t] *Seeing the Moveables of Minors are to be ſold only in order to prevent their periſhing, and that the Money which they yield may be improved, and that theſe motives ceaſe in the caſe of this Article; the Diſpoſition of the Law which orders the Sale of the Moveables, ought to ceaſe here likewiſe.*

XVII.

17. *Another Exception.* If for other Reaſons it be neceſſary, or uſeful to the Minor, to keep ſome of the Moveables, ſuch as Jewels, Pictures, and other precious Moveables belonging to an Illuſtrious Family, or Sets of Horſes, and other Things neceſſary to the Perſon, or Eſtate of the Minor, care ought to be taken in theſe and the like caſes, to reſerve ſuch kinds of Things, according as the Quality of the Minors, the Uſe of ſuch Moveables, and other Circumſtances may require[u].

[u] Gemmas, cæteraque mobilia pretioſa. *l.* 22. *C. de adm. tut. This Law forbad in general the Sale of all the Moveables of Minors, except ſuch Things as it ſhould be judged neceſſary to ſell after a Judicial Enquiry into the matter, and a Decree of the Judge; which was contrary to the antient Law of the* Romans, *and to our Cuſtom.* See the thirteenth Article of this Section, with the Remarks on it.

XVIII.

18. *The Advantage of the Minor, is to be preferred to the diſpoſition of the Father.* If the Father of the Minor hath forbid, by ſome Diſpoſition, the Sale of his Moveables, the Tutor ſhall nevertheleſs be under an Obligation to ſell them; unleſs there be ſome particular conſideration that obliges him to keep them. And this ought to be regulated

by the Judge, with the advice of the Relations[x].

[x] Uſque adeo autem licet tutoribus patris præceptum negligere, ut ſi pater caveret, ne quid rei ſuæ diſtrahatur, vel ne veſtis, vel ne domus, vel ne aliæ res periculo ſubjectæ, liceat eis contemnere hanc patris voluntatem. *l.* 5. §. 9. *ff. de adm. & per. tut.* See the preceding Articles. See the ſeventh Article, as to the Will of the Father.

XIX.

19. *Small and deſperate Debts ought to be ſold.*

If among the Goods of a Minor there be Debts owing to him, which it may be more uſeful to ſell, than to ſue for them at Law, becauſe of the danger of being at fruitleſs Charges; as for Example, if in the Succeſſion of a Merchant by Retail, there be a great number of ſmall Debts, which it may be either impoſſible, or very difficult, to recover, becauſe of their multitude, their ſmallneſs, and the difficulties in recovering them at Law; theſe ſorts of Debts may be ſold, the neceſſary Formalities being obſerved in the Sale, and the other Debts which it may be more advantageous to charge the Tutor with the recovery of them, may remain unſold[y].

[y] *Theſe ſorts of Debts being as much, or rather more, liable to periſh than Moveable Goods, there is the ſame reaſon for ſelling them.*

XX.

20. *How the Money is to be imployed.*

All the Monies ariſing from the Sale of the Moveables, and other Effects, as alſo the ready Money that is found among the Goods of the Minor, ought to be employed by the Tutor in paying off the Minor's Debts, if he owes any, and acquitting the other Charges which he is liable to. And what Money remains over and above, ought to be laid out on the Purchaſe of Lands, or Houſes, or put out to Uſe[z]. And we muſt reckon among the Debts which the Tutor is bound to acquit, that which is owing to himſelf by his Minor[a].

[z] Ex mobilibus prædia idonea comparentur. *l.* 24. *C. de adm. tut.*

[a] Sicut autem ſolvere tutor quod debet, ita & exigere quod ſibi debetur poteſt; ſi creditor fuit patris pupilli. Nam & ſibi ſolvere poteſt. *l.* 9. §. 5. *ff. eod. l* 8. *C. qui dare tut.*

By the Ordinance of Orleans, *Art.* 102. *Tutors and Curators are obliged to lay out the Monies in the Purchaſe of Annuities, or Lands and Tenements, with the advice of Friends and Relations, upon pain of paying in their own Names the Intereſt of the Money. This Ordinance having directed the Money to be laid out either on Lands and Tenements, or in Annuities, it has excluded the putting it out to Uſe by a Loan, as being unlawful.*

XXI.

21. *Of a Tutor who is Creditor to his Minor, and compounds with the other Creditors.*

If the Succeſſion of the Father of the Minor be burdened with Debts, and the Tutor being one of the Creditors, compounds with the other for ſome abatement, in order to keep the Minor from renouncing the Succeſſion, he ſhall be obliged to grant the ſame abatement of his own Debt. Unleſs it be that for ſome particular conſiderations, the Friends and Relations of the Minor think fit to excuſe the Tutor from ſuch Compoſition[b].

[b] Cùm hæreditas patris ære alieno gravaretur, & res in eo ſtatu videretur, ut pupilla ab hæreditate paterna abſtineretur: unus ex tutoribus cum pleriſque creditoribus ita decidit, ut certa crediti portione contenti eſſent, acciperentque——reſpondi, cùm tutorem qui cæteros creditores ad portionem vocaret, eadem parte contentum eſſe debere. *l.* 59. *ff. de adm. & per. tut.*

If the Relations of the Minor, ſhould find it reaſonable to diſtinguiſh the condition of the Tutor from that of the other Creditors, in conſideration of his Care about the Minor's Concerns, and of the Advantage he had procured to him, by obtaining from the other Creditors an Abatement, which perhaps he himſelf was not in a condition to grant for the Debt due to him, it might be juſt not to oblige the Tutor to ſtand to the ſame Compoſition for his own Debt.

XXII.

22. *The Tutor obliged to pay Intereſt for the Minor's Money, when he neglects to imploy it for the Pupil's behoof.*

The Monies which ſhall ariſe by the Redemption of Annuities, and the Payment of other Debts owing to the Minor, as alſo the Monies which ſhall come to him by Succeſſion, or otherwiſe, ſhall be imployed, in the ſame manner as the Monies ariſing from the Sale of the Moveables, in purchaſing Lands, or Houſes, or Annuities. And if the Tutor does not uſe all reaſonable diligence to find out ſuch a Purchaſe, or if he converts the Money of his Minor to his own uſe, he ſhall be bound to pay Intereſt for the Sums which he ſhall have neglected to put out[c].

[c] Si poſt depoſitionem pecuniæ comparare prædia tutores neglexerunt, incipient in uſuras conveniri, quamquam enim à prætore cogi eos oportet ad comparandum, tamen ſi ceſſent, etiam uſuris plectendi ſunt, tarditatis gratia: niſi per eos factum non eſt quominus compararint. *l.* 7. §. 3. *ff. de adm. & per. tut.* Pecuniæ quam in uſus ſuos converterent tutores, legitimas uſuras præſtant. *d. l.* §. 4. *l.* 1. *C. de uſur. pup.*

By the Roman *Law the Tutor was obliged to depoſite the Money which he had ſaved by his good Management, that it might be laid out on ſome Purchaſe. But by our Cuſtom, the Money remains in the hands of the Tutor; and he is to take care, at his peril, to imploy it for the Advantage of the Minor.*

XXIII.

23. *The Tutor has ſome time allowed him for laying out the Minor's Money.*

The Tutor is not bound to pay Intereſt for the Minor's Money from the moment that he received it. But a certain time is allowed him to look out which way he can moſt ſafely lay it out for the Benefit of the Minor, whether it be Money that was lying in ready Caſh,

Caſh at the time that the Inventary was made, or Money ariſing from the Sale of Moveables, or from other Cauſes, or even what is ſaved out of the Minor's Revenues, or Income, of which we ſhall ſpeak in the following Article[d].

XXIV.

24. *What is ſaved out of the Revenue, how to be imployed.* If the Revenues of the Minor exceed the Expences, the Tutor is obliged to accumulate what remains over and above every year, to make a Capital Stock of it, to be laid out in the Purchaſe of Lands, or Tenements, or Annuities, when it amounts to ſuch a Sum as may be judged ſufficient for ſuch an uſe. Which if he has neglected to do, he ſhall be bound to pay the Intereſt of the remaining Capital Stock ariſing from what is ſaved of the ſaid Revenues, purſuant to the Rule explained in the foregoing Article[e].

XXV.

25. *How the Revenues ariſing from the new Funds ought to be imployed.* The Rents and other Revenues which ſhall ariſe from the Funds that have been made out of the Monies which have been ſaved out of the Revenue, are likewiſe to be accumulated into Capital Stocks, to be imployed in the Purchaſe of Lands, or Tenements, or Annuities, whenever they amount to Sums ſufficient for that purpoſe, as has been ſaid in the preceding Article, and according as the duration of the Guardianſhip will allow of it. For all the Money ariſing from the Revenues being out of the hands of the Debtors, and in the hands of the Tutor, it is reckoned as a Capital Stock to the Minor, which ought to be laid out for his advantage[f].

XXVI.

26. *If there be no opportunity of laying out the Money to advantage.* If there be no opportunity found of putting out the Money to a lawful and profitable Uſe, the Tutor will be diſcharged. But in order to have this Diſcharge, he ought to take the neceſſary precautions, uſe his diligence, and procure proper atteſtations of the Counſel given him by the Perſons with whom he was bound to adviſe, by which it may appear that the Money has remained by him in Specie, and that it was not poſſible for him to imploy it to advantage[g]. Otherwiſe he will be anſwerable for it, according to the Rule explained in the following Article.

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[d] Uſuræ à tutoribus non ſtatim exiguntur, ſed interjecto tempore ad exigendum, & collocandum duûm menſium, idque in judicio tutelæ ſervari ſolet. Quod ſpatium, ſeu laxamentum temporis tribui non oportet his qui nummos impuberum vel adoleſcentium in ſuos uſus converterunt. *l. 7. §. 11. ff. de adm. & per. tut.*

According to our Uſage in France, *the Delay granted to the Tutor for employing the Principal Sums which he may receive, by the Redemption of Mortgages, or the like, depends on the circumſtances, according to the quality of the Sums, and the difficulties of imploying them with ſafety and advantage; as to which the Tutor is obliged to take his precautions by the advice of the Relations. And as to the Sums which ariſe out of what is ſaved of the Rents, a time is fixed for accumulating them, and converting them into a Capital Stock, ſuch as once every three years; and a delay of ſix months is granted for laying out the ſaid Capital in the Purchaſe of Lands, or putting it out to Intereſt. And if the Tutor has not imployed the Money, he is obliged to pay Intereſt for it in his own Name after the ſaid delays, it being preſumed that he has converted the Money to his own uſe. As to which he is obliged likewiſe to take his precautions.* See the following Articles.

[e] Ita autem depoſitioni pecuniarum locus eſt, ſi ea ſumma corradi, id eſt, colligi poſſit, ut comparari ager poſſit. Si enim tam exiguam eſſe tutelam facile probatur, ut ex numero refecto prædium puero comparari non poſſit, depoſitio ceſſat. Quæ ergo tutelæ quantitas depoſitionem inducat, videamus, & cum cauſa depoſitionis exprimatur, ut prædia pupillis comparentur, manifeſtum eſt ut ad minimas ſummas non videatur pertinere: quibus modus præfiniri generaliter non poteſt, cùm facilius cauſa cognita, per ſingulos poſſit examinari. *l. 5. ff. de adm. & per. tut.* See the preceding Article, with the Remark on it, as alſo the following Article.

If the Tutor be indebted in his own Name to his Minor, he ſhall be bound to include in the Capital Stock ariſing from the Revenues, the Intereſt which he himſelf owes. For he ought to have paid it; and it is the ſame thing, with reſpect to him, as if he had received the Intereſt from another Debtor. A ſemetipſo exigere eum oportuit. *l. 38. ff. de neg. geſt.*

[f] Si uſuras exactas tutor vel curator uſibus ſuis retinuerint, earum uſuras agnoſcere eos oportet. Sanè enim parvi refert, utrùm ſortem pupillarem, an uſuras in uſus ſuos converterent. *l. 7. §. 12. ff. de adm. & per. tut.* Ex duobus tutoribus pupilli altero defuncto, adhuc impubere pupillo, qui ſupererat, ex perſona pupilli ſui judice accepto conſecutus eſt cum uſuris quantum ex tutela ad tutorem defunctum pervenerat. Quæſitum eſt, judicio tutulæ quo experitur pubes factus, utrùm ejus tantùm portionis quæ ab initio ex tutelæ ratione pervenerat ad defunctum contutorem uſuræ veniant: an etiam ejus ſummæ, quæ ex uſuris pupillæ aucta, poſt mortem ejus ad ſuperſtitem æquè cum ſorte tranſlata ſit, aut transferri debuit. Reſpondit, ſi eam pecuniam in ſe vertiſſet, omnium pecuniarum uſuras præſtandas. Quòd ſi pecunia manſiſſet in rationibus pupilli, præſtandum quod bona fide percepiſſet, aut percipere potuiſſet, ſi fœnori dare cùm potuiſſet, neglexiſſet. Cùm id quod ab alio debitoris nomine uſurarum cum ſorte datur, ei qui accipit, totum ſortis vice fungitur, vel fungi debet. *l. 58. §. 1. ff. de adm. & per. tut.*

[g] Si pecuniam pupillarem neque idoneis hominibus credere, neque in emptionem poſſeſſionum convertere potuiſti, non ignorabit judex uſuras ejus à te exigi non oportere. *l. 3. C. de uſur. pup.* Si tutor pecuniam pupillarem credere non potuit, quod non erat cui crederet, pupillo vacabit. *l. 12. §. ult. ff. de adm. & per. tut.* See the following Article.

XXVII.

27. If the Tutor neglects to employ the Money, or to take his Diſcharge.

If the Tutor does not lay out the Money, and does not take the neceſſary precautions to juſtify his not doing it, he will be liable to pay in his own Name Intereſt for the Money. For in this caſe it is juſtly preſumed, that he has converted the Money to his own uſe[h].

[h] Si comparare prædia tutores neglexerunt, incipient in uſuras conveniri. *l. 7. §. 3. ff. de adm. & per. tut.* Niſi per eos factum non eſt, quominùs compararent. *d. §. 3.* See the preceding Article, and the twenty ſecond Article.

XXVIII.

28. Of the Adminiſtration of two or more Tutors.

If a Minor has two or more Tutors, and that by their Nomination there is aſſigned to every one of them their particular Charge, their Adminiſtration will be diſtinct and ſeparate: and none of them ſhall be accountable for the Adminiſtration of the others[i]. But if the ſame Adminiſtration be committed to two or more Tutors, they will be all of them anſwerable for the whole. And whether they be willing to exerciſe their Office jointly, or ſeparately, or that they agree among themſelves to commit the Management to one of their number, or that they all neglect the Adminiſtration, they ſhall all of them be bound one for the other, becauſe it is their common Charge[l].

[i] In diviſionem adminiſtratione deducta, ſive à præſide, ſive à teſtatoris voluntate, unumquemque pro ſua adminiſtratione convenire poteſt (adoleſcens) periculum invicem tutoribus ſeu curatoribus non ſuſtinentibus. *l. 2. §. 1. C. de divid. tut.*

[l] Si diviſio adminiſtrationis inter tutorès ſive curatores in eodem loco ſeu provincia conſtitutos facta necdum fuerit: licentiam habet adoleſcens & unum eorum eligere, & totum debitum exigere. *d. l. 2. l. 1. §. 11. & 12. ff. de tut. & rat. & diſtr.* Sin verò ipſi inter ſe res adminiſtrationis diviſerunt, non prohibetur adoleſcens unum ex his in ſolidum convenire. *d. l. 2. in fine.* Si quidam ex his (qui non adminiſtraverint) idonei non ſint, onerabuntur ſine dubio cæteri: nec iniquè, cùm ſingulorum contumacia pupillo damnum in ſolidum dederit. *l. 38. §. 1. ff. de adm. & per. tut.*

XXIX.

29. The benefit of Diviſion and Diſcuſſion among many Tutors.

If two or more Tutors have been named to act jointly, and to be anſwerable for one another, yet notwithſtanding this Obligation for the Whole that every one of them is under, when the Minor comes to call them to account for their Adminiſtration, he will be obliged to divide his Action among thoſe who have intermedled in the Management, and to diſcuſs every one of them for their reſpective Adminiſtrations, or their Heirs and Executors, before he can ſue one Tutor for the other, unleſs that ſome of them ſhould happen to be inſolvent: and if there be any of the Tutors who did not act, they are not to be ſued till the others who did act be firſt diſcuſſed. If the Tutors have renounced this Benefit of Diviſion and Diſcuſſion, they may be immediately ſued every one of them for the Whole. But whether this Benefit take place or not, the Tutors who have paid for the others, will ſucceed to the Minors Right of Action againſt them, for the Recovery of what they ſhall have paid over and above their own Share[m].

[m] Licet tutorum conventione mutuum periculum minimè finiatur, tamen eum qui adminiſtravit ſi ſolvendo ſit, primo loco, ejuſque ſucceſſores conveniendos eſſe non ambigitur. *l. ult. C. de divid. tut.* Si quidem omnes ſimul geſſerunt tutelam, & omnes ſolvendo ſunt, æquiſſimum erit dividi actionem inter eos pro portionibus virilibus, exemplo fidejuſſorum. *l. 1. §. 11. ff. de tut. & rat. diſtr. V. l. 2. §. 2. ff. de cur. bon. dando.* Et ſi forte quis ex facto alterius tutoris condemnatus præſtiterit, vel ex communi geſtu, nec ei mandatæ ſunt actiones, conſtitutum eſt à divo Pio, & ab Imperatore noſtro & divo patre ejus, utilem actionem tutori adverſùs contutorem dandam. *d. l. 1. §. 13. ff. de tut. & rat. diſtr. l. 2. C. de divid. tut.*

We do not explain in this Article what the meaning is of theſe words Diviſion and Diſcuſſion, becauſe it appears plainly enough from the Sequel. See the third Article of the firſt Section of the Solidity among two, *&c.*

XXX.

30. When there are many Tutors, who ſhall be preferred?

If two or more Tutors, named for the Adminiſtration of the ſame Guardianſhip, cannot agree neither to act jointly together, and to anſwer one for another, nor to intruſt the Management to one alone, the others anſwering for him, and if there be one of them who offers to give Security, that he may have the ſole Management, the other Tutors not offering the like Security, he ſhall be preferred and intruſted with the ſole Management[n]. But if all the Tutors offer to give Security, then he who is the moſt capable, and moſt reſponſible, both as to his own Perſon, and as to his Surety, ſhall be preferred. For it is better that the Minor's Affairs be managed only by one Perſon; and the other Tutors, in this caſe, ſhall not be bound to anſwer for his Adminiſtration[o]. If none of the Tutors offer to give Security, and they do not agree either to act jointly together, or to let one of their number manage for the others; the Adminiſtration ſhall be divided among them: and in this caſe, every one will be accountable only for his own. Or if the Adminiſtration is committed to one of them alone, the other Tutors refuſing to anſwer for him, they ſhall be diſcharged[p].

[n] Cùm quis offert ſatiſdationem ut ſolus adminiſtret, audiendus eſt. *l. 17. ff. de teſt. tut. §. 1. inſt. de ſatiſdat. tut. l. 4. in fine. C. de tut. vel cur. qui ſat. n. d.*

[o] Quod ſi plures ſatiſdare parati ſint, tunc idonior præferendus erit: ut & tutorum perſonæ inter ſe, & fidejuſſorum comparentur. *l.* 18. *ff. de teſt. tut.* Apparet igitur prætori curæ fuiſſe ne tutela per plures adminiſtretur. *l.* 3. §. 6. *ff. de adm. & per. tut.* Sanè enim facilius unus tutor & actiones exercet, & excipit. *d. l.*

[p] Si non erit à teſtatore electus tutor, aut gerere nolet, tum is gerat, cui major pars tutorum tutelam decreverit. Prætor igitur jubebit eos convocari; aut ſi non coibunt, aut coacti non decernent, cauſâ cognita, ipſe ſtatuet quis tutelam geret. Planè ſi non conſentiant tutores prætori, ſed velint omnes gerere, quia fidem non habeant electo, nec patiuntur ſuccedanei eſſe alieni periculi, dicendum eſt prætorem permittere eis omnibus gerere. Item ſi dividi inter ſe tutelam velint tutores, audiendi ſunt, ut diſtribuatur inter eos adminiſtratio, vel in partes, vel in regiones: & ſi ita fuerit diviſa, unuſquiſque exceptione ſummovebitur pro ea parte vel regione, quam non adminiſtrat. *l.* 3. §. 6. 7. 8. 9. *& l.* 4. *ff. de adm. & per. tut. l.* 55. *eod.* §. 1. *Inſt. de ſatiſdationibus tut.* See the ninth Article of the firſt Section.

XXXI.

31. The Obligation of Honorary Tutors. Altho' Honorary Tutors be not bound to concern themſelves in the Management of the Minor's Affairs, as the Onerary Tutors are, who are charged with the Adminiſtration, yet nevertheleſs, if in the Nomination of an Honorary Tutor, ſome particular Function had been aſſigned him, and he had failed in it, or that by Connivance, or an inexcuſable Negligence, he had winked at the bad Management of the Onerary Tutor, he might be made accountable for it according to the circumſtances[q].

[q] Honorarium tutorem periculum ſolere pati, ſi malè paſſus ſit adminiſtrari tutelam. *l.* 60. §. 2. *ff. de rit. nupt.* Cæteri igitur tutores non adminiſtrabunt, ſed erunt hi quos vulgò honorarios apellamus: nec quiſquam putet ad hos periculum nullum redundare. Conſtat enim hos quoque excuſſis prius facultatibus ejus qui geſſerit, conveniri oportere. Dati ſunt enim quaſi obſervatores actus ejus, & cuſtodes. Imputabiturque eis quandoque cur, ſi malè eum converſare videbant, ſuſpectum (eum) non fecerunt. Aſſiduè igitur & rationem ab eo exigere oportet: & ſollicitè curare qualiter converſetur, &c. *l.* 3. §. 2. *ff. de adm. & per. tut.* See the ſixth Article of the firſt Section.

We have not conceived this Rule in the rigour of which had by the Roman *Law: and we have drawn it up in terms which agree with our Practice.*

XXXII.

32. The Tutor ought to give an Account, after his Tutorſhip is ended. The laſt Engagement of the Tutor, is to give an Account of his Adminiſtration, to anſwer for what he ſhall have ill managed, or neglected to do; to pay in the Sums of Money remaining in his hands, together with the Intereſt thereof from the day of balancing the Account: and to reſtore the Fruits which he ſhall have reaped[r]. And the Engagement of giving an Account is ſo indiſpenſible, that altho' the Father of the Minor, in naming the Tutor, had exempted him from giving an Account, he would nevertheleſs be obliged to it: For otherwiſe the Miſdemeanors of a Tutor might go unpuniſhed; which is neither conſiſtent with Good Manners, nor Publick Juſtice[ſ].

[r] Tutorem quondam ut tam rationem, quàm ſi quid reliquorum nomine debet, reddat, apud prætorem convenire poteſt. *l.* 9. *C. arbitr. tut.* In omnibus quæ fecit tutor cùm facere non deberet, item in his quæ non fecit, rationem reddet hoc judicio. *l.* 1. *ff. de tutela & rat. diſtr. d. l.* §. 3. Sciendum eſt tutorem poſt officium finitum uſuras debere in diem quo tutelam reſtituit. *l.* 7. §. *ult. ff. de adm. & per. tut.* Circa tutelæ reſtitutionem, pro favore pupillorum latior interpretatio facta eſt. Nemo enim ambigit hodie, ſive judex accipiatur, in diem ſententiæ, ſive ſine judice tutela reſtituatur, in eum diem quo reſtituerit uſuras præſtari. *l.* 1. §. *ult. ff. de uſur.* Si poſtea quàm pupillus ad paupertatem pervenerit, tutor in reſtituenda tutela aliquandiù moram fecerit, certum eſt fructuum nomine & uſurarum medii temporis, tam fidejuſſores ejus quàm ipſum teneri. *l.* 10. *ff. rem. pup. ſalv. fore.*

[ſ] Quidam decedens filiis ſuis dederat tutores, & adjecerat, *eoſque aneclogiſtos eſſe volo.* Et ait Julianus, tutores niſi bonam fidem in adminiſtratione præſtiterint, damnari debere, quamvis teſtamento comprehenſum ſit, ut aneclogiſti eſſent—— & eſt vera iſta ſententia. Nemo enim jus publicum remittere poteſt hujuſmodi cautionibus: nec mutare formam antiquitus conſtitutam. *l.* 5. §. 7. *ff. de adm. & per. tut.*

It may not be improper to take notice upon this Article, that according to the Uſage in France, *contrary to the Diſpoſition of the* Roman *Law*, in the fourth and fifth Laws C. de Tranſ. *the Tutor is under ſo ſtrict an Obligation to give an Account, that even altho' the Minor, after he came to Age, had tranſacted with his Tutor, or Guardian, concerning his Adminiſtration of the Guardianſhip, or that by an Acquittance, or ſome other Act, he had diſcharged him directly, or indirectly, when the Tutor had not accounted to him; all theſe Acts would be annulled. For it would be reaſonably preſumed, that the Tutor were guilty of Fraud, by keeping the Minor in ignorance of the State of his Affairs, which he could have no knowledge of, but by an Account. So that theſe ſorts of Acts are reckoned diſhoneſt, and contrary to Good Manners.*

XXXIII.

Tutors are not only bound to give an Account after their Truſt is at an end; but they are likewiſe obliged to do it during their Adminiſtration, if there falls out any thing that may make it neceſſary. Thus, for Example, if the Minor's Creditors ſeize on his Goods, in order to ſell them, the Tutor muſt give in a Summary Account of the Minor's Effects, that it may appear whether he has not ready Money enough to pay off the Debts[t]. *33. Caſe where the Tutor is obliged to give an Account during his Adminiſtration.*

[t] Imprimis igitur quoties deſideratur ab eo, ut remittat diſtrahi, requirere debet, qui ſe inſtruat de fortunis pupilli—— jubere debet edi rationes: itemque ſinopſim bonorum pupillarium. *l.* 5. §. 11. *ff. de reb. eor. qui ſub. tut.*

XXXIV.

Tutors ought, in ſtating their Accounts, *34. Charge and Diſ-*

charge in Tutors Accounts. counts, to charge themſelves with what they have actually received, and alſo with what they ought to have received; and in their Diſcharge they may ſet down what they have not been able to receive, in order to be diſcharged of it, if there be ground for it, as if they have uſed all neceſſary diligence againſt a Debtor, who proves to be inſolvent. For Tutors, altho' they be obliged to an exact and faithful Adminiſtration, yet they ought not to be made accountable for the Event[u].

[u] Rationem reddat. *l. 9. C. arbitr. tut.* Sufficit tutori benè & diligenter negotia geſſiſſe, etſi eventum adverſum habuit quod geſtum eſt. *l. 3. §. 7. ff. de contr. tut. & ut. act.* See the ninth Article.

XXXV.

35 The Tutor allowed all reaſonable Expences. Tutors may charge in their Accounts all the Expences that a reaſonable Adminiſtration obliged them to lay out[x]. In the number of which we muſt reckon the Expences which he has laid out by the advice of the Perſons who were appointed to be his Counſel, and thoſe that have been directed by the Judge, unleſs there ſhould appear to be ſome Fraud on his part[y]. But if any Accident renders thoſe Expences uſeleſs which it appeared reaſonable to lay out, the Tutor will nevertheleſs recover them[z].

[x] Si tutelæ judicio quis convenietur, reputare poteſt id quod in rem pupilli impendit. *l. 1. §. 4. ff. de contr. tut. & ut. act.* See the third Article of the ſecond Section.

[y] Manet actio pupillo ſi poſtea poterit probari obreptum eſſe prætori. *l. 5. §. 15. ff. de reb. eor. qui ſub. tut. Altho' this Text belongs to another Subject, yet it may be applied to this caſe.*

[z] Sufficit tutori bene & diligenter negotia geſſiſſe, & ſi eventum adverſum habuit quod geſtum eſt. *l. 3. §. 7. ff. de contr. tut. & ut. act.* See the ſeventh Article of the ſecond Section of thoſe who manage the Affairs of others without their knowledge.

XXXVI.

36. The Minor has a Mortgage upon the Eſtate of the Tutor. All the Eſtate of the Tutor is mortgaged, from the time of his Nomination, for what he ſhall appear to be indebted to his Minor, after ſtating his Accounts[a].

[a] Pro officio adminiſtrationis tutoris vel curatoris bona, ſi debitores exiſtant, tanquam, pignoris titulo obligata, minores ſibimet vindicare minimè prohibentur. Idem etſi tutor, vel curator quis conſtitutus, res minorum non adminiſtraverit. *l. 20. C. de adm. tut. l. 7. §. 5. in f. C. de cur. fur. l. 1. §. 1. C. de rei. ux. act.* See the ſixth Article of the fifth Section. Tutelæ periculo omnibus imminente qui ad tutelam vocantur, & ſubſtantiis eorum minori ætate tacite ſubjacentibus, pro hujuſmodi gubernatione. *Nov. 118. C. 5. in f.* See the fifth Article of the ſecond Section of Mortgages. See hereafter the ſixth Article of the fifth Section.

XXXVII.

If the Mother, who is Guardian to her Children, marries a ſecond Huſband before ſhe gets another Tutor named to them, and gives in an Account of her Adminiſtration, and pays off, or gives Security for what ſhe is indebted to them, the Eſtate of the ſecond Huſband will be mortgaged to the Minors, for all that the Mother ſhall appear to be indebted to them by the Balance of the Account, both for the time paſt before the Marriage, and for what follows after[b]. *37. Of the Mother who is Guardian, and marries a ſecond Huſband.*

[b] Si mater, legitimè liberorum tutelâ ſuſceptâ, ad ſecundas adſpiraverit nuptias, antequàm eis tutorem alium fecerit ordinari, eiſque, quod debetur ex ratione tutelæ geſtæ, perſolverit: mariti quoque ejus, præteritæ tutelæ geſtæ ratiociniis, bona jure pignoris tenebuntur obnoxia. *l. 6. C. in quib. cauſ. pign. vel hypoth. tacitè contrahatur.* Bona ejus primitùs, qui tutelam gerentis affectaverit nuptias, in obligationem venire & teneri obnoxia rationibus parvulorum præcipimus: ne quid incuria, ne quid fraude depereat. *l. 2. C. quando mulier tutelæ officio fungi poteſt.*

This Rule is moſt equitable, to prevent the Frauds which might enſue upon ſecond Marriages, in transferring the Moveable Goods of Minors, and even thoſe of the Mother, to the Children of the ſecond Marriage, or even to the Huſband himſelf. And it is becauſe of the Equity of this Rule, that altho' it be not punctually obſerved, we have judged it proper not to ſuppreſs it.

SECT. IV.

Of the Engagements of thoſe who are Sureties for Tutors; and of thoſe who name them; and of their Heirs, and Executors.

The CONTENTS.

1. *Sureties of Tutors, to what they are obliged.*
2. *The Tutor ought to be firſt diſcuſſed, before an Action is brought againſt his Surety.*
3. *Of thoſe who certify the Tutor to be ſolvent.*
4. *Of the perſons who name a Tutor.*
5. *Engagements of the Heirs, or Executors, of Tutors.*
6. *The duty of the Heirs, or Executors, of Tutors, in Affairs begun by the Tutors before their death.*
7. *Of new Affairs which fall out after the Tutor's death.*
8. *If the Heir, or Executor, takes upon himſelf the Tutorſhip.*
9. *The Surety is diſcuſſed before the Co-Tutor.*

I. Thoſe

I.

1. Sureties of Tutors, to what they are obliged. THoſe who become Sureties for Tutors, are bound for all that the Tutors may chance to owe on account of their Adminiſtration[a]. But if after the Tutorſhip was expired, the Tutor intruded himſelf into ſome new Affair of the Minor's, which was not a neceſſary Conſequence of the Tutorſhip, he who was his Surety, will not be anſwerable for it[b].

[a] Si ſtipulatio rem ſalvam pupillo fore interpoſita eſt, vel cautum eſt in id quod à tutore, vel curatore ſervari non poteſt, manet fidejuſſor obligatus ad ſupplendam tibi indemnitatem. *l. 2. C. de fidejuſſ. tut. Tot. Tit. ff. & C. eod. Inſt. de ſatiſdat. tut.* See the thirty ſecond Article of the third Section, and the tenth Law, *ff. rem. pup. ſalv. fore*, which is there quoted.

[b] Paulus reſpondit, propter ea quæ poſt pubertatem, nulla neceſſitate cogente, ſed ex voluntate ſua tutor adminiſtravit, fidejuſſorem qui ſalvam rem fore cavit, non teneri. *l. 46. §. 4. ff. de adm. & per. tut.*

II.

2. The Tutor ought to be first diſcuſſed, before an Action is brought againſt his Surety. If the Sureties of Tutors are bound only as ſimple Sureties, without renouncing the benefit of Diſcuſſion, they cannot be ſued till after a Diſcuſſion of the Eſtate of the Tutors for whom they are bound[c]. And that according to the Rules which ſhall be explained in the Title of Cautions or Sureties.

[c] *V. Nov. 4. C. 1.* Si ſtipulatio rem ſalvam pupillo fore, interpoſita eſt, vel cautum eſt in id quod a tutore vel curatore ſervari non poteſt, manet fidejuſſor obligatus ad ſupplendam tibi indemnitatem. *l. 2. in fin. C. de fidej. tut.*

By the ancient Law of the Romans, *it was lawful to ſue the Sureties of Tutors before the Diſcuſſion of the Tutor himſelf.* l. ult. ff. rem pup. ſalv. fore. l. 7. ff. de fidej. tut. l. 1. C. eod. *But the fourth Novel, ch. 1. has given to all Sureties in general the benefit of Diſcuſſion, without excepting the Sureties of Tutors. And the ſaid benefit is altogether natural to the Obligation of a Surety, which is, to pay, in caſe the Principal Party that is bound does not pay,* ad ſupplendam indemnitatem. *d. l. 2. C. de fid. tut.*

III.

3. Of thoſe who certify the Tutor to be ſolvent. Among the Sureties of Tutors, we are to reckon thoſe who, without binding themſelves expreſly as Sureties, have certified that the Tutor was ſolvent; for they ought to anſwer for him as much as if they were his Sureties[d].

[d] Eadem cauſa videtur affirmatorum, qui ſcilicet cùm idoneos eſſe tutores affirmaverint, fidejuſſorum vicem ſuſtinent. *l. 4. in f. ff. de fidej. tut.*

IV.

4. Of the perſons who name a Tutor. If the perſons who have the Nomination of a Tutor, have been guilty of any Miſdemeanor, as if they have named a perſon who was apparently inſolvent; the perſons who named him muſt anſwer for him. But before the Minor can bring his Action againſt thoſe who named the Tutor, he ought to diſcuſs the Tutor, and his Sureties[e].

[e] Adverſus nominatorem tutoris vel curatoris minus idonei non ante perveniri poteſt, quam ſi bonis nominati, itemque fidejuſſorum ejus, nec non collegarum, ad quorum periculum conſortium adminiſtrationis ſpectat, excuſſis, non ſit indemnitati pupilli vel adulti ſatisfactum. *l. 4. C. de magiſtr. conv.*

We ſay nothing here of the Engagement of Magiſtrates towards Minors, in what concerns the Nomination of Tutors. For our Uſage is altogether different from the Roman *Law, which obliged the Magiſtrate to give to the Minor a Tutor that was ſolvent, and to take good Security from thoſe who were bound to give it.* l. 1. §. 12. l. 6. ff. de magiſtr. conv. *But by our Uſage, the Magiſtrate only confirms the Nomination of a Tutor who is choſe by the Relations of the Minor, and gives him the Oath. So that the Judges are not anſwerable for the Solvency of the Tutors, unleſs they have been guilty of ſome Prevarication, which may oblige them to it.*

V.

The Heirs, or Executors of the Tutor are bound to anſwer for his whole Adminiſtration, and even for the Damages occaſioned by his Fraud, or Negligence, as alſo for what he may have failed to look after. And they muſt give in an Accompt for him, as he ought to have done himſelf[f]. *5. Engagements of the Heirs, or Executors, of Tutors.*

[f] Hæredes eorum qui tutelam vel curam adminiſtraverunt, ſi quid ad eos ex re pupilli vel adulti pervenerit, reſtituere coguntur. In eo etiam quod tutor vel curator adminiſtrare debuit, nec adminiſtraverit, rationem reddere eos debere non eſt ambigendum. *l. ult. C. de hæred. tut.* Pater veſter tutor vel curator datus, ſi ſe non excuſavit, non ideo vos minus hæredes ejus tutelæ vel utili judicio conveniri poteſtis, quod eum tutelam ſeu curam non adminiſtraſſe dicitis: nam & ceſſationis ratio reddenda eſt. *l. 2. eod. l. 10. C. arb. tut.* Tutelæ actio tam hæredibus quàm etiam contra ſucceſſores competit. *l. 12. eod.*

VI.

Altho' the Heirs, or Executors of Tutors be not Tutors, yet if the Heir, or Executor of the Tutor deceaſed, be a Man come to full Age, and capable of Buſineſs, he is obliged to take care of the Affairs which the Tutor had begun, till another Tutor be named, or till ſome other Proviſion be made therein; and if he ſhould fail to do it, either thro' Fraud, or groſs Negligence, he would be made accountable for it[g]. *6. The duty of the Heirs, or Executors of Tutors, in Affairs begun by the Tutors before their death.*

[g] Sciendum eſt nullam tutelam hæreditario jure ad alium tranſire. *l. 16. §. 1. ff. de tut.* Quamvis hæres tutoris tutor non eſt, tamen ea quæ per defunctum inchoata ſunt, per hæredem, ſi legitimæ ætatis & maſculus ſit, explicari debent, in quibus dolus ejus admitti poteſt. *l. 1. ff. de fidejuſſ. & nom. & hær. tut.* See the following Article, and the third Article of the ſixth Section.

VII.

7. Of new Affairs which fall out after the Tutor's death. As for the Affairs which were not begun by the Tutor, and which came not to the knowledge of his Heir, or Executor, he is not bound to take care of them. But if thro' groſs Neglect, he had abandoned an Affair of the Minor's which he knew of, without taking care of it, either by himſelf, or others, he would be made anſwerable for it[h].

[h] Negligentia planè propria hæredi non imputabitur. *l.* 4. §. 1. *ff. de Fidejuſſ. tut.* Hæredes tutorum ob negligentiam quæ non latæ culpæ comparari poſſit, condemnari non oportet. *l.* 1. *C. de hæred. tut.*

VIII.

8. If the Heir, or Executor, takes upon himſelf the Tutorſhip. If the Heir, or Executor, of the Tutor, takes upon himſelf the Adminiſtration of the Tutorſhip, he ſhall be bound to take the ſame Care as if he were Tutor[i].

[i] Cum oſtendimus hæredem quemque tutelæ judicio poſſe conveniri videndum an etiam proprius ejus dolus, vel propria adminiſtratio veniat in judicium. Et extat Servii ſententia exiſtimantis, ſi poſt mortem tutoris hæres ejus negotia pupilli gerere perſeveraverit, aut in arca tutoris pupilli pecuniam invenerit & conſumpſerit, vel pecuniam quam tutor ſtipulatus fuerat exegerit, tutelæ judicio eum teneri ſuo nomine. *l.* 4. *ff. de Fidejuſſ. & nom. & hæred. tut.*

IX.

9. The Surety is diſcuſſed before the Co-Tutor. If there be ſeveral Tutors bound for one and the ſame Adminiſtration, and one of them hath a Surety; the other Tutors cannot be ſued on account of that Tutor, till after the diſcuſſion of his Surety[l].

[l] Uſque adeo autem ad contutores non venitur, ſi ſint ſolvendo contutores, ut prius ad fidejuſſores veniatur. *l.* 1. §. 15. *ff. de tut. & rat. diſt.*

SECT. V.

Of the Engagements of Minors to their Tutors.

The CONTENTS.

1. *A general Engagement of the Minor to the Tutor.*
2. *The Minor ought to allow all reaſonable Expences.*
3. *A Steward.*
4. *Alimony to the Father and Mother, Brothers and Siſters of the Minor.*
5. *The Tutor allowed Intereſt for the Money which he advances.*
6. *The Tutor has a Mortgage on the Minor's Eſtate.*
7. *A Caſe where the Tutor is privileged in his Mortgage.*

I.

1. A general Engagement of the Minor to the Tutor. AS Tutors are bound for every thing that relates to the Adminiſtration of the Eſtate of the Minor, and as they have power to do every thing which the duty of their Charge requires, ſo likewiſe the Minors are reciprocally obliged to approve and ratify, after they come of Age, every thing that the Tutors have done reaſonably and honeſtly. And they are moreover bound to their Tutors in the Engagements explained in the following Rules[a].

[a] Quæ bona fide à tutore geſta ſunt rata habentur. *l.* 12. §. 1. *ff. de adm. & per. tut.* Contrariam tutelæ actionem Prætor propoſuit, induxitque in uſum: ut facilius tutores ad adminiſtrationem accederent, ſcientes pupillum quoque ſibi obligatum fore ex ſua adminiſtratione. *l.* 1. *ff. de contr. tut. & ut. act.*

II.

2. The Minor ought to allow all reaſonable Expences. The Minor being come to full Age, ought to allow to his Tutor, in the Accompt of his Adminiſtration, all the Expences which ſhall have been laid out on his Perſon, his Eſtate, and his Affairs, according as they ſhall appear to have been neceſſarily, or uſefully laid out, or to have been ſettled by the Judge, in the caſes where the Tutor was bound to procure ſuch a Regulation.

[b] Si tutelæ judicio quis convenietur, reputare poteſt id quod in rem pupilli impendit. *l.* 1, §. 4. *ff. de contr. tut. & ut act.* Etenim provocandi fuerant tutores, ut promptius de ſuo aliquid pro pupillis impendant, dum ſciunt, ſe recepturos id quod impenderint. *d. l.* See the fifth Article of the ſecond Section.

III.

3. A Steward. If the Tutorſhip be ſuch, as that, for the eaſe of the Tutor, it be neceſſary to give him the aſſiſtance of a Steward, the Salary which he ſhall give to ſuch Perſon, will be allowed him in his Account, according as it ſhall have been regulated during the Tutorſhip, or as it ſhall be adjudged at the ſtating of the Account, and in proportion to the Quality of the Minor, and the Nature of his Eſtate and Affairs; the Tutor remaining always reſponſible for the deed of the Perſons whom he ſhall have imployed to aſſiſt him. And altho' the Tutor have not really imployed a Steward, yet he will nevertheleſs be allowed the Expences of one, if his Adminiſtration required this Aſſiſtance[c].

[c] Eſt etiam adjutor tutelæ, quem ſolet prætor permittere tutoribus conſtituere, qui non poſſunt ſufficere adminiſtrationi tutelæ, ita tamen ut ſuo periculo eum conſtituat. *l.* 13. §. 1. *ff. de tutelis.* Decreto prætoris actor conſtitui periculo tutoris ſolet, quotieſcumque aut diffuſa negotia ſunt, aut dignitas, vel ætas, aut valetudo tutoris id poſtulet. *l.* 24. *ff. de adm. & per. tut.* Principalibus conſtitutionibus declaratur, ſumptuum qui bona fide in tutelam, non qui in ipſos tutores fiunt, ratio haberi ſolet: niſi ab eo qui eum dat, certum ſalarium ei conſtitutum eſt. *l.* 3. §. *ult. ff. eod.* Ergo etſi ea inquiſitione propter rei notitiam fuerit datus tutor, eique alimenta ſtatuerint contutores, debebit eorum ratio haberi, quia juſta cauſa eſt præſtandi. *l.* 1. §. 7. *ff. de tut. & rat. diſtr.*

IV.

4. Alimony to the Father and Mother, Brothers and Siſters of the Minor. If the Father, Mother, or Brothers and Siſters of a Minor under Tuition, had no means of Subſiſtence, and the Minor had an Eſtate, he would be bound to allow to his Tutor the Expences which he had laid out in ſupplying thoſe perſons with Neceſſaries for Life[d], according to the Regulation which ſhall have been made in this matter.

[d] Aliud eſt ſi matri forte, aut ſorori pupilli tutor ea quæ ad victum neceſſaria ſunt præſtiterit, cùm ſemetipſa ſuſtinere non poſſit. Nam ratum id habendum eſt. *l.* 13. §. 2. *ff. de adm. & per. tut.* Exiſtimo, & citra magiſtratuum decretum tutor ſororem pupilli ſui aluerit, & liberalibus artibus inſtituerit, cùm hæc aliter ei contingere non poſſent, nihil eo nomine tutelæ judicio pupillo, aut ſubſtitutis pupilli præſtare debere. *l.* 4. *in f. ff. ubi pup. educ.* See the fourth Article of the ſecond Section of the Reſciſſion of Contracts.

According to the Practice with us, Tutors ought not to lay out theſe kind of Expences, without having them firſt allowed and regulated by the Judge.

V.

5. The Tutor allowed Intereſt for the Money which he advances. If the Tutor has been engaged in ſome Expences, having no Fund in his hands, either of the Minor's Revenues, or of his other Effects, ſo that he hath been obliged to borrow, or advance Money of his own; the Intereſt of the Money which he ſhall have advanced will be allowed him, till a ſufficient Fund can be raiſed either out of the Minor's Revenues, or otherwiſe, for his Reimburſement[e].

[e] Conſequitur autem pecuniam ſi quam de ſuo conſumpſit, etiam cum uſuris, ſed vel trientibus, vel his quæ in regione obſervantur, vel his quibus mutuatus eſt, ſi neceſſe habuit mutuari, ut pupillo ex juſta cauſa prorogaret. *l.* 3. §. 1. *ff. de contr. tut. & ut. act.* Uſuras utrùm tamdiù conſequetur tutor, quamdiù tutor eſt, an etiam poſt finitam tutelam, videamus, an ex mora tantùm: & magis eſt ut quoad ei reddatur pecunia conſequatur. *d. l.* 3. §. 4. Si tamen fuerit in ſubſtantia pupilli, unde conſequeretur, dicendum eſt non oportere eum uſuras à pupillo exigere. *d. l.* §. 5. See the fifth Article of the ſecond Section of thoſe who manage the Affairs, *&c.* *This Intereſt is not to be reckoned Uſurious, if the Tutor ſuffers any Loſs by this Advance: but he ought not to advance the Money imprudently, without the Advice of the Minor's Relations.*

VI.

6. The Tutor has a Mortgage on the Minor's Eſtate. As the Minor hath his Mortgage on the Eſtate of the Tutor, for all that the Tutor may chance to owe him on account of his Adminiſtration; ſo the Tutor likewiſe hath on his part a Mortgage on the Eſtate of the Minor; for the Sums that the Minor may chance to be indebted to him by his Account[f]. For the Engagement of the Tutor, and that of the Minor being reciprocal, and being contracted at the ſame time, the Mortgage, which is an Acceſſory to the Engagement, is contracted likewiſe in the ſame manner. And if, for Example, the Minor being come to full Age, borrows Money of any one before his Tutor has made up his Accounts, and it appear upon the Balance of the Account that the Tutor is Creditor, the Tutor's Mortgage will be prior to the Debt contracted by the Minor after he came of Age.

[f] Et ut pleniùs dotibus ſubveniatur, quemadmodum in adminiſtratione pupillarium rerum, & in aliis multis juris articulis tacitas hypothecas ineſſe accipimus, ita & in hujuſmodi actione damus ex utroque latere hypothecam. *l. un.* §. 1. *C. de rei ux. act.* Etenim provocandi fuerunt tutores, ut promptiùs de ſuo aliquid pro pupillis impendant, dum ſciunt, ſe recepturos id quod impenderint. *l.* 1. *ff. de contr. tut. & ut. act.* Hoc caſu mutuæ ſunt actiones. §. 2. *inſt de oblig. quæ quaſi ex contr. l.* 5. §. 1. *ff. de obl. & act.* See the thirty ſixth Article of the third Section. *Altho' this Mortgage, which the Tutor hath on the Minor's Eſtate, were not founded on theſe Laws, yet it is a natural conſequence of his Adminiſtration, and of the mutual Obligation that is contracted between the Tutor and the Minor.*

VII.

7. A Caſe where the Tutor is privileged in his Mortgage. Beſides this Mortgage, the Tutor hath likewiſe a Privilege for the Money which he has laid out in the Recovery, or Preſervation of the Minor's Eſtate, and Debts. And he is preferred, in his Mortgage on ſuch Eſtate and Debts, to other Creditors[g].

[g] *See the ſixth Article of the third Section of Curators, and the twenty fifth Article of the fifth Section of Pawns and Mortgages.*

SECT. VI.

Of the ways which put an end to the Tutorſhip, and of the deprivation of Tutors.

The CONTENTS.

1. *The Tutorſhip is at an end, when the Minor comes of Age.*

2. *Of the Tutorſhip of ſeveral Minors.*
3. *The conſequence of the Adminiſtration after Majority.*
4. *The Death of the Minor puts an end to the Tutorſhip.*
5. *As alſo the Death of the Tutor.*
6. *The Civil Death either of Tutor, or Minor, hath the ſame effect.*
7. *When the Tutor is excuſed, or removed, the Tutorſhip ceaſes.*
8. *Cauſes for which the Tutor may be removed.*
9. *The Tutor that is removed for his diſhoneſty, is branded with Infamy.*
10. Miſdemeanours that are puniſhable.

I.

1. *The Tutorſhip is at an end, when the Minor comes of Age.*

THE Office of Tutor is at an end, when the Perſon who was under Tuition comes of Age. For being arrived at full Age, he may take upon himſelf the Care of his Eſtate, and of his Affairs. But the Benefit of Age by Indulgence, hath not the ſame effect[a].

[a] Pupilli pupillæque cùm puberes eſſe cœperint, à tutela liberantur.——Et ideo noſtra ſancta conſtitutione promulgata, pubertatem in maſculis poſt decimum quartum annum completum illicò initium accipere diſpoſuimus; antiquitatis normam in fœminis bene poſitam, in ſuo ordine relinquentes, ut poſt duodecim annos completos viripotentes eſſe credantur. *inſt. quib. mod. tut. fin. l.* 1. *C. quando tut. vel cur. eſſe deſinant.* Maſculi quidem puberes, & fœminæ viripotentes, uſque ad vigeſimum quintum annum completum curatores accipiunt. Quia licet puberes ſint, adhuc tamen ejus ætatis ſunt, ut ſua negotia tueri non poſſint. *inſt. de curat.* See the Remarks in the Preamble of this Title. See, as to the Benefit of Age, the twenty ſecond Article of the ſecond Section of the Reſciſſion of Contracts.

II.

2. *Of the Tutorſhip of ſeveral Minors.*

If there are two or more Minors under the Tuition of one and the ſame Tutor, the Tuition ends for every one as they reſpectively arrive at Age; and he who has attained the Years of Majority, may oblige the Tutor to give an Account of his Adminiſtration, altho' the Tutorſhip continue ſtill with reſpect to the others[b].

[b] Tutelæ judicium ita differri non oportet, quod fratris & cohæredis impuberis idem tutelam ſuſtineat. *l.* 39. §. 17. *ff. de adm. & per. tut.*

III.

3. *The Conſequence of the Adminiſtration after Majority.*

Altho' the Tutorſhip ends the moment that the Minor arrives at the Age of Majority, yet the Tutor is not ſo diſcharged by this Change, as that he may immediately abandon all farther Care of the Minor's Concerns. But he ought to continue his Adminiſtration as to thoſe Affairs which he cannot neglect without occaſioning ſome Loſs, or Damage, to the Minor. And he ought to give order about every thing that is neceſſary, and which does not admit of delay, till he has given up his Accounts; or till he has, waiting for a convenient time to make up his Accounts, delivered over the Affairs and Papers into the hands of his Minor, who is become Major, that he may look after them himſelf[c].

[c] Tutores qui necdum adminiſtrationem ad curatores tranſtulerunt, defenſioni cauſarum pupillarium aſſiſtere oportere ſæpe reſcriptum eſt. Et ideò, ſi ut proponis, inſtrumenta quibus aſſeri poſſunt cauſæ provocationis, etiamnum hi quorum meminiſti apud ſe detinent, aditus præſes provinciæ periculi ſui eos admoneri præcipiet. *l. un. C. ut cauſ. poſt pubert. adſ. tut.* Quaſi connexum ſit hoc tutelæ officio, quamvis poſt pubertatem admittatur. *l* 5. §. 5. *in f. ff. de adm. & per. tut. d. l.* §. 6. V. l. 27. ff. de appel. l. 13. ff. de tut. & rat. diſt. See the ſixth Article of the fourth Section.

IV.

4. *The Death of the Minor puts an end to the Tutorſhip.*

The Tutorſhip likewiſe expires by the death of the Minor[d]. But ſo as that the Tutor ought not to abandon that which requires his Care, till the Heirs of the Minor be in a condition to diſcharge him of it, according to the Rule explained in the foregoing Article.

[d] Finitur tutela morte pupilli. *l.* 4. *ff. de tut. & rat. diſtr.* §. 3. *inſt. quib. mod. tut. fin.*

V.

5. *As alſo the Death of the Tutor.*

If the Tutor dies during the Tutorſhip[e], it is thereby at an end, not only with reſpect to himſelf, but alſo to his Heirs and Executors. And they ſhall be bound only according to the Rules explained in the fourth Section.

[e] Finitur (tutela) morte tutoris. *l.* 4. *ff. de tut. & rat. diſtr.* §. 3. *inſt. quib. mod. tut. fin.*

VI.

6. *The Civil Death either of Tutor, or Minor, hath the ſame effect.*

The Tutorſhip ends likewiſe by the Civil Death either of the Tutor, or of the Minor[f]. For as to the Tutor, the Civil Death renders him incapable of that Office: and as to the Minor, it puts him out of a condition of ſtanding in need of a Tutor, being no longer Maſter of his own Perſon, nor of any Eſtate. But the Tutor is obliged, after the Civil Death of his Minor, to take Care of his Eſtate, purſuant to the third and fourth Rules of this Section, for the benefit of thoſe to whom he ſhall be bound to give an Account of it.

[f] Sed & capitis deminutione tutoris, per quam libertas vel civitas amittitur, omnis tutela perit. §. 4. *inſt. quib. mod. tut. fin. l.* 14. *ff. de tutel. d. l.* §. 1. & 2. Pupilli & pupillæ capitis deminutio, licet minima ſit, omnes tutelas tollit. *d.* §. 4. *d. l.* 14.

VII.

7. When the Tutor is excuſed, or removed, the Tutorſhip ceaſes.

If the Tutor is diſcharged from his Office at his own requeſt, he pleading a reaſonable Excuſe; or if he is turned out for Miſdemeanour; his Truſt is at an end[g].

[g] Si ſuſpectus quis fuerit remotus, deſinit eſſe tutor. *l. 14. §. 4. ff. de tutel.* Deſinunt etiam tutores eſſe qui vel removentur à tutela, ob id quòd ſuſpecti viſi ſunt: vel qui ex juſta cauſa ſeſe excuſant, & onus adminiſtrandæ tutelæ deponunt. *§. ult. inſt. quib. mod. tut. fin.*

VIII.

8. Cauſes for which the Tutor may be removed.

The Tutor may be removed from his Office, if his bad Conduct be ſuch as to deſerve that the Management of the Minor's Concerns be taken out of his hands; as if he prevaricates in defending the Rights of the Minor that he may loſe them: if he abandons the Affairs, if he abſents himſelf, and refuſes to appear, leaving the Minor's Concerns in diſorder, if he does not furniſh the Neceſſaries for his Minor's Maintenance and Education, having wherewithal to do it; and in general, if there be any other juſt Cauſes for removing him, altho' it were only Negligence, if it be ſuch as makes it neceſſary to put the Management of the Minor's Affairs into other hands[h].

[h] Nunc videamus, ex quibus cauſis ſuſpecti removeantur. Et ſciendum eſt aut ob dolum in tutela admiſſum, ſuſpectum licere poſtulare, ſi fortè graſſatus in tutela eſt, aut ſordidè egit, vel perniciosè pupillo, vel aliquid intercepit ex rebus pupillaribus, jam tutor. *l. 3. §. 5. ff. de ſuſp. tut.* Is tutor qui inconſideranter pupillum, vel dolo abſtinuit hæreditate, poteſt ſuſpectus poſtulari. *d. l. 3. §. 17.* Tutor qui ad alimenta pupillo præſtanda copiam ſui non faciat, ſuſpectus eſt, poteritque removeri. *d. l. 3. §. 14. & §. 15.* Item ſi quis datus tutor non compareat, ſolet edictis evocari: noviſſiméque, ſi copiam ſui non fecerit, ut ſuſpectus removeri, ob hoc ipſum quòd copiam ſui non fecit. Quòd & perraro, & diligenti habita inquiſitione faciendum eſt. *l. 7. §. ult. eod.* Si fraus non ſit admiſſa, ſed latâ negligentiâ, quia iſta prope fraudem accidit, removeri hunc quaſi ſuſpectum oportet. *d. l. 7. §. 1.* Et generaliter ſi qua juſta cauſa prætorem moverit, cur non debeat in ea tutela verſari, rejicere eum debebit. *l. 3. §. 12. eod.*

IX.

9. The Tutor that is removed for his diſhoneſty, is branded with Infamy.

The Tutor who is removed from his Office, becauſe of his fraudulent dealing, is branded with Infamy; but he is not ſo, who is removed on account of his Negligence, or his unfitneſs for ſuch a Charge. And if the cauſe of his Removal be not expreſſed in the Sentence of his Deprivation, his Removal will not be attended with any mark of Infamy; it being reaſonable to preſume in that caſe, that the Tutor was removed only for his Negligence, or Incapacity[i].

[i] Suſpectos tutores ex dolo, non etiam eos qui ob negligentiam remoti ſunt, infames fieri manifeſtum eſt. *l. ult. C. de ſuſp. tut.* Qui ob ſegnitiem, vel ruſticitatem, inertiam, ſimplicitatem, vel ineptiam remotus ſit, in hac cauſa eſt, ut integra exiſtimatione, tutela vel cura abeat. *l. 3. §. ult. ff. de ſuſpect. tut.* Decreto igitur debebit cauſa revocandi ſignificari, ut appareat de exiſtimatione. Quid ergò, ſi non ſignificaverit cauſam remotionis decreto ſuo? Papinianus ait, debuiſſe dici, hunc integræ eſſe famæ: & eſt verum. *l. 4. §. 1. & 2. ff. de ſuſp. tut.*

X.

10. Miſdemeanours that are puniſhable.

If a Tutor has procured the Tutorſhip by Bribery, or if his Miſdemeanours be ſuch, that, beſides the removing him from his Truſt, he deſerves ſome other Puniſhment; he ſhall be liable to ſuch Puniſhment as the Nature of the Fact ſhall deſerve[l].

[l] In eos extra ordinem animadvertitur, qui probentur nummis datis tutelam occupaſſe. *l. 9. ff. de tutel.* Qui tutelam, corruptis miniſteriis prætoris, redemerant. *l. 3. §. 15. in f. ff. de ſuſp. tut.* Solent ad præfecturam urbis remitti etiam tutores, ſive curatores qui malè in tutela, ſive cura verſati, graviori animadverſione indigerent, quàm ut ſufficiat eis ſuſpectorum infamia. Quos probari poterit, vel nummis datis tutelam occupaſſe: vel præmio accepto operam dediſſe ut non idoneus tutor alicui daretur: vel conſulto circa edendum patrimonium quantitatem minuiſſe: vel evidenti fraude pupilli bona alienaſſe. *l. 1. §. 7. ff. de off. præf. urbi. l. 1. §. ult. ff. de ſuſp. tut.*

SECT. VII.

Of the Cauſes which render Perſons incapable of being Tutors, and of thoſe which excuſe them from that Office.

We have not put down in this Section, among the Incapacities and Excuſes which may ſuffice for diſcharging any one from the Office of Tutor, that which was regulated by *Juſtinian*[a], that thoſe who were either Creditors, or Debtors, to Minors, ſhould be incapable of being their Tutors. For altho' the perſon who is named Tutor ſhould be found to be either Debtor or Creditor, to the Minor, yet our Uſage provides ſufficiently for the ſafety of the Minors, by ordering an Inventory of their Goods to be made, and to be lodged in Court; which preſerves the Titles of their Claims, or Defences againſt their Tutors, and by appointing them a Curator, or Subſtitute-

Tutor, to defend them in any Diſputes they may chance to have with their Tutors[b]. But if the Debt, or other Affair, that is in diſpute between the Tutor and the Minor, be ſuch that it is evidently more for the advantage of the Minor to have another Tutor, it will in that caſe be prudent for the Judge to oblige the Relations to make choice of another Tutor.

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[a] *Nov. 72. c. 1.*

[b] *See the Remark on the ſeventeenth Article.*

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I.

INcapacity excludes from the Tutorſhip, even thoſe who would willingly accept of it[a]: and an Excuſe diſpenſes with thoſe who might be Tutors if they pleaſed[b]. *1. Difference between Incapacity, and an Excuſe.*

[a] Ut nec volens ad tutelæ onus admittatur. §. 14. *inſt. de excuſ. tut. vel cur.*

[b] Excuſantur tutores vel curatores variis ex cauſis. *inſt. de excuſ. tut.*

II.

The Cauſes of Incapacity have their Foundation, either in Natural Equity, or in ſome particular Law[c]. *2. Cauſes of Incapacity, and Excuſes.*

[c] *Which will appear by the following Rules.*

III.

Women are incapable of being Guardians to any beſides their own Children. For the Office of Guardian requires an Authority, and obliges the Perſon to Functions, which it would be indecent for a Woman to exerciſe towards any other Perſons beſides her own Children[d]. *3. Women cannot be Guardians, but to their own Children.*

[d] Fœminæ tutores dari non poſſunt, quia id munus maſculorum eſt. *l. ult. ff. de tut. l. 1. C. quando mul. tut. off. f. p. ff. l. 2. ff. de reg. jur. l. 21. de tut. & curat.* Tutela plerumque virile officium eſt. *l. 16. ff. de tut.* See the following Article.

IV.

Mothers and Grandmothers may be Tutoreſſes or Guardians to their own Children; for the Authority which Nature gives them over their Children, and the Affection which they have for their Intereſts, except them from the Rule which excludes Women from Guardianſhips[e]. And as the Mother is capable of being Tutoreſs, or Guardian, ſo the Guardianſhip may likewiſe be committed to her ſecond Huſband, Father in Law to the Minor[f]. *4. Mothers and Grandmothers may be Tutoreſſes or Guardians. The Father in Law may be Tutor.*

[e] Fœminæ tutores dari non poſſunt, quia id munus maſculorum eſt: niſi à principe filiorum tutelam ſpecialiter poſtulent. *l. ult. ff. de tut. Tot. tit. C. quando mulier tut. off. f. p. Nov. 118. C. 5.*

[f] Si pater tuus quem privigni ſui tutelam adminiſtraſſe proponis, &c. *l. 3. C. de contr. jud. tut. v. l. 2. C. de interd. mar. l. 32. §. 1. ff. de adopt.*

V.

Minors cannot be Tutors, becauſe they themſelves are under Tuition, and ſtand in need of the Aſſiſtance of others in the Management of their own Concerns[g]. *6. Minors cannot be Tutors.*

[g] Minores viginti quinque annis olim quidem excuſabantur, noſtra autem conſtitutione prohibentur ad tutelam vel curam aſpirare. Adeo ut nec excuſatione opus ſit. Qua conſtitutione cavetur, ut nec

pupillus ad legitimam tutelam vocetur, nec adultus. Cùm ſit incivile, eos qui alieno auxilio in rebus ſuis adminiſtrandis egere noſcantur, & ab aliis reguntur, aliorum tutelam vel curam ſubire. §. 13. *inſt. de excuſ. tut. l. ult. C. de leg. tut.*

VI.

6. Infirmities which render perſons incapable of being Tutors. Thoſe who labour under any Infirmity which diſables them from looking after their own Concerns, are incapable of being Tutors; ſuch as Perſons who are mad, blind, deaf, dumb, and thoſe who are under any Habitual Malady which produces the ſame effect[h]. And if theſe kinds of Accidents happen to a Tutor, after he has been named, and even after he has acted as Tutor, he ſhall be excuſed[i]. But if the Diſeaſe, or Infirmity, which ſeizes the Tutor during the Tutorſhip, be only for a time, a Curator may be named in the mean while to ſupply the place of the Tutor during his Illneſs, if there be occaſion[l].

[h] Mutus tutor dari non poteſt, quoniam authoritatem præbere non poteſt. *l.* 1. §. 2. *ff. de tut.* Surdum non poſſe dari tutorem, plerique & Pomponius libro ſexageſimo nono ad edictum probant. Quia non tantùm loqui, ſed & audire tutor debet. *d. l.* §. *ult.* Surdus & mutus nec legitimi tutores eſſe poſſunt, cùm nec teſtamento, nec alio modo utiliter dari poſſint. *l.* 10. §. 1. *ff. de legit. tut.* Luminibus captus, aut ſurdus, aut mutus, aut furioſus, aut perpetua valetudine tentus, tutelæ ſeu curæ excuſationem habent. *l. un. C. qui morbo. l.* 3. *C. qui dare tut.* Adverſa valetudo excuſat: ſed ea quæ impedimento eſt quominùs quis ſuis rebus ſupereſſe poſſit, ut imperator noſter cum patre reſcripſit. *l.* 10. *in f. ff. de excuſ.* §. 7. *inſt. eod.*

[i] Et non tantùm ne incipiant, ſed & à cœpta excuſari debent. *l.* 11. *ff. eod.* Poſt ſuſceptam tutelam, cœcus, aut ſurdus, aut mutus, aut furioſus, aut valetudinarius deponere tutelam poteſt. *l.* 40. *ff. de excuſ.*

[l] Si quis ita ægrotus fuerit, ut oporteat eum non omninò dimitti à tutela, in locum ejus curator interim dabitur. Sanatus autem hic rurſus recipiet tutelam. *l.* 10. §. 8. *eod.*

VII.

7. A Son, that is of Age, may be a Tutor. A Son who is of full Age, altho' under the Father's Authority, may be a Tutor. But the Father will not be accountable for his Son's Adminiſtration, if he does not oblige himſelf to it, either expreſly, or tacitly, as if he himſelf acts, and intermeddles in the Adminiſtration of the Minor's Eſtate. But a bare conſent to his Son's being named Tutor, and to his taking upon him the Adminiſtration, does not bind him[m].

[m] Si filius familias tutor à prætore datus ſit, ſiquidem pater tutelam agnovit, in ſolidum debet teneri: ſi non agnovit, duntaxat de peculio. Agnoviſſe autem videtur, ſive geſſit, ſive gerenti filio conſenſit, ſive omnino attigit tutelam. *l.* 7. *C. de tut.* Nec multùm videri in hoc caſu facere ſcientiam & conſenſum ad obligandum eum in ſolidum. *l.* 21. *ff. de adm. & per. tut.*

VIII.

8. Other Cauſes for not confirming the Nomination of a Tutor. If beſides the Cauſes of Incapacity juſt now mentioned, there ſhould happen to be, in the perſon who is named Tutor, any other Cauſe which might render him unworthy of the Office, or give ground of Suſpicion, the Judge ought in prudence not to confirm ſuch Nomination. Thus, for Example, if it ſhould be found out that the Tutor gave Money to get himſelf named, not only ſhould the ſaid Nomination not be confirmed, but this Offence would deſerve to be puniſhed. Thus, he whom the Father had forbid to be named Tutor to his Son, ought not to be admitted to that Office, without very pregnant reaſons[n]. But that Excluſion would not any way blemiſh the Reputation of the ſaid Perſon[o]. Thus, he ought not eaſily to be admitted as Tutor who makes intereſt to get himſelf named[p].

[n] In eos extra ordinem animadvertitur, qui probentur nummis datis tutelam occupaſſe. *l.* 9. *ff. de tut. l.* 21. §. *ult. ff. de tut. & cur. dat.*

[o] Sed etſi quis à parentibus prohibitus fuerit tutor eſſe, hunc neque creari oportet: & ſi creatus ſit, nec recuſaverit, prohiberi eum eſſe tutorem, manente epitimia. *l.* 21. §. 2. *ff. de tut. & cur. dat.*

[p] Semper autem maximè hoc obſervent magiſtratus, ne creent eos qui ſeipſos volunt ingerere, ut creentur. *l.* 21. §. *ult. ff. de tut. & cur. dat. v. l.* 19. *ff. de teſt. tut.*

IX.

9. Excuſes of two kinds. The Excuſes alledged by Tutors, to free themſelves from the Tutorſhip, are, in the ſame manner as Incapacities, founded either upon ſome natural Impediment, or on ſome particular Law[q].

[q] *This will appear by the following Articles.*

[*The Laws of* England *take no notice of the Excuſes of Tutors, becauſe no one is put upon this Office in* England *againſt his will. Cowel*'s Inſtitutes, Lib. 1. Tit. 25.]

X.

10. Incapacity ſerves as an Excuſe. The Cauſes of Incapacity which may be fairly alledged, may likewiſe ſerve as Excuſes. Thus Minority, and the Infirmities which render Perſons incapable of being Tutors, ought to excuſe them from the Office[r].

[r] Minores viginti quinque annis olim quidem excuſabantur, noſtra autem conſtitutione prohibentur ad tutelam vel curam aſpirare. §. 13. *inſt. de excuſ. tut.*

XI.

11. Excuſe on the account of being up- Thoſe who are paſt Seventy Years of Age, may excuſe themſelves from being Tutors[ſ].

[ſ] Excuſantur

wards of Seventy Years old.

[s] Excuſantur à tutela, & curatoria, qui ſeptuaginta annos compleverunt. *l.* 2. *ff. de excuſ.* §. 13. *inſt. eod. l. un. C. qui ætate.*

XII.

12. The number of Children is an Excuſe. If he who is named to be Tutor, has five Children lawfully begotten and alive, he is excuſed. The Children which are unborn, altho' conceived, are not reckoned in the Number of the Children which ſerve as an Excuſe. And the Grand-Children, and other Deſcendants, of Children that are deceaſed, are counted as repreſenting the Perſon of whom they are deſcended: Thus ſeveral Children of one Son are reckoned, in this caſe, only as one Child [t].

[t] Remittit à tutela vel curatoria & liberorum multitudo. *l.* 2. §. 2. *ff. de excuſ.* Qui ad tutelam, vel curatoriam vocantur. Romæ quidem trium liberorum incolumium numero, de quorum etiam ſtatu non ambigitur, in Italia verò quatuor, in provinciis autem quinque, habent excuſationem. *l.* 1. *C. qui num. lib. ſe excuſ. inſt. de excuſ. tut.* Legitimos autem liberos eſſe oportet omnes, etſi non ſint in poteſtate. *d. l.* 2. §. 3. *ff. de excuſ.* Oportet autem liberos vivos eſſe, quando tutores patres dantur. *d. l.* 2. §. 4. *l.* 1. *C. qui num. lib.* Qui in ventre eſt, etſi in multis partibus legum comparatur jam natis, tamen in præſenti quæſtione, neque in reliquis civilibus muneribus prodeſt patri. *d. l.* §. 6. remiſſionem tribuunt nepotes ex filiis maſculis nati. *d. l.* §. 7. quotcunque autem nepotes fuerint ex uno filio, pro uno filio numerantur. *d.* §. 7.

We have not limited in this Article what is ſaid of Grand-Children to thoſe deſcended of Males, in which ſenſe it is limited in the ſeventh Section above quoted. For altho' Daughters, and their Children, be in another Family, yet it often happens that the Daughters, and their Children, are as much, or more chargeable to the Fathers, than the Sons are; and it would be hard, that a Grand-Father on the Mother's ſide, who has the Burden of Children of ſeveral Daughters deceaſed, ſhould be deprived of the benefit of this Excuſe. And therefore it is that our Uſage admits for an Excuſe, the Guardianſhip of Grand-Children by Daughters.

XIII.

13. Three Tutorſhips excuſe from a fourth. He who has already the Burden of three Tutorſhips, may excuſe himſelf from accepting a fourth. We do not reckon as many Tutorſhips, thoſe of many Minors, when the Eſtate of all the Minors is managed by one and the ſame Adminiſtration [u]. Neither do we reckon in the Number of Tutorſhips that ſerve as an Excuſe, the Engagement of Honorary Tutors, nor that of the Sureties of Tutors [x].

[u] Tria onera tutelarum dant excuſationem. Tria autem onera ſic ſunt accipienda, ut non numerus pupillorum plures tutelas faciat; ſed patrimoniorum ſeparatio. *l.* 3. *ff. de excuſ. l.* 2. §. *ult. eod. l. unic. C. qui num. tut.* See the following Article.

[x] Si civitatis princeps, id eſt, magiſtratus, incidente ei creatione obnoxius fuerit periculo tutelæ, hanc non connumerabit aliis tutelis: quemadmodum nec fide juſſores tutelæ, ſed neque qui ob honorem tutores conſcripti ſunt. *l.* 15. §. 9. *ff. de excuſat.*

XIV.

If one Tutorſhip alone be of ſuch Extent, or ſo burdenſome, that it would be hard to call the Tutor to a ſecond Tutorſhip, he ſhall be excuſed [y]. *14. One Tutorſhip that is burdenſome, will ſerve as an Excuſe.*

[y] Cæterum putarem, rectè facturum prætorem, ſi etiam unam tutelam ſufficere crediderit, ſi tam diffuſa & negotioſa ſit, ut pro pluribus cedat. *l.* 31. §. 4. *ff. de excuſ.*

XV.

If there had been a mortal Hatred between the Father of the Minor, and the Perſon who is named Tutor, and that there never was any reconciliation between them, the Tutor ſhall be excuſed from accepting the Office [z]. *15. Enmity between the Minor's Father and the Tutor.*

[z] Inimicitiæ quas quis cum patre pupillorum vel adultorum exercuit, ſi capitales fuerunt, nec reconciliatio intervenit, à tutela vel cura ſolent excuſare. §. 11. *inſt. de excuſ. tut. l.* 6. §. 17. *ff. de excuſ.*

XVI.

If there be a Law-Suit between the Minor and the Perſon whom they intend to name Tutor, which calls in queſtion the Minor's Legitimacy, or claims a Right to all his Eſtate, or a great part of it, the ſaid Perſon ſhall be excuſed from the Tutorſhip. But Law-Suits of a ſmall conſequence will not ſerve to excuſe him [a]. *16. Law-Suits which excuſe.*

[a] Amplius autem abſolvitur à tutela cùm quæſtionem quis pupillo de ſtatu movet: cùm videtur hoc non calumnia facere, ſed bona fide. *l.* 6. §. 18. *ff. de excuſ.* Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excuſari non poteſt: niſi fortè de omnibus bonis, vel hæreditate controverſia ſit. §. 4. *inſt. de excuſ. tut. vel curat.* Propter litem quam quis cum pupillo habet, excuſare ſe à tutela non poteſt, niſi forte de omnibus bonis aut plurima parte eorum controverſia ſit. *l.* 21. *ff. eod. l.* 16. *C. eod.* See the following Article, and the Remark upon it.

XVII.

If the Minor happens to have a conſiderable Law-Suit againſt the Father or Mother, Brothers, Siſters, or Nephews of the Perſon who is named to be his Tutor, both Humanity, and the Intereſt of the Minor, do require, that the ſaid perſon be excuſed from being Tutor. For he ought not to be engaged in a Guardianſhip which will oblige him to go to Law with his neareſt Relations: And the Minor ought to have a Tutor who may be under no temptation to betray his Truſt [b]. *17. A Law-Suit between the Minor and the Next of Kin to his Tutor.*

[b] Humanitatis ac religionis ratio non permittit, ut adverſus ſorores, vel filios ſororis, actionum neceſſitates tutelæ occaſione ſuſcipias. Cùm & ipſius etiam pupilli, cui tutor datus es, aliud videatur exigere utilitas: ſcilicet ut eum tutorem potius

habeat, qui ad defenſionem ejus non inhibeatur affectu. *l.* 23. *C. de excuſ. tut.*

It is to be obſerved on this Article, that it is by the Circumſtances that we are to judge whether the Law-Suit be ſuch as that it ought to ſerve as an Excuſe, or that it would be ſufficient to name a Curator, or Subſtitute-Tutor, to take care of ſuch Law-Suits inſtead of the Tutor. For it is our Uſage in ſuch caſes, and even when the Law-Suit is between the Minor and the Tutor himſelf, that if the ſaid Law-Suit be not of ſuch conſequence as to be ſufficient to excuſe the Tutor from the Office, to name a Curator to defend the Minor againſt the Tutor; or againſt the other Perſons, whom the Tutor ought not, in Humanity, to be obliged to go to Law with. See the eleventh Article of the ſecond Section.

XVIII.

18. *Excuſe on account of Privilege.* Perſons who, on account of their Employment, or for other Cauſes, are privileged with an Exemption from being Tutors, ſhall be excuſed from the Office. Which depends either on the Nature of the Employments, if they be ſuch as in their own Nature ought to give an Exemption from the Office of Tutor, ſuch as an Embaſſy, the Command of an Army, or Garriſon, or on the particular Grant of the ſaid Privilege by ſome Declaration, or Edict[c].

[c] *V. l.* 6. §. 1. *& ſeq. ff. de excuſ. It is to be obſerved, with reſpect to theſe Kinds of Exemptions mentioned in this Law, that in* France, *no Perſons are exempted from the Office of Tutor, except they be entitled to this Privilege by ſome Edict, or ſome Declaration.*

XIX.

19. *Eccleſiaſticks are exempted from being Tutors.* Eccleſiaſtical Perſons cannot be named Tutors, or Curators. For the Holineſs of their Sacred Function obliges them, that they may be the better able to attend the Duties of it, to diſengage themſelves from all other Cares: and exempts them from all Engagements to an Adminiſtration of Temporal Concerns. But if a Clergyman be willing to take charge of the Education and Government of Orphans that are his Relations; it ſhall be lawful for him to accept of the Tutorſhip of them, that he may take care of their Perſons, and, occaſionally likewiſe, of their Eſtate, which has ſo neceſſary a connexion with their Perſons[d].

[d] Generaliter ſancimus omnes viros reverendiſſimos, necnon Presbyteros, Diaconos & Subdiaconos ——immunitatem ipſo jure omnes habere tutelæ ſive teſtamentariæ, ſive legitimæ, ſive dativæ: & non ſolùm tutelæ eos eſſe expertes, ſed etiam curæ non ſolùm pupillorum, & adultorum, ſed & furioſi, & muti, & ſurdi, & aliarum perſonarum quibus tutores vel curatores à veteribus legibus dantur. *l.* 52. *C. de Epiſc. & Cleric.* Propter hoc ipſum beneficium eis indulgemus ut aliis omnibus derelictis, Dei omnipotentis miniſteriis inhæreant. *d. l.* Deo autem amabiles Epiſcopos——ex nulla lege tutores, aut curatores cujuſcumque perſonæ fieri permittimus. Presbyteros autem, & Diaconos, & Subdiaconos jure & lege cognationis tutelam, aut curam ſuſcipere hæreditatis permittimus, &c. *Nov.* 123. *C.* 5.

XX.

20. *Poverty, and want of Induſtry, may ſerve as an Excuſe.* If he who is called to the Office of a Tutor, has not an Eſtate ſufficient to bear the charges of it, if he can neither read nor write, or if he is not induſtrious enough to manage his own Concerns, or if his own Affairs demand his whole Time and Labour, he may be either excuſed from the Tutorſhip, or confirmed in it. according to the Quality of the Perſons, the Nature of the Eſtate, and the other circumſtances[e].

[e] Mediocritas & ruſticitas interdùm excuſationem præbent, ſecundùm epiſtolas divorùm Hadriani, & Antonini. Ejus qui ſe neget litteras ſcire excuſatio accipi non debet, ſi modò non ſit expers negotiorum. *l.* 6. §. *ult. ff de excuſ.* Eos qui litteras neſciunt eſſe excuſandos Divus Pius reſcripſit. Quamvis & imperiti literarum poſſunt ad adminiſtrationem negotiorum ſufficere. §. 8. *inſt. eod.* Paupertas ſanè dat excuſationem, ſi quis imparem ſe oneri injuncto poſſit probare. Idquè Divorum fratrum reſcripto continetur. *l.* 7. *l.* 40. §. 1. *eod.* §. 6. *inſt. eod.*

XXI.

21. *The Tutor who is named ought to act till he is diſcharged.* Altho' he who has been named Tutor appeals from his Nomination, and that he has a juſt Excuſe; he ſhall nevertheleſs be bound as Tutor till he is diſcharged of the Truſt: and he is obliged to act proviſionally in the mean while till his Appeal be determined[f].

[f] Ipſo jure tutor eſt antequam excuſetur. *l.* 31. *ff. de excuſ.* Tutor vel curator cujus injuſta appellatio pronuntiata erit, cujuſve excuſatio recepta non ſit, ex quo accedere adminiſtrationem debuit, erit obligatus. *l.* 20. *ff. de adm. & per. tut.* Tutor datus adverſus ipſam creationem provocavit: hæres ejus poſteà victus, præteriti temporis periculum præſtabit: quia non videtur levis culpa, contra juris auctoritatem, mandatum tutelæ officium detrectare. *l.* 39. §. 6. *eod. v. l.* 16. *C. de excuſ. tut.*

XXII.

22. *Acceptance of the Tutorſhip cuts off all Excuſes.* If he who had an Excuſe, has accepted of the Tutorſhip, or acted voluntarily as Tutor before he gave in his Excuſe, he cannot be afterwards admitted to excuſe himſelf[g].

[g] Tutores quos poſteaquàm bona pupillorum adminiſtraverunt, à præſide provinciæ, quaſi re integra excuſari ſe impetraſſe aſſeveras, periculum adminiſtrationis evitare minime poſſe, manifeſtum eſt. *l.* 2. *C. ſi tutor. vel cur. fal. alleg. exc. ſit. l.* 17. §. 5. *ff. de excuſ.*

XXIII.

23. *Incapacity that happens after the Nomination.* If after that the Tutor has accepted of the Tutorſhip, he falls under ſome Incapacity, as if he becomes blind, deaf, dumb, if he runs mad, or is ſeized with other Infirmities, which render him incapable of exerciſing the Office of Tutor, he ſhall be diſcharged from

it: and another Tutor will be named in his place[h].

[h] Complura ſenatuſconſulta facta ſunt, ut in locum furioſi, & muti, & ſurdi tutoris, alii tutores dentur. *l. pen. ff. de tut.* Poſt ſuſceptam tutelam cœcus, aut ſurdus, aut furioſus, aut valetudinarius deponere tutelam poteſt. *l. 40. ff. de excuſ.*

XXIV.

24. Privilege acquired after the Nomination. The Privileges which one acquires after his Nomination to the Tutorſhip, do not excuſe him from it. For they are granted only to exempt thoſe who are not as yet under any Engagement. Thus, he who has been prevented by his Nomination, before he acquired the Privilege, cannot plead his Privilege in order to be diſcharged[i].

[i] Tutor petitus, ante decreti diem, ſi aliquod privilegium quærit, rectè petitionem inſtitutam excludere non poterit. *l. 28. ff. de excuſ.* quaſi præventus. *v. l. 7. ff. de jud.*

XXV.

25. An Excuſe happening after the Tutor's entring upon his Office. The Grounds of Excuſes which do not proceed from an Incapacity, and which happen only after the Nomination of the Tutor, will not procure him his diſcharge from the Office. Thus the Number of Children, which ſerve as an excuſe, or the Age of Seventy Years, being compleated after he has entred upon the Adminiſtration of the Tutorſhip, will not excuſe him from it[l].

[l] Oportet autem liberos vivos eſſe, quando patres tutores dantur. *l. 2. §. 4. ff. de excuſ.* Exceſſiſſe autem oportet ſeptuaginta annos tempore illo quo creantur. *d. l. 2.*

XXVI.

26. When the Tutor and Minor have different Places of Abode. It is not always a lawful Ground of Excuſe for him who is named Tutor, not to be an Inhabitant of the Place where the Minor has his Abode. For it may happen, that in the Place where the Minor lives, there be no body capable of being named Tutor. And beſides, it may be reaſonable and advantageous to the Minor, not to ſtand upon the diſtance between his Domicil, and that of his Tutor, provided it be not ſuch as to render the Adminiſtration too difficult, and too chargeable, either to the Minor, or Tutor. So that it is by the circumſtances that we are to judge of the regard that ought to be had to the diſtance of their Dwellings[m].

[m] Quæro an non ejuſdem civitatis cives teſtamento quis tutores dare poſſit? Paulus reſpondit, poſſe. *l. 32. ff. de teſt. tut.* Qui in teſtamento dati ſunt tutores, renuent, ſecundùm leges adminiſtrationem earum quæ in alia provincia ſunt poſſeſſionum. *l. 10. §. 4. ff. de excuſat.* Sed & hoc genus excuſationis eſt, ſi quis ſe dicit ibi domicilium non habere, ubi ad tutelam datus eſt. *l. ult. §. ult. ff. eod.* See the third Article of the firſt Section.

XXVII.

27. Several Excuſes, whereof none is ſufficient of it ſelf. If he who is named Tutor has no Ground of Excuſe which is of it ſelf ſufficient, ſuch as the Age of Seventy Years compleat, or the Number of Children that is required; but that he is only, for Example, Sixty Years of Age, and has two or three Children; theſe Excuſes, of which every one is inſufficient by it ſelf, will not be ſufficient, when put all together, to procure him a diſcharge from the Tutorſhip[n].

[n] Qui jura multa poterit dicere, quorum unumquodque per ſeipſum ſatis validum non eſt, an poſſit excuſari quæſitum eſt: puta ſeptuaginta quis annorum non eſt, neque tres habet tutelas, ſed neque quinque filios: at aliquod aliud jus remiſſionis habet, nimirum duas tutelas, & duos filios, & ſexaginta annorum eſt, aut alia quædam talia dicit, per ſeipſa quidem perfectum auxilium non præbentia, quæ tamen ſi invicem conjuncta ſint juſta appareant? Sed viſum eſt hunc non excuſari. *l. 15. §. 11. ff. de excuſat.*

But if this Tutor were Sixty Nine Years of Age, and had four Children, would it not be as juſt, or rather more, that he ſhould be diſcharged, than if he were Seventy Years of Age, and had no Children, or only Forty Years, with five Children?

TITLE II.

Of CURATORS.

Uſage as to Curators. As there are other Cauſes beſides the Infirmity of Age, which render Perſons incapable of governing themſelves, and their Affairs; ſuch Perſons who happen to be in that condition are put under the Conduct of others, who are to them inſtead of Tutors, and who are called Curators. *Curator of one that is mad, or infirm.* Thus, Curators are appointed to perſons that are mad, and to thoſe who, becauſe of ſome Infirmity, are incapable of managing their own Concerns; ſuch as, for Inſtance, thoſe who are both deaf and dumb.

Curator of a Prodigal. Among Perſons incapable of governing themſelves, we reckon Prodigals, who laviſh away their Eſtates in fooliſh and idle Expences. And the ſame reaſon which obliges the Publick to take the Management of their Eſtates out of their hands, makes it neceſſary to give them Curators to look after their Concerns.

Curator to a Minor who has a Tutor. Sometimes likewiſe a Curator is aſſigned to a Minor who has a Tutor, when it happens, that the Tutor and Minor have ſome Difference, or ſome Right, to be adjuſted between them[a].

[a] *See the eleventh Article of the ſecond Section of Tutors, and the Preamble to the ſeventh Section of the ſame Title.*

Curator to Goods which are not claimed by any Owner. There is yet another ſort of Curators, the uſe of which is neceſſary for taking care of Goods that are abandoned, and which no body looks after. As in the caſe of a long abſence of any one from his Eſtate, without committing the Care of it to any body; or in the caſe of an Inheritance without Heirs, or which the Heirs have renounced: or if a Debtor relinquiſhes all his Eſtate to his Creditors. In all theſe Caſes, and others of the like nature, where Goods are without any Owner; or without any Perſon to look after them, Curators are appointed to take care of them, and to preſerve them for the uſe and benefit of thoſe who either have, or ſhall have, a Right to them.

The ſubject matter of this Title. All theſe kinds of Curators being charged with the Goods and Affairs that are committed to their care, and ſome of them likewiſe with the care of Perſons, ſuch as the Curators of thoſe who are mad; their Truſt is of the ſame Nature, and ſubject to the ſame Rules with that of Tutors, in what relates to their Engagements, the Reaſons that may ſerve to excuſe them from the Office, and all other things that are common to both Offices. So that we muſt add to this Title, the Rules of the foregoing Title which may be applied to this.

Another ſort of Curators, which does not belong to this place. We do not place among the Number of Curators that are to be treated of under this Title, thoſe who are named in Criminal Proſecutions in certain caſes againſt the Memory of Perſons who are proſecuted after their death; ſuch as thoſe who have been killed in a Duel, and who have made away with themſelves. For the Functions of theſe Curators is of another kind, and belong to the Matter of Crimes, which does not come in in this place.

SECT. I.

Of the ſeveral Sorts of Curators, and of their Power.

The CONTENTS.

1. *Curators of Mad Men.*
2. *When a Minor is mad.*
3. *The Madneſs ought to be Judicially proved.*
4. *The Son may be Curator to his Father or Mother, if they are mad.*
5. *When a Son, living under the Father's Juriſdiction, is mad.*
6. *The Huſband cannot be Curator of his Wife that is mad.*
7. *Madneſs with lucid Intervals.*
8. *Infirmities which require a Curator.*
9. *Curators of perſons who are declared Prodigals.*
10. *A Prodigal ought to be proved ſuch.*
11. *The Son cannot be Curator to his Father, who is a Prodigal.*
12. *Duration of the Curatorſhip of a Prodigal.*
13. *Curator to the Effects of one that is abſent.*
14. *Curator to a Child that is yet unborn.*
15. *A Curator to a Succeſſion.*
16. *Curator to Goods relinquiſhed by a Debtor to his Creditors.*
17. *A Creditor may be Curator to the Goods of his Debtor.*
18. *Power of Curators.*

I.

1. Curators of Mad Men. MAd Men being incapable of governing their Perſons, and Eſtates, altho' they be of Age, Curators are appointed to take care of them[a].

[a] Mente captis, quia rebus ſuis ſupereſſe non poſſunt, curatores dandi ſunt. §. 4. *inſt. de curat.* Furioſi, licet majores viginti quinque annis ſint, tamen in curatione ſunt. §. 3. *eod. l.* 1. *C. de cur. fur.* Conſilio & opera curatoris tueri debet non ſolùm patrimonium, ſed & corpus, ac ſalus furioſi. *l.* 7. *ff. eod.*

II.

2. When a Minor is mad. A Curator is not aſſigned to any one as a Madman, unleſs he has attained the Age of Majority. For if a Minor be in a ſtate of Madneſs, it is ſufficient, and likewiſe more decent to appoint him a Curator on account of his Minority, rather than becauſe of his Madneſs; at leaſt till he arrive at the Years of Majority[b].

[b] Putavi & ſi minor viginti quinque annis furioſus ſit, curatorem ei non ut furioſo, ſed ut adoleſcenti dari, quaſi ætatis eſſet impedimentum, & ita definiemus ei quem ætas curæ vel tutelæ ſubjicit, non eſſe neceſſe quaſi dementi quæri curatorem. Et ita Imperator Antoninus reſcripſit, cùm magis ætati, quàm dementiæ, tantiſper ſit conſulendum. *l.* 3. §. 1. *ff. de tutel.*

III.

3. The Madneſs ought to be judicially proved.

The Madneſs of a Perſon of full Age ought to be proved Judicially, in order to his having a Curator aſſigned him. For beſides that it is only by the Authority of Juſtice that a Curator can be appointed, it may ſometimes happen, that a Perſon may counterfeit himſelf to be mad for ſome particular end[c], or that others, out of Intereſt, may repreſent him to be mad, without any ground.

[c] Obſervare prætorem oportebit, ne cui temerè citra cauſæ cognitionem pleniſſimam, curatorem det, quoniam plerique vel furorem, vel dementiam fingunt, quo magis curatore accepto, onera civilia detrectent. *l.* 6. *ff. de cur. fur. & al.*

IV.

4. The Son may be Curator to his Father, or Mother, if they are mad.

The Son may be named Curator to his Mother, who is mad; as alſo to his Father, in the ſame caſe[d].

[d] Furioſæ matris curatio ad filium pertinet. Pietas enim parentibus, etſi inæqualis eſt eorum poteſtas, æqua debebitur. *l.* 4. *ff. de cur. fur.* Extat divi Pii reſcriptum, filio potius curationem permittendam in patre furioſo, ſi tam probus ſit. *l.* 1. *in fine ff. eod.* Nec dubitabit (Proconſul) filium quoque patri curatorem dari. *l.* 2. *eod.*

V.

5. When a Son, living under the Father's Juriſdiction, is mad.

If a Son, who is ſtill under his Father's Juriſdiction, falls into a ſtate of Madneſs, no Curator is aſſigned him, becauſe his Father is naturally charged with the Government of his Perſon, and the Adminiſtration of his Eſtate[e].

[e] Cùm furioſus quem morbus detinet perpetuus, in ſacris parentis ſui conſtitutus eſt, indubitatè curatorem habere non poteſt. Quia ſufficit ei ad gubernationem rerum quæ ex caſtrenſi peculio, vel aliter ad eum pervenerunt, & vel ante furorem ei acquiſitæ ſunt, vel in furore obveniunt, vel in his quorum proprietas ei tantummodò competit, paterna verecundia. Quis enim talis affectus extraneus inveniatur, ut vincat paternum? Vel cui alii credendum eſt res liberorum gubernandas, parentibus derelictis. *l.* 7. *C. de cur. fur.* See the tenth Article of the firſt Section of Tutors.

VI.

6. The Huſband cannot be Curator of his Wife that is mad.

In the caſes where it may be neceſſary to name a Curator to a married Woman, or to her who is contracted in Marriage, whether it be on account of Madneſs, or for other Cauſes, neither the Huſband[f], nor the Perſon with whom ſhe is contracted[g], can be named Curators.

[f] Maritus, etſi rebus uxoris ſuæ debet affectionem, tamen curator ei creari non poteſt. *l.* 2. *Cod. qui dare tut.* Virum uxori mente captæ curatorem dari non oportet. *l.* 14. *ff. de curat. fur.* §. 19. *Inſt. de excuſ. tut.*

[g] Non poteſt curator eſſe ſponſæ ſponſus. *l.* 1. §. *ult. ff. de excuſ. tut.*

This Rule ſeems to be founded either on the Intereſt which the Huſband may have in the Affair, which ſhould require the Appointment of a Curator to his Wife, or upon the inconveniences of making the Huſband accountable to his Wife: And with reſpect to the Perſon with whom the Woman is contracted in Marriage, the ſame Reaſons do likewiſe extend to him, becauſe the intended Marriage may take effect. And if the Marriage does not take effect, there would be ſtill leſs reaſon that the Perſon to whom the Woman was betrothed ſhould be her Curator.

We do not aſſign a Curator to a married Woman that is mad, for the Adminiſtration of the Effects pertaining to her Dowry, for that Adminiſtration belongs to the Huſband who has a Right to the Enjoyment of them. See the third Article of the firſt Section of the Title of Dowries.

VII.

7. Madneſs with lucid Intervals.

The Curator of a Perſon whoſe Madneſs comes and goes by Intervals, does not exerciſe his Function but during the Fit of Madneſs, and ceaſes to exerciſe it in the lucid Intervals, when the Perſon's reaſon is fully re-eſtabliſhed; but the Office of this Curator laſts during the Life of the Perſon that is mad, to avoid the trouble of naming a Curator at every new Fit of Madneſs[h].

[h] Manere (curatorem ſancimus) donec talis furioſus vivit: quia non eſt penè tempus in quo hujuſmodi morbus deſperatur: ſed per intervalla quo perfectiſſima ſunt nihil curatorem agere: ſed ipſum poſſe furioſum dum ſapit & hæreditatem adire, & omnia alia facere, quæ ſanis hominibus competant. Sin autem furor ſtimulis ſuis eum accenderit, curatorem in contractu ſuo conjungi, ut nomen quidem curatoris in omne tempus habeat, effectum autem quoties morbus redierit. Ne crebra, vel quaſi ludibrioſa fiat curatoris creatio, & frequenter tam naſcatur quàm deſinere videatur. *l.* 6. *C. de curat. fur.*

VIII.

8. Infirmities which require a Curator.

Curators are given to all Perſons, who by reaſon of ſome Infirmity, are incapable of the Adminiſtration of their Eſtates and Affairs; ſuch as one who is deaf and dumb; and all thoſe who by other the like Infirmities are brought under the like Incapacity[i].

[i] Sed & aliis dabit proconſul curatorem qui rebus ſuis ſupereſſe non poſſunt. *l.* 2. *ff. de curat. fur.* Surdis & mutis, & qui perpetuo morbo laborant, quia rebus ſuis ſupereſſe non poſſunt, curatores dandi ſunt. §. 4. *inſt. de curat.* Quibus curatores quaſi debilibus, vel prodigis dantur, vel ſurdo muto, vel fatuo. *l.* 19. *in fine. l.* 20. *l.* 21. *ff. de reb. auth. jud. poſſid.* His qui in ea cauſa ſunt, ut ſupereſſe rebus ſuis non poſſint, dare curatorem, proconſulem oportebit. *l.* 12. *ff. de tut. & curat. dat.*

IX.

9. Curators of perſons who are declared Prodigals. Thoſe who laviſh away their Eſtates in fooliſh extravagant Expences, and whoſe bad Conduct makes it neceſſary to declare them Prodigals, and to interdict them Judicially, are deprived of the Adminiſtration of their Affairs, and of the Management of their Eſtate; the Charge of which is committed to a Curator. And the ſame courſe would be taken with a Woman, whoſe Manners and Conduct ſhould give occaſion to ſuch an Interdiction[l].

[l] Lege 12. tabularum prodigo interdicitur bonorum ſuorum adminiſtratio. Quod moribus quidem ab initio introductum eſt, ſolent prætores vel præſides, ſi talem hominem invenerint, qui neque finem, neque tempus expenſarum habet, ſed bona ſua dilapidando, & diſſipando profundit, curatorem ei dare, exemplo furioſi. *l.* 1. *ff. de curat. fur.* Nam æquum eſt proſpicere nos etiam eis, qui quoad bona ipſorum pertinet, furioſum faciunt exitum. *l.* 12. §. *ult. ff. de tut. & cur. dat.* Et mulieri quæ luxurioſè vivit bonis interdici poteſt. *l.* 15. *ff. de cur. fur.*

By the Ordinance of Blois, *Art.* 182. *Widows who, having Children by a former Marriage, marry again with Perſons beneath their Quality, are put under an Interdiction as to the Diſpoſal of their Eſtates, which they can neither ſell, nor alienate. But this Interdiction being only to hinder Alienations, in order to preſerve the Eſtate to the Children, it hath not the effect to make Curators be aſſigned to thoſe Women.*

X.

10. A Prodigal ought to be proved ſuch. The Interdiction of a Prodigal cannot be decreed, and a Curator aſſigned to him, till after that his bad Conduct ſhall have been proved[m]. And he whom his Father ſhall have declared a Prodigal in his Will, is preſumed to be ſuch[n]; unleſs it ſhould appear by the circumſtances that no regard ought to be had to ſuch a Declaration.

[m] Si talem hominem invenerint. *l.* 1. *ff. de cur. fur.*

[n] Per omnia judicium teſtatoris ſequendum eſt, ne quem pater vero conſilio prodigum credidit, eum magiſtratus propter aliquod forte ſuum vitium, idoneum putaverit. *l.* 16. §. *ult. eod.*

XI.

11. The Son cannot be Curator to his Father who is a Prodigal. The Son cannot be named Curator to his Father, who is declared a Prodigal, altho' he may be Curator to his Father who is mad[o].

[o] Curatio autem ejus cui bonis interdicitur, filio negabatur permittenda. *l.* 1. §. 1. *ff. de curat. fur.*

XII.

12. Duration of the Curatorſhip of a Prodigal. The Office of a Curator to a Prodigal, is not at an end till the Interdiction is Judicially taken off[p].

[p] Tamdiù erunt ambo in curatione, quamdiù vel furioſus ſanitatem, vel ille ſanos mores receperit, quod ſi evenerit, ipſo jure deſinunt eſſe in poteſtate Curatorum. *l.* 1. *ff. de curat. fur.*

Altho' it be true, that the Amendment of the Manners of a Prodigal, as well as the Return of a Madman to his right Senſes, puts them both in a condition to reſume the Care of their Affairs; yet it is neceſſary however, with reſpect to the Prodigal, that as he has been Judicially interdicted, ſo the Interdiction ſhould be Judicially taken off, as well for the Diſcharge of his Curator, as for the Security of thoſe who ſhall have buſineſs to tranſact with him.

XIII.

13. Curator to the Effects of one that is abſent. If any perſon happens to be long abſent, without committing to any one the care of his Effects and Affairs, and it be neceſſary that ſome body ſhould look after them; in that caſe a Curator is named to take care of them[q].

[q] Ei cujus pater in hoſtium poteſtate eſt, tutorem dari non poſſe palam eſt——imò curator ſubſtantiæ dari debet: ne in medio pereat. *l.* 6. §. *ult. ff. de tut.* Cùm cognatos tuos nondùm poſt liminio regreſſos affirmes, ſed adhuc in rebus eſſe humanis, & bona eorum fraudibus diverſæ partis diſſipari, interpellatus rector provinciæ providebit, eum ſub obſervatione conſueta conſtituere, qui ſtipulante ſervo publico, ſatis idoneè dederit. *l.* 3. *C. de poſtlim. reverſ. v. l.* 6. §. *ult. ff. quibus ex cauſ. in poſſ. eat. l.* 15. *ff. ex quibus cauſ. mai.* Si bonis curator datis ſit, vel abſentis, vel ab hoſtibus capti. *l.* 22. §. 1. *ff. de rebus auct. jud. poſſid.* Quia rebus ſuis ſupereſſe non poſſunt. §. 4. *inſt. de curat.*

XIV.

14. Curator to a Child that is yet unborn. If a Widow happens to be big with Child at the time of her Huſband's Death, a Tutor cannot be named to the Child till it is born. But if it be neceſſary, a Curator is appointed to look after the Rights of the Child that may be born, and to take care of the Effects which are to be his as ſoon as he is born[r].

[r] Ventri tutor a magiſtratibus populi Romani dari non poteſt, curator poteſt. *l.* 20. *ff. de tut. & curat. dat.* Bonorum ventris nomine curatorem dari oportet. *l.* 8. *ff. de curat. fur. l.* 24. *ff. de reb. auct. jud. V. tit. de ventre in poſſ. mit. & curat. ejus. l.* 1. §. 17. & 18. *eod.*

If there were other Children, and it were neceſſary only to have one Tutorſhip for them all, the ſame Tutor would ſerve to look after the Intereſt of the Children to be born.

XV.

15. A Curator to a Succeſſion. If a Succeſſion happens to be without Heirs, or Executors, as if the deceaſed left behind him no Relations, nor inſtituted any perſon his Executor by Will, or that he who had a Right to ſucceed had renounced the Succeſſion, or were abſent, or that during the time he was deliberating about accepting the Succeſſion, and refuſed in the mean while to intermeddle, it ſhould be found neceſſary to appoint ſome perſon to look after the Affairs, and to take care of the Goods; a Curator, in this caſe, is named ed to the Succeſſion, who is to exerciſe that Function, for the preſervation of the Goods, either for the benefit of the Creditors, or of thoſe to whom the Succeſſion ſhall appertain[f].

[f] Si diù incertum ſit, hæres extaturus, necne ſit; cauſa cognita permitti oportebit, bona rei ſervandæ cauſa poſſideri. Et ſi ita res urgeat, vel conditio, bonum etiam hoc erit concedendum, ut curator conſtituatur. *l.* 8. *ff. quib. ex cauſ. in poſſ. eat.* Dum deliberant hæredes inſtituti adire, bonis à prætore curator datur. *l.* 3. *ff. de curat. fur. l.* 22. §. 1. *ff. de rebus auct. jud. poſſ. toto tit. ff. de curat. bon. dando.* See the following Articles.

XVI.

16. Curator to Goods relinquiſhed by a Debtor to his Creditors. When a Debtor relinquiſhes his Effects to his Creditors, they may procure a Curator to be appointed, to take care of them[t], or they may name ſome of their own Number to have the direction of them.

[t] De curatore conſtituendo hoc jure utimur, ut prætor adeatur, iſque curatorem curatoréſve conſtituat ex conſenſu majoris partis creditorum. *l.* 2. *& toto tit. ff. de curat. bon. dando.* See the following Article.

XVII.

17. A Creditor may be Curator to the Goods of his Debtor. We may name for a Curator to the Goods relinquiſhed by a Debtor, or to his Inheritance after his Death, one of his Creditors, or ſome other Perſon, to take care of the Eſtate[u].

[u] Nec omnimodò creditorem oportet eſſe eum qui curator conſtituitur, ſed poſſunt & non creditores. *l.* 2. §. 4. *ff. de curat. bon. dand.* Si diù incertum ſit hæres extaturus, necne ſit, cauſa cognita permitti oportebit, bona rei ſervandæ cauſa poſſideri. Et ſi ita res urgeat, vel conditio, bonum etiam hoc erit concedendum, ut curator conſtituatur unus ex creditoribus. *l.* 8. *& l.* 9. *ff. quibus ex cauſ. in poſſ. eat.*

We muſt not confound theſe ſorts of Curators, or Directors, which are mentioned in this and the foregoing Article, with the Curators who are named for the Validity of a Seizure of Goods that are abandoned, ſuch as an Inheritance without Heirs. For as to this laſt ſort of Curators, Creditors are not named, becauſe that would be to make them both Plaintiff and Defendant in the ſame Cauſe.

XVIII.

18. Power of Curators. Curators have their Functions regulated by the Power which is given them, and they have a right to do every thing that their Office requires[x].

[x] Quæ per eum, eóſve qui ita creatus, creatíve eſſent, acta, facta, geſtaque ſunt, rata habebuntur, eiſque actiones, & in eos utiles competunt. *l.* 2. §. 1. *ff. de curat. bon. dando.* See the third Article of the ſecond Section.

SECT. II.

Of the Engagements of Curators.

The CONTENTS.

1. *Oath and Adminiſtration of Curators.*
2. *Difference between Tutors and Curators.*
3. *Engagements of Curators.*

I.

1. Oath and Adminiſtration of Curators. ALL theſe ſorts of Curators, of which mention has been made in the foregoing Section, are bound, in the ſame manner as Tutors, to take an Oath faithfully to diſcharge their Truſt, to make an Inventory of the Goods committed to their Charge, and to take the ſame care of every thing belonging to their Adminiſtration, as Tutors are bound to do in relation to theirs[a].

[a] Tactis ſacro ſanctis Evangeliis edicat omnia ſe rectè, & cum utilitate furioſi agere: & neque prætermittere ea quæ utilia furioſo eſſe putaverit, neque admittere quæ inutilia exiſtimaverit. *l.* 7. §. 5. *C. de cur. fur. Nov.* 72. *c. ult.* Eadem obſervatione & pro jurejurando, & pro inventario, & ſatiſdatione, & hypotheca rerum curatoris modis omnibus adhibenda. *d. l.* 7. §. 6. *inf.* In pauciſſimis diſtant curatores a tutoribus. *l.* 13. *ff. de excuſ.* A tutoribus & *curatoribus* pupillorum eadem diligentia exigenda eſt circa adminiſtrationem rerum pupillarium, quam paterfamilias rebus ſuis ex bona fide præbere debet. *l.* 33. *ff. de admin. & per. tut. & cur.* See the Law quoted upon the ſecond Article of the following Section. See the twelfth Article of the firſt Section of Tutors, and the third Article of this Section.

II.

2. Difference between Tutors and Curators. There is almoſt no other difference between the Engagements of Curators and Tutors, except that Tutors are named both for Perſons, and for the Eſtate belonging to the ſaid Perſons, and that their Adminiſtration never laſts longer than till the Majority of the Perſons committed to their Charge; whereas ſome Curators are appointed only for Goods, and the Duration of their Office is not limited to any time, but continues, or ends, according as the Cauſe which has given occaſion to their Nomination continues or ceaſes[b].

[b] In pauciſſimis diſtant curatores à tutoribus. *l.* 13. *ff. de excuſ.* See the preceding Section.

III.

3. Engagements of Curators. The Rules which have been explained in the Title of Tutors, and which may agree to the Functions and Engagements

gagements of Curators, ought to be applied to them. As, for Example, that they cannot take Aſſignments to Rights, or Debts, againſt thoſe whoſe Curators they are: that their Eſtates are mortgaged from the Day of their Nomination, for the Sums for which they ſhall be found to be accountable: that they cannot alienate any part of the Eſtate of thoſe committed to their Charge, without obſerving the Formalities preſcribed by Law. And ſo it is with reſpect to the other Rules, where the Diſpoſitions and Motives of the ſaid Rules may have any relation to the Office of Curators[c].

[c] Et hæc dicimus in omni curatore, in quibus omninò curas aliquorum introducunt leges, prodigorum forte, aut furioſorum, aut amentium, aut ſi quid aliud jam lex dixit, aut ſi quid inopinabile natura adinvenerit. *Novel. 72. c. 5. in fine.* Hipotheca rerum curatoris modis omnibus adhibenda. *l. 7. §. 6. ff. de cur. fur.* Si prædia minoris viginti quinque annis diſtrahi deſiderentur, cauſa cognita Præſes provinciæ debet id permittere. Idem ſervari oportet etſi furioſi, vel prodigi, vel cujuſcumque alterius prædia curatores velint diſtrahere. *l. 11. ff. de reb. eor. qui ſub. tut.* See in the Title of Tutors, the Rules which may agree to Curators.

SECT. III.

Of the Engagements of thoſe to whom Curators are aſſigned.

The CONTENTS.

1. *Action of Curators appointed to Perſons.*
2. *Action of Curators appointed to Goods.*
3. *Action of a Curator to the Goods of an abſent perſon.*
4. *Action of a Curator whoſe charge is at an end.*
5. *Effect of the Action which Curators have.*
6. *Mortgage which Curators have for their Security.*

I.

1. Action of Curators appointed to Perſons.

THE Curators which are appointed for Perſons, and for the Goods belonging to the ſaid Perſons, have their Action for recovering what ſhall be due to them, and for indemnifying them for all that they ſhall have well tranſacted, and for the other conſequences of their Adminiſtration; either againſt the Perſons themſelves to whom they have been Curators, if they are capable of auditing their Accounts, or againſt their Heirs, and Executors, or other Perſons to whom the ſaid Accompt ought to be rendred[a].

[a] Sed etſi curator ſit vel furioſi, vel prodigi, dicendum eſt etiam his contrarium dandum. Idem in curatore quoque ventris probandum eſt. Quæ ſententia fuit Sabini, exiſtimantis, cæteris quoque curatoribus, ex iiſdem cauſis dandum contrarium judicium. *l. 1. §. 2. ff. de cont. tut. & ut. act.*

II.

2. Action of Curators appointed to Goods.

The Curators whoſe Adminiſtration relates only to Goods, and not to Perſons, have their Action againſt the Perſons who are intereſted in the Preſervation of the ſaid Goods: as for Inſtance, againſt the Perſons who ſhall be declared Heirs to a Succeſſion that hath lain vacant for ſome time, and againſt the Creditors of Goods that are relinquiſhed by the Owner[b].

[b] Quæ per eum, eóſve, qui ita creatus, creative eſſent, acta, facta, geſtaque ſunt, rata habebuntur. Eiſque actiones, & in eos utiles competunt. *l. 2. §. 1. de cur. bon. d.*

III.

3. Action of a Curator to the Goods of an abſent perſon.

The Curator appointed to look after the Goods of an abſent Perſon, hath his Action againſt the ſaid Perſon when he returns, or againſt thoſe to whom the Goods ſhall belong, and that with much more reaſon than he who of his own accord takes upon him the Care of the Goods of an abſent Perſon[c].

[c] *See the ſecond Article of this Section.* Cùm quis negotia abſentis geſſerit, ultrò citroque inter eos naſcuntur actiones. *Inſt. de obl. quæ quaſi ex contr. l. 5. de obl. & act.* See the ſecond Section of thoſe who manage the Affairs of others.

IV.

4. Action of a Curator, whoſe Charge is at an end.

If a Curator having acted, another be named in his ſtead, whether it be that the former ceaſes to be Curator becauſe of his excuſing himſelf, or for other Reaſons, he ſhall have his Action for what he has acted againſt the Perſons intereſted in the Affairs that have been committed to his Adminiſtration, and whom his Nomination has put under an Engagement to him: and he may likewiſe bring his Action againſt the Curator who is named in his room, who will intimate it to the perſons concerned[d].

[d] *This is a Conſequence of the foregoing Articles.*

V.

5. Effect of the Action which Curators have.

By this Action the Curators recover all that they have reaſonably laid out of their own, with the Intereſt of the Money which they have advanced, if they have advanced any; and what may be due to them on the Score of Salary for their Adminiſtration. And they procure a Ratification of what they have tranſacted honeſtly and well[e].

VI.

6. Mortgage which Curators have for their Security.

The Curators of Mad Men, of thoſe labouring under any Infirmity, of Prodigals, and abſent Perſons, have their Mortgage on all the Eſtate belonging to the Perſons to whom they have been Curators. And the Curators to vacant Succeſſions, and other Eſtates, have their Mortgage on the Eſtates that have been committed to their Adminiſtration. And all theſe Curators have likewiſe their Privilege and Preference on the Goods which they have recovered, or preſerved, for the Money which they have laid out to that end; as, for Example, for the Charges of a Law-Suit for recovering a Debt, or for the Charges of repairing a Houſe, or other Tenement[f].

* * *

TITLE III.

Of SYNDICKS, DIRECTORS, and other Adminiſtrators of Companies and Corporations.

Of Communities, and Corporations, and of the Perſons appointed to have the Direction of their Affairs.

WE have ſeen in the Title of Perſons, that there are Communities and Corporations, Eccleſiaſtical and Secular, ſuch as Chapters, Religious Houſes, Corporations, and Communities of Towns, Univerſities, Companies of Trades, and others of the like nature: and that theſe Communities are conſidered as holding the place of Perſons. For as particular Perſons have their Rights, their Privileges, their Eſtates, their Affairs, their Burdens; ſo theſe Communities have likewiſe theirs: But with this difference among others, that whereas every particular Perſon is Maſter of what belongs to him, and diſpoſes of it ſolely according to his own will and pleaſure, if there be no obſtacle in the way, ſuch as a Minority, or ſome other Incapacity; each of the particular Perſons who compoſe thoſe Communities, nor the whole Body together, have not that Right: nor can they diſpoſe in the ſame manner of what belongs to the Community. Thus, they cannot alienate their Eſtate, except for juſt Cauſes, and according to the Formalities preſcribed by Law. Which is founded upon this, that thoſe Communities being erected, whether they belong to the Church, or State, with a view of promoting thereby the Publick Good, which requires that they ſhould always ſubſiſt; it is neceſſary, that they ſhould not be at Liberty to alienate their Eſtates without juſt Cauſe, that they may be able always to maintain and ſupport themſelves, and that they may not have it in their power to ruin this Foundation, which makes them to ſubſiſt for the Publick Good.

It is a neceſſary Conſequence of theſe ſeveral Eſtabliſhments of Communities both in Church and State, that for the Management of their Affairs, for the Preſervation and Adminiſtration of their Eſtates and Rights, they may appoint Perſons to take care of them. And theſe Perſons are called by different Names, ſuch as Mayors, Sheriffs, Aldermen in Towns, Governors, Syndicks, Directors, Adminiſtrators, or by other Names, in the other Corporations. And there is formed between thoſe Perſons, and the Corporations who name them, a mutual Engagement without any Covenant; for ſuch Nominations are often made without the previous conſent of the Perſons who are choſen. Thus, this kind of Engagement being formed without a Covenant, it is one of the Matters to be treated of in this Book, and ſhall be the Subject Matter of this Title.

The ſubject Matter of this Title.

We muſt not confound this Engagement with that which is formed between ſuch Corporations, or Communities, and thoſe whom they appoint their Proctors or Agents, in any Buſineſs; for this Engagement is made by Covenant, and is comprehended in the Matter of the Title of Proxies.

We ſhall not ſpeak here of the other Matters which may relate to Communities, ſuch as their Uſe, their Origine, the Manner in which they are formed, their Rights, their Privileges, and the reſt; for theſe Matters do not belong to this place, but are a part of the Publick Law, of which mention has been made in the fourteenth Chapter of the Treatiſe of Laws, *numb.* 27. But the Subject Matter of this Title is reſtrained to what relates in general to the Nomination, and Power of thoſe Syndicks, or Governors, and Directors, and the Engagements which are formed between them and the Perſons who name them, in what relates to the Affairs with which they are charged.

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[e] *See the firſt, ſecond, third and fifth Articles of the fifth Section of the Title of Tutors.*

[f] *See the ſixth and ſeventh Articles of the fifth Section of Tutors, and the twenty fifth Article of the fifth Section of Pawns and Mortgages.*

SECT. I.

Of the Nomination of Syndicks, Directors, and other Adminiſtrators of Companies, and Corporations, and of their Power.

The CONTENTS.

1. *Uſe of Syndicks, and other Directors.*
2. *By whom they are named.*
3. *In what manner they are named.*
4. *The Perſon who is named, is reckoned in computing the Number of the Votes.*
5. *The Power of him who is named.*
6. *Duration of this Power.*

I.

1. Uſe of Syndicks, and other Directors.

THoſe who have permiſſion to form a Company, or Corporation, have alſo their Rights, their Privileges, their Goods, their Affairs; and all the Members not having leiſure to attend at the ſame time the Buſineſs of the Community, they may appoint Perſons to take care of it, and who are called Syndicks, or by ſome other Names [a].

II.

2. By whom they are named.

The Syndicks and other Directors of the Affairs of Companies and Corporations, are named by the Members of thoſe Communities, unleſs ſome particular Law hath otherwiſe provided for the Choice of the ſaid Perſons. And if the Corporation be ſuch, that all who are Members of it cannot meet together, or ought not all of them to have a ſhare in the Direction of the common Affairs, they chuſe a certain Number of the Members, according as it is provided by the Regulations and Uſage of the Community, and that Number, which repreſents the Whole Body, names thoſe who are to be intruſted with the Care of the Affairs [b].

III.

3. In what manner they are named.

The Nomination of ſuch Governors and Directors, is made by Plurality of Voices, when thoſe who have a Right to Vote are aſſembled in the manner, and in the number preſcribed by the Rules or Cuſtom of the Community; as if it be neceſſary that there ſhould be two Thirds of the Members preſent, or any other Proportion, or a certain Number; and thoſe who have a Right to vote in the Nomination, ought to obſerve therein the Formalities which are preſcribed them [c].

IV.

4. The Perſon who is named, is reckoned in computing the Number of the Votes.

To make up the Number of Voters that is neceſſary in ſuch Nominations, we may reckon the Perſon who is named, if he was of the Number of thoſe who aſſiſted at the Nomination [d].

V.

5. The Power of him who is named.

Thoſe who have been thus legally nominated, have the Power of exerciſing the Functions which are committed to them; and that according to the Extent, or Bounds, that are preſcribed to them [e].

VI.

6. Duration of this Power.

The Power of thoſe Syndicks, and other Adminiſtrators, ends with their Offices, when they expire. And it ceaſes alſo by a Revocation, if that can take place; provided it be done according to Rule, and be known to the Perſon who is revoked, and to thoſe who had buſineſs with him [f].

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[a] Quibus permiſſum eſt corpus habere collegii, ſocietatis, ſive cujuſque alterius eorum nomine, proprium eſt, ad exemplum Reipublicæ, habere res communes, arcam communem, & actorem ſive Syndicum per quem, tanquam in Republica, quod communiter agi, fierique oporteat, agatur, fiat. *l.* 1. §. 1. *ff. quod cui un. nom.*

[b] Nulli permittetur nomine civitatis, vel curiæ experiri, niſi ei cui lex permittit, aut lege ceſſante ordo dedit. *l.* 3. *ff. quod cui. un. nom.* Quibus ſumma Reipublicæ commiſſa eſt. *l.* 14. *ff. ad munic.* Secundum locorum conſuetudinem. *l.* 6. §. 1. *in f. ff. quod cui un. nom.*

[c] Quod major pars curiæ effecit, pro ea habetur, ac ſi omnes egerint. *l.* 19. *ff. ad municip.* Cùm duæ partes adeſſent, aut amplius quàm duæ. *l.* 3. *ff. quod cui. un. nom.*

[d] Planè ut duæ partes Decuriorum adfuerint, is quoque quem decernent numerari poteſt. *l.* 4. *ff. quod cui. un. nom.*

[e] Per quem, tanquam in Republica, quod communiter agi, fierique oporteat agatur, fiat. *l.* 1, §. 1. *in f. ff. quod cui. un. nom.*

[f] Quid ſi actor datus poſtea decreto Decurionum prohibitus ſit? An exceptio ei noceat? & puto ſic hoc accipiendum, ut ei permiſſa videatur, cui & permiſſa durat. *l.* 6. §. 2. *ff. quod cui. un. nom.* See the firſt Article of the fourth Section of Proxies.

SECT. II.

Of the Engagements of Syndicks, and other Directors.

The CONTENTS.

1. *The Care of Syndicks, and Directors.*
2. *Their Engagements.*
3. *Other Engagements.*

I.

1. The Care of Syndicks, and Directors. THoſe who are named by Companies and Corporations, to have the Direction of their Affairs, are obliged to the ſame Care and Diligence, as Factors or Agents. And they are anſwerable not only for any Fraud, and groſs Negligence, which they may be guilty of, but alſo for all Faults that are contrary to the Care required of them[a].

II.

2. Their Engagements. The Syndicks, and other Directors, who undertake an Affair by order of the Community which has named them, are obliged to take care of all the conſequences of it. Thus, he who is ordered to commence a Law-Suit, is bound to proſecute it in all its conſequences, during the continuance of his Adminiſtration. And in general, he is obliged to anſwer for his Conduct, to thoſe who have employed him, and to ſhew his Warrant and Authority to thoſe whom he ſues, or with whom he treats, and to procure from the Community a Ratification of what he ſhall have tranſacted[b].

III.

3. Other Engagements. The other Engagements of theſe Syndicks, and Directors, are pointed out to 'em by the Functions which are committed to them, and by the Power which is given them. Thus, thoſe of Mayors and Sheriffs are regulated by the nature of their Offices. And thoſe of a Syndick, or other Governor and Director of a Chapter, or other Corporation, by the Power, and Functions which are appointed them. And in general, all Overſeers and Adminiſtrators have the Functions proper to their Offices, according as they are either ſettled by the Rules and Uſage of the Society, or particularly committed to them by thoſe who name them[c].

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[a] Actor iſte procuratoris partibus fungitur. *l.* 6. §. 3. *ff. quod cui. un. nom.* Magiſtratus Reipublicæ non dolum ſolummodò, ſed & latam negligentiam, & hoc amplius etiam diligentiam debent. *l.* 6. *ff. de adm. rer. ad civ. pert.* See the fourth Article of the third Section of Proxies.

This Obligation hath not its effect againſt the Superiors, and Procurators of Convents; who are Perſons civilly dead, againſt whom the Community hath not this Recourſe.

[b] Actor univerſitatis ſi agat, compellitur etiam defendere. *l.* 6. §. 3. *ff. quod cui. un. nom.* Si de decreto dubitetur, puto interponendam & de rato cautionem. *d.* §. 3.

[c] Actor ipſe procuratoris partibus fungitur. *l.* 6. §. 3. *ff. quod cui. un.* Diligenter fines mandati cuſtodiendi ſunt. *l.* 5. *ff. mand.* Pecuniam publicam tractare, ſive erogandam decernere. *l.* 2. §. 1. *ff. ad munic.* Exigendi tributi munus. *l.* 17. §. 7. *eod.* Ad Rempublicam adminiſtrandam. *l.* 8. *ff. de mun. & hon. Tit. ff. de adm. rer. ad civ. pert.*

SECT. III.

Of the Engagements of Corporations and Communities, who commit the Adminiſtration of their Affairs to Syndicks, Directors, or others.

The CONTENTS.

1. *Engagement to ratify what their Syndicks, or Directors, do.*
2. *Engagement to allow the Expences.*
3. *Bounds of the Engagements of Communities.*
4. *How Directors or Adminiſtrators of Communities may be bound in their own Names.*
5. *The Engagement of a Community is not divided among all the Members.*

I.

1. Engagement to ratify what their Syndicks, or Directors, do. THE Corporations and Communities which have named Syndicks, or other Directors, for the Adminiſtration of their Affairs, are bound to ratify what they have well tranſacted, purſuant to their Power. For ſeeing all the Members of the Community cannot act in a Body together, nor even know all of them the Concerns of the Community, it is preſumed that they know as much of their Affairs, as the Perſon does whom they have intruſted with the Management of them: That whatever comes to his Knowledge, comes likewiſe to theirs: And that what he does, or what is tranſacted with him, is tranſacted with all the Members of the Community, provided it be within the Bounds of the Power which they have given him[a].

II.

2. Engagement to allow the Expences. The Community is obliged to allow to the Perſon whom they have conſtituted their Syndick, or Director, the reaſonable Charges which he has been at for the Affairs committed to his Care[b].

III.

3. Bounds of the Engagements of Communities. Communities are not bound by the act of the Perſon to whom they have committed the Direction of their Affairs, except within the limits of the Engagements which they are impowered to contract, and according as they are advantageous to the Community. Thus, for Example, if a Community has given power to borrow Money, it will not be obliged except for ſuch Sums as have been uſefully imployed for its behoof[c]; or if it has given a power to ſell, the Sale will not ſubſiſt, except where it has been made for a neceſſary Cauſe, and where the Formalities preſcribed in ſuch ſorts of Sales have been obſerved[d].

IV.

4. How Directors, or Adminiſtrators of Communities, may be bound in their own Names. If a Community be diſcharged from the Engagement contracted by the Perſon whom it has intruſted with the Adminiſtration of its Affairs, we are to judge by the Circumſtances, if the ſaid Adminiſtrator ought in his own Perſon to make good the Engagement to thoſe who have treated with him. Thus, for Example, if the Magiſtrates of a Town have borrowed Money to pay their Debts, or to be laid out to ſome other Uſe, for the benefit of the Corporation, and the Creditor truſts the Money with them, that they may pay the Debts, or lay it out to the other Uſe; if they have failed to imploy this Money for the behoof of the Publick, they muſt anſwer for it in their own Names. Thus, on the contrary, if the Director, or Adminiſtrator of a Community ſells an Eſtate belonging to it, to a Purchaſer who aſks no other Security than an Order of the Community, impowering the ſaid Perſon to ſell, and the Sale made by the ſaid Perſon in that Quality, and purſuant to the Power granted him, and that afterwards the ſaid Sale comes to be annulled, for having been made without Neceſſity, and without obſerving the uſual Formalities, the ſaid Director, or Adminiſtrator, ſhall not be bound to warrant the Sale. Thus in general, Directors, or Adminiſtrators, who treat for Communities, are bound for what is their own particular fact and deed, to thoſe who have truſted to their Integrity, but are not bound for the deed of the Community, if they have acted only in conformity to the Power which it gave them[e].

V.

5. The Engagement of a Community is not divided among all the Members. The Engagement of a Corporation, or Community, is not divided among the Perſons who compoſe it, ſo as to become the Engagement of every one of the Members in particular: And it is only the Community, that is bound by the deed of the Perſon to whom it has committed the Adminiſtration of its Affairs. And as the particular Members do not enter, in their own Names, into the Obligation contracted by the Community, unleſs they engage themſelves expreſly; ſo thoſe who oblige themſelves to Communities, do not by that engage themſelves to every one of the Members of the ſaid Communities in particular[f].

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[a] Sicut municipum nomine actionem prætor dedit, ita & adverſus eos juſtiſſime edicendum putavit. *l. 7. ff. quod cui. un. nom.* Municipes intelliguntur ſcire quod ſciant hi quibus ſumma Reipublicæ commiſſa eſt. *l. 14. ff. ad municip.* See the fifth Article of the ſecond Section of Covenants.

[b] Legato, qui in negotium publicum ſumptum fecit, puto dandam actionem in municipes *l. 7. ff. quod cui. un. n.*

[c] Civitas mutui datione obligari poteſt, ſi ad utilitatem ejus pecuniæ verſæ ſunt. *l. 27. ff. de reb. cred. l. 11. ff. de pig. & hyp.*

[d] *V. l. 14. C. de ſacr. Eccleſ. Nov. 7. c. 1. Nov.* 120. See the following Article.

[e] Civitas mutui datione obligari poteſt, ſi ad utilitatem ejus pecuniæ verſæ ſunt. Alioquin ipſi ſoli qui contraxerunt, non civitas tenebuntur. *l. 27. ff. de reb. cred.* See the preceding Article, touching Alienations: and the Remark on the firſt Article of the ſecond Section, concerning the Engagements of Syndicks, and Directors.

[f] Si municipes, vel aliqua univerſitas ad agendum det actorem, non erit dicendum, quaſi à pluribus datum, ſic haberi: hic enim pro Republica, vel Univerſitate intervenit, non pro ſingulis. *l. 2. ff. quod. cuj. un. nom.* Si quid debetur Univerſitati, ſingulis non debetur: nec quod debet Univerſitas ſinguli debent. *l. 7. §. 1. eod.*

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TITLE IV.

Of thoſe who manage the Affairs of others, without their Knowledge.

The Duty of taking care of the Affairs of abſent perſons.

THE Law which enjoins us to do for others what we would that they ſhould do for us, obliges thoſe who happen to be in a Conjuncture where the Intereſt of abſent Perſons is abandoned, to take what care of it they are able. The bare Sentiments of Humanity, not to ſpeak of Religion, recommend this Duty towards abſent Perſons, and engage thoſe to look after their Eſtates, and Concerns, to whom the conjuncture of Affairs has afforded an opportunity of ſo doing. And the *Roman* Laws invite all ſorts of Perſons to this Duty; giving to thoſe who take care of the Affairs of abſent Perſons, an Aſſurance that what they ſhall have reaſonably acted, ſhall be confirmed, and that they ſhall be reimburſed the Monies which they ſhall have laid out to advantage[a]. It is this kind of Office, and the Conſequences reſulting from it, that the Rules which are the Subject Matter of this Title, have relation to. For there is formed an Engagement without a Covenant, and which is reciprocal, between the Maſter of an Affair, and the perſon who takes care of it without his knowledge. Thus this kind of Engagement hath its rank in this Place.

The Subject Matter of this Title.

It is to be obſerved as to this Title, that there is this difference, among others, between the Adminiſtration of Tutors and Curators, and that of Perſons who manage the Affairs of others without their knowledge; that whereas Tutors and Curators, being named or confirmed by Authority of Juſtice, have their Mortgage on the whole Eſtate of the Perſons who have been under their Care, and Curators to Goods upon the Goods of which they have had the Adminiſtration; thoſe who manage the Affairs of others without their knowledge have not the ſame Privilege: But they have the Preference which they may have acquired on account of Monies laid out, either for the Preſervation of a Thing, or Recovery of a Debt[b].

Seeing there is a great reſemblance between the Engagement of thoſe who manage the Affairs of others without their knowledge, and that of Factors, or Agents; we muſt join to this Title the Rules of the Title of Proxies which are applicable to this Subject.

SECT. I.

Of the Engagements of him who does the Buſineſs of another Perſon without his knowledge.

The CONTENTS.

1. *Engagement to continue an Affair that is begun.*
2. *Care of an Affair which one has undertaken.*
3. *If he who meddles with the Affairs of an abſent Perſon, neglects ſome part of them.*
4. *An Affair undertaken without neceſſity.*
5. *Of him who manages only one Affair.*
6. *Of Accidents.*
7. *If the abſent Perſon dies before the Buſineſs is ended.*
8. *Intereſt of Monies received on account of the abſent perſon.*
9. *Of him who manages the Affair of one Perſon, believing it to belong to another.*
10. *If a Woman manages the Affairs of an abſent Perſon.*
11. *Of thoſe who act thro' neceſſity.*
12. *A Caſe where he who acts is not obliged to the moſt exact Care.*

I.

1. Engagement to continue an Affair that is begun.

THE Civil Law obliges no body to take care of the Affairs of others, except thoſe who are charged with them by reaſon of ſome particular Duty, ſuch as Tutors, Curators, and other Adminiſtrators. But he who undertakes willingly the Care of the Affair of another Perſon, is not any longer at liberty to abandon it; for he ſhall be bound for the Conſequences of his Adminiſtration, to continue what he ſhall have begun, till he has made an end of it, or till the Maſter be in a condition to look after it himſelf; and he ſhall be accountable for what he ſhall have done, or neglected to do[a]. And the Perſon for whom he ſhall have acted, ſhall, on his part be bound to him in the Engagements which ſhall be explained in the ſecond Section.

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[a] Utilitatis cauſa receptum eſt invicem eos obligari. *l. 5. ff. de obl. & act.* Idque utilitatis cauſa receptum eſt, ne abſentium qui ſubitâ feſtinatione coacti, nulli demandatâ negotiorum ſuorum adminiſtratione, peregrè profecti eſſent, deſererentur negotia. Quæ ſanè nemo curaturus eſſet, ſi de eo quod quis impendiſſet, nullam habiturus eſſet actionem. §. 1. *inſt. de obl. quæ qu. ex contr. n. l. 5. ff. de obl. & act.*

[b] *See the ſixth Article of the third Section of Curators, and the fifth Section of Pawns and Mortgages.*

[a] Tutori vel Curatori ſimilis non habetur qui, citra mandatum, negotium alienum ſponte gerit. Quippe ſuperioribus quidem neceſſitas muneris adminiſtrationis finem, huic autem propria voluntas facit. *l.* 20. *C. de neg. geſt.* Nova inchoare neceſſe mihi non eſt, vetera explicare, ac conſervare neceſſarium eſt. *l.* 21. §. 2. *ff. eod.* Sicut autem is qui utiliter geſſit negotia, dominum habet obligatum negotiorum geſtorum, ita & contra iſte quoque tenetur, ut adminiſtrationis reddat rationem. §. 1. *inſt. de obl. qua quaſi ex contr.* Cùm quis negotia abſentis geſſerit, ultrò citróque inter eos naſcuntur obligationes. *d.* §. Æquum eſt ipſum actus ſui rationem reddere, & eo nomine condemnari, quidquid vel non ut opportuit, geſſit: vel ex his negotiis retinet. *l.* 2. *ff. de neg. geſt.*

II.

2. Care of an Affair which one has undertaken.

He who has undertaken the Affair of another Perſon without his knowledge, is obliged to take the ſame care of it as if he were conſtituted the other's Agent, or Factor; for he is inſtead of one: and ſeeing he does a good Office, he ought to do it ſo as that it be no ways prejudicial, either thro' his Negligence, or thro' any other Fault. Thus, he ſhall be accountable not only for any Fraud, or unfair Dealing, which he may be guilty of, but likewiſe for want of Care. And even altho' he ſhould be negligent in his own proper Concerns, yet he is bound to take a very exact care of the Affairs of another perſon which he has undertaken, and he will be anſwerable for the Faults that are contrary to this Care; unleſs the Circumſtances make it appear reaſonable to abate ſomething of the Rigour, according to the Rule which ſhall be explained in the laſt Article of this Section[b].

[b] Secundùm quæ ſuper his quidem quæ nec tutor nec curator conſtitutus ultrò quis adminiſtravit, cùm non tantum dolum & latam culpam, ſed & levem præſtare neceſſe habeat à te conveniri poteſt. *l.* 20. *C. de neg. geſt.* Quo caſu ad exactiſſimam quiſque diligentiam compellitur reddere rationem. Nec ſufficit talem diligentiam adhibere qualem ſuis rebus adhibere ſolet, ſi modò alius diligentior eo commodius adminiſtraturus eſſet negotia. §. 1. *in f. inſt. de obl. qua quaſi ex contr.* Si mater tua major annis conſtituta, negotia quæ ad te pertinent, geſſerit, cùm omnem diligentiam præſtare debeat, &c. *l.* 24. *C. de uſur.* Si negotia abſentis & ignorantis geras, & culpam, & dolum præſtare debes. *l.* 11. *ff. de neg. geſt.* See the fourth Article of the third Section of Proxies.

III.

3. If he who meddles with the Affairs of an abſent Perſon, neglects ſome part of them.

If the Perſon who has undertaken the Management of the Affairs of one that is abſent, neglects a part of them, and his taking the Management upon him hinders other perſons from looking after them, he ſhall be made accountable for the ſaid Neglect according to the circumſtances[c].

[c] Videamus in perſona ejus qui negotia adminiſtrat, ſi quædam geſſit, quædam non? Contemplatione tamen ejus, alius ad hæc non acceſſit: & ſi vir diligens, quod ab eo exigimus, etiam ea geſturus fuit, an dici debeat negotiorum geſtorum eum teneri & propter ea quæ non geſſit? quod puto verius. *l.* 6. §. 12. *ff. de neg. geſt. v. l.* 1. §. *ult. ff. de eo qui pro. tut. prove. cur. neg. geſſit.* See the fifth Article of this Section.

IV.

4. An Affair undertaken without neceſſity.

But if, on the contrary, he who manages the Affairs of an abſent Perſon, undertakes without neceſſity ſome new Affair, which nothing obliged the abſent Perſon to engage in, as if he buys for him ſome Merchandize, or engages him in ſome Commerce, he alone ſhall bear all the Loſs that ſhall happen by this new Buſineſs, altho' the Profit that it may yield will belong to the abſent Perſon. But if there happens to be in the ſame Affair Loſs one way, and Gain another, he who has undertaken it may compenſate the Gain with the Loſs which he is to bear[d].

[d] Interdùm etiam caſum præſtare debere: veluti ſi novum negotium, quod non ſit ſolitus abſens facere, tu nomine ejus geras: veluti venales novitios coemendo, vel aliquam negotiationem ineundo. Nam ſi quod damnum ex ea re ſecutum fuerit, te ſequetur: lucrum verò abſentem. Quod ſi in quibuſdam lucrum factum fuerit, in quibuſdam damnum, abſens penſare lucrum cum damno debet. *l.* 11. *ff. de neg. geſt.*

V.

5. Of him who manages only one Affair.

He who is not obliged to concern himſelf any ways in the Affairs of another Perſon, may confine himſelf to one Affair, and not meddle with the others, if there be no Connexion between them[e].

[e] Nova inchoare neceſſe mihi non eſt. *l.* 21. §. 2. *ff. de neg. geſt. l.* 16. *eod.* Satis abundéque ſufficit, ſi cui vel in paucis amici labore conſulatur. *l.* 20. *C. eod.* See the ſixth Article of this Section.

VI.

6. Of Accidents. Altho' he who does the Buſineſs of another, have engaged himſelf in it of his own accord, yet he is not anſwerable for Accidents, and for the other Events which may render ineffectual the good Office which he had done[f].

[f] Negotium gerentes alienum, non interveniente ſpeciali pacto, caſum fortuitum præſtare non compelluntur. *l. 22. C. de neg. geſt. l. 22. ff. eod.* See the ſeventh Article of the ſecond Section.

VII.

7. If the abſent Perſon dies before the Buſineſs is ended. If the abſent Perſon, whoſe Buſineſs another hath undertaken, happens to die before the Buſineſs be ended, or if he was already dead before the ſaid Perſon intermeddled with it, he will be obliged to continue his Adminiſtration for the behoof of the Heirs and Executors, or other Perſons who may have an Intereſt in the ſaid Affair: For it is a Conſequence of his Engagement, which we muſt conſider in its Origine, without regard to the change of Maſters that may happen[g].

[g] Ait prætor, *Si quis negotia alterius, ſive quis negotia quæ cujuſque, cùm is moritur, fuerint, geſſerit, judicium eo nomine dabo*, l. 3. ff. de neg. geſt. Hæc verba, *ſi quis negotia quæ cujuſque cùm is moritur, fuerint, geſſerit*, ſignificant illud tempus quo quis poſt mortem alicujus negotia geſſit, de quo fuit neceſſarium edicere. *d. l. 3. §. 6. l. 12. §. ult. eod.* Si vivo Titio negotia ejus adminiſtrare cœpi, intermittere mortuo eo non debeo——nam quæcumque prioris negotii explicandi cauſa geruntur, nihilum refert quo tempore conſummentur, ſed quo tempore inchoarentur. *l. 21. §. 2. eod.*

VIII.

8. Intereſt of Monies received on account of the abſent Perſon. If in the Adminiſtration of the Affairs, or Eſtate of an abſent Perſon, there remains, after deduction of all neceſſary Charges, any Sum of Money in the hands of him who has the Management, and he convert it to his own uſe, or neglect to lay it out for the behoof of the Owner, as if he fails to diſcharge a Debt of the abſent Perſon, which carries Intereſt: in theſe and the like caſes, whether he was guilty of any unfair dealing, or not, or of any Negligence for which he might be blamed; he may be liable for the Intereſt of the ſaid Sum, according to the Quantity thereof, the Time which he kept it by him, and the other Circumſtances[h].

[h] Qui aliena negotia gerit, uſuras præſtare cogitur, ejus ſcilicet pecuniæ, quæ purgatis neceſſariis ſumptibus ſupereſt. *l. 31. §. 3. ff. de neg. geſt.* Non tantùm ſortem, verùm etiam uſuras ex pecunia aliena perceptas, negotiorum geſtorum judicio præſtabimus: vel etiam quas percipere potuimus. *l. 19. §. 4. eod. v. l. 6. §. ult. eod.*

We have added in this Article for the Intereſt which may be due according to the circumſtances. For our Uſage is not the ſame, with reſpect to Intereſt, as it was at Rome, *where Uſury was permitted, and where the uſe of it was frequent and eaſy among the Bankers, who drove a publick Trade of taking the Money of particular perſons upon Intereſt. And this Commerce was ſo eſtabliſhed, that thoſe who were under an Obligation of improving the Money for which they are accountable, ſuch as Tutors, were diſcharged, provided they gave it to a Banker of undoubted credit, altho' it afterwards happened that he proved inſolvent.* V. l. 10. §. 1. ff. de edend. l. 24. §. 2. ff. de reb. auct. jud. poſſ. l. 7. §. 2. ff. depoſ. l. 50. ff. de adm. & per. tut.

IX.

9. Of him who manages the Affair of one Perſon, believing it to belong to another. If any one, thro' miſtake, has managed an Affair which he believed to be the Concern of one of his Friends, and it proved to be the Affair of another Perſon; there is no manner of Engagement formed between him and his Friend whom he thought the Affair concerned; but only between the Maſter of the Affair and him, in the ſame manner as if he had known the truth[i].

[i] Sed etſi cùm putavi Titii negotia eſſe, cùm eſſent Sempronii, ea geſſi: ſolus Sempronius mihi actione negotiorum geſtorum tenetur. *l. 5. §. 1. ff. de neg. geſt. l. 45. §. 2. eod.*

X.

10. If a Woman manages the Affairs of an abſent Perſon. If a Woman has taken upon her ſelf the Management of the Affairs of another Perſon without their knowledge, ſhe will be accountable for them according to the foregoing Rules; for altho' Women cannot be named Tutoreſſes, or Guardians, except to their own Children, yet they enter into the Engagements which may ariſe from an Adminiſtration into which they intrude themſelves[l].

[l] Hæc verba, *ſi quis*, ſic ſunt accipienda, *ſive quæ*. Nam & mulieres negotiorum geſtorum agere poſſe, & conveniri non dubitatur. *l. 3. §. 1. ff. de neg. geſt.*

XI.

11. Of thoſe who act through neceſſity. Thoſe who thro' ſome neceſſity find themſelves obliged to take upon them the Management of the Affairs of others; as is, for Example, in certain caſes the Heir or Executor of a Tutor, or Guardian[m]; enter into the ſame Engagements as he does who intrudes himſelf into the Buſineſs voluntarily. And they have likewiſe on their part, the ſame Actions againſt the Perſons whoſe Affairs they manage, and that with much greater reaſon than he who engaged himſelf in the Buſineſs without any neceſſity[n].

[m] *See the ſixth Article of the fourth Section of Tutors.*

[n] Hac actione tenetur non ſolùm is qui ſponte, & nulla neceſſitate cogente, immiſcuit ſe negotiis alienis, & ea geſſit: verùm & is, qui aliquâ neceſſi-

tate urgente, vel neceſſitatis ſuſpicione, geſſit. *l.* 3. §. 10. *ff. de neg. geſt.* Quo jure contra eos etiam, quorum te neceſſitate compulſum, negotium geſſiſſe proponis, per judicium negotiorum geſtorum uteris. *l.* 18. *C. de neg. geſt.*

XII.

12. A Caſe where he who acts is not obliged to the moſt exact Care. Altho' thoſe who intrude themſelves into the Affairs of others, be bound regularly to a moſt exact Care of them, according to the Rule explained in the ſecond Article; yet if the Circumſtances be ſuch, that it would be a hardſhip to require ſuch an exact Care of him who had managed the Affair of another, ſome abatement might be made of the Rigour of the Law in this caſe, and he be made reſponſible only for ſuch Faults as might be imputed to a diſhoneſt and unfair dealing. Which Abatement ought to depend on the Quality of the Perſons, on the Tie of Friendſhip, or Relation, between them, the Nature of the Affair, the Neceſſity there was to look after it; as if it was to prevent a Seizure, or Sale, of the Goods of the abſent Perſon; on the Difficulties which it may have been attended with, the Conduct of the Perſon who has taken upon himſelf the Management, and on the other Circumſtances of the like Nature[o].

[o] Interdùm in negotiorum geſtorum actione Labeo ſcribit dolum ſolummodò verſari: nam ſi affectione coactus, ne bona mea diſtrahantur, negotiis te meis obtuleris, æquiſſimum eſſe, dolum dumtaxat te præſtare, quæ ſententia habet æquitatem. *l.* 3. §. 9. *ff. de neg. geſt.*

SECT. II.

Of the Engagements of the Perſon whoſe Buſineſs hath been managed by another, without his knowledge.

The CONTENTS.

1. *The Foundation of the Engagements of him whoſe Affair hath been managed by another.*
2. *Engagement to ratify, and execute what hath been well done.*
3. *Reimburſement of Expences.*
4. *Exceſſive Expences.*
5. *Intereſt of Money advanced.*
6. *Unneceſſary Expences.*
7. *If what hath been uſefully done, periſhes by ſome Accident.*
8. *Approbation of what has been ill done.*
9. *Of good Offices done out of Duty, or out of Liberality.*
10. *Exception to the foregoing Article.*
11. *We ought to judge of ſuch kind of Expences by the circumſtances.*

I.

1. The Foundation of the Engagements of him whoſe Affair hath been managed by another. HE whoſe Buſineſs another hath managed for him without his knowledge, is bound to him in all that the Conſequences of what he has tranſacted may require[a]. And this Obligation is contracted, altho' the Perſon be ignorant of it, by the Duty of Gratitude for this good Office, and comprehends the Engagements which ſhall be explained in the following Rules.

[a] Hoc edictum neceſſarium eſt: quoniam magna utilitas abſentium verſatur, ne indefenſi rerum poſſeſſionem, aut venditionem patiantur, vel pignoris diſtractionem, vel pœnæ committendæ actionem, vel injuria rem ſuam amittant. *l.* 1. *ff. de neg. geſt.* Cùm quis negotia abſentis geſſerit, ultrò citròque naſcuntur obligationes, quæ appellantur negotiorum geſtorum. §. 1. *inſt. de obl. qua quaſi ex cont.* Ex qua cauſa hi quorum negotia contracta fuerint, etiam ignorantes obligantur. *d.* §.

II.

2. Engagement to ratify, and execute what hath been well done. He whoſe Affair hath been well managed, is engaged to him who has taken care of it, to free and indemnify him as to the Conſequences of his Adminiſtration; as, for Inſtance, to pay for him what he has promiſed, to ſave him harmleſs from the Engagements into which he has entered, and to ratify what he has well done[b].

[b] Sanè ſicut æquum eſt ipſum actus ſui rationem reddere, & eo nomine condemnari, quidquid vel non ut oportuit, geſſit, vel ex his negotiis retinet: ita ex diverſo juſtum eſt, ſi utiliter geſſit, præſtari ei quidquid eo nomine vel abeſt ei, vel abfuturum eſt. *l.* 2. *ff. de neg. geſt.* Vel etiam ipſe in rem abſentis alicui obligaverit. *d. l.* 2. Quod utiliter geſtum eſt, neceſſe eſt apud judicem pro rato haberi. *l.* 9. *ff. eod.*

III.

3. Reimburſement of Expences. If he who has managed the Affair of an abſent Perſon, has laid out on it Expences that are neceſſary or uſeful, and ſuch as the abſent Perſon himſelf would and ought to have done, he ſhall recover them[c].

[c] Si quis abſentis negotia geſſerit, licet ignorantis: tamen quidquid utiliter in rem ejus impenderit—— habeat eo nomine actionem. *l.* 2. *ff. de neg. geſt.* Quæ utiliter in negotia alicujus erogantur——actione negotiorum geſtorum, peti poſſunt. *l.* 45. *eod.*

IV.

4. Exceſſive Expences. If in a neceſſary Expence more hath been laid out than was neceſſary; it will be reduced to what ought to have been laid out on the Buſineſs[d].

[d] Si quis negotia aliena gerens, pluſquàm oportet impenderit recuperaturum eum id quod præſtari debuerit, *l.* 25. *ff. de neg. geſt.*

V.

5. Intereſt of Money advanced. If he who has laid out theſe Expences has been obliged either to borrow the Money upon Intereſt, or to advance it himſelf to his own loſs; the Maſter of the Affair will be bound to pay the Intereſt of the Sums advanced, even altho' he who has advanced the Money ſhall have been obliged thro' ſome neceſſity to take upon him the Care of the ſaid Affair[e].

[e] Ob negotium alienum geſtum, ſumptuum factorum uſuras præſtari bona fides ſuaſit. Quo jure contra eos etiam, quorum te neceſſitate compulſum negotia geſſiſſe proponis, per judicium negotiorum geſtorum uteris. *l.* 18. *C. de negot. geſt. l.* 19. §. 4. *in f. ff. eod. l.* 37. *ff. de uſur.* See the fifth Article of the fifth Section of Tutors; and the eleventh Article of the firſt Section of this Title.

VI.

6. Unneceſſary Expences. The Expences which ſhall have been laid out imprudently, for one who was not willing, or even not in a condition to make them, will fall upon him who has expended the Money of his own free motion. As if, for Example, he has made in a Houſe ſome uſeleſs Repairs, or ſome Change which the Maſter was neither able, nor willing to make: for he ought not to have engaged the Maſter indiſcreetly in an Expence which would be burdenſome to him[f].

[f] Sed ut Celſus refert, Proculus apud eum notat, non ſemper debere dari. Quid enim ſi eam inſulam fulſit, quàm Dominus, quaſi impar ſumptui, dereliquerit: vel quam ſibi neceſſariam non putavit? Oneravit, inquit, Dominum, ſecundum Labeonis ſententiam: cùm unicuique liceat & damni infecti nomine rem derelinquere. Sed iſtam ſententiam Celſus eleganter deridet. Is enim negotiorum geſtorum inquit, habet actionem, qui utiliter negotia geſſit. Non autem utiliter negotia gerit, qui rem non neceſſariam, vel quæ oneratura eſt patremfamilias, adgreditur. Juxta hoc eſt, & quod Julianus ſcribit: eum qui inſulam fulſit, vel ſervum ægrotum curavit, habere negotiorum geſtorum actionem, ſi utiliter hoc faceret, licet eventus non ſit ſecutus. Ego quæro, quid ſi putavit ſe utiliter facere, ſed patrifamilias non expediebat? Dico tunc non habiturum negotiorum geſtorum actionem. Ut enim eventum non expectamus, debet utiliter eſſe cœptum, *l.* 10. §. 2. *ff. de neg. geſt.*

VII.

7. If what hath been uſefully done, periſhes by ſome Accident. If the Expence has been neceſſary, and ſuch as the Maſter himſelf would have been obliged to make, and if, by ſome Accident, what has been uſefully done periſhes, or is loſt; the Maſter ſhall nevertheleſs be bound to refund the Money to the Perſon who has laid it out, and who cannot be blamed for the Loſs of the Thing. Thus, for Example, if a Friend of an abſent Perſon, whoſe Houſe was in danger of falling, takes care to have it propped up, if he buys Proviſions neceſſary for the Suſtenance of his Family, and the Houſe, or Proviſions periſh by Fire, or by ſome other Accident, without any fault of the perſon who has done the ſaid Services, he will nevertheleſs recover the Money which he has laid out on them[g].

[g] Sive hæreditaria negotia, ſive ea quæ alicujus eſſent, gerens aliquis, neceſſariò rem emerit, licet ea interierit, poterit quod impenderit, judicio negotiorum geſtorum conſequi. Veluti ſi frumentum, aut vinum familiæ paraverit, idque caſu quodam interierit, forte incendio, ruina. Sed ita ſcilicet hoc dici poteſt, ſi ipſa ruina, vel incendium ſine vitio ejus acciderit. *l.* 22. *ff. de neg. geſt.* Habere negotiorum geſtorum actionem, ſi utiliter hoc faceret, licet eventus non ſit ſecutus. *l.* 10. §. *ult. ff. eod.* See the ſixth Article of the firſt Section. Is autem qui negotiorum geſtorum agit non ſolùm ſi effectum habuit negotium quod geſſit, actione iſta utetur: ſed ſufficit ſi utiliter geſſit, ſi effectum non habuit negotium, & ideo ſi inſulam fulſit, vel ſervum ægrum curavit, etiamſi inſula exuſta eſt, vel ſervus obiit, aget negotiorum geſtorum. *d. l.* 10. §. 1. *ff. eod.* See the thirty fifth Article of the third Section of Tutors.

VIII.

8. Approbation of what has been ill done. If he whoſe Affair hath been managed by another, has approved of what has been done, after having had information of the matter; he cannot afterwards complain of it, even altho' he ſhould have reaſon not to approve it; unleſs that ſome Fraud be afterwards diſcovered, which did not at firſt appear[h].

[h] Pomponius ſcribit, ſi negotium à te, quamvis malè geſtum, probavero, negotiorum tamen geſtorum te mihi non teneri —— quod reprobare non poſſim ſemel probatum. Et quemadmodum: quod utiliter geſtum eſt, neceſſe eſt apud judicem prò rato haberi, ita omne quod ab ipſo probatum eſt. *l.* 9. *ff. de neg. geſt.* Ita verum ſe putare, ſi dolus malus à te abſit. *d. l.*

IX.

9. Of good Offices done out of Duty, or out of Liberality. The Expences which one Perſon is at for another, out of a Motive of Liberality, or out of the Duty of Charity, cannot be recovered, and are not placed in the Rank of Expences laid out by thoſe who manage the Affairs of others, in hopes of being repaid what they ſhall have advanced of their own. Thus, for Example, if an Uncle gives Alimony to his Niece, and he afterwards repenting of his Liberality, or of this Duty to which his Proximity of Blood engages him, demands to be reimburſed of what he has laid out on this account, his Demand will not be received. And it would be the ſame thing, and with much more reaſon, in the caſe of a Mother, who had maintained her own Children. But if, beſides their Maintenance,

tenance, the Mother had likewiſe diſburſed ſome Money on their Affairs, and it appeared that ſhe did it with a view of recovering it, ſhe may oblige her Children to repay her[i].

X.

10. *Exception to the foregoing Article.*

If any one has laid out for another thoſe kinds of Expences which the Duties of Relation, or Charity, require, and ſuch as he may either do out of Liberality, or with a deſign to recover what he ſhall have laid out; the Intention of the Perſon who has laid out the Money will ſerve as a Rule, either to oblige him for whoſe behoof the Money has been laid out, to repay it, or to diſcharge him of the ſaid Obligation. And we are to judge of this Intention, by the circumſtances of the Quality of the Perſons, of their Eſtates, of the Precautions taken by him who lays out ſuch kinds of Expences, and others of the like Nature[l].

XI.

11. *We ought to judge of ſuch kind of Expences by the circumſtances.*

The greateſt Proximity of Relation is not ſufficient to found a Preſumption, that the Expence which one has laid out for another, was intended as a meer Bounty. And altho' there has not been any Proteſtation, or Declaration of a deſign to recover Payment of what is advanced, yet if it ſhall appear by the Circumſtances, that there was no Intention of giving it, the Perſon who has laid out ſuch Expences may demand to be reimburſed. Thus, for Example, if a Mother who took care of the Eſtate and Affairs of her Children, or a Grand-Mother of thoſe of her Grand-Children, had educated and maintained them; it would be preſumed in this caſe, that the Intention of the ſaid Mother, or Grand-Mother, was only to maintain her Children, or Grand-Children, out of their own Eſtate, of which ſhe had the Adminiſtration: and the ſaid Expence would be allowed her, altho' ſhe had made no Proteſtation of her Intention to recover it; and this would ſtill admit of leſs difficulty, if ſhe had kept an Account of it with deſign to recover Payment[m].

TITLE V.

Of thoſe who chance to have any Thing in common together, without a Covenant.

Things belonging in Common to ſeveral Perſons, without a Covenant.

WHEN one and the ſame Thing happens to belong in Common to two or more Perſons, without their entring into any Covenant about it, ſuch as an Inheritance among Coheirs, a Legacy of the ſame Thing to ſeveral Legatees; there is formed among them divers Engagements, according as their common Intereſts may require. Thus, he who has the Thing belonging to them in common in his Cuſtody, ought to take care of it: Thus, they ought to reimburſe one another of what has been laid out on its Preſervation: Thus, they ought to make an equal Partition of it. And it is theſe Engagements, together with others of the like Nature, which ſhall be the Subject Matter of this Title.

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[i] Titium, ſi pietatis reſpectu ſororis aluerit filiam, actionem hoc nomine contra eam non habere reſpondi. *l. 27. in f. ff. de neg. geſt.* Munere pietatis fungebaris, quæ cauſa non admittit negotiorum geſtorum actionem. *l. 1. C. de neg. geſt.* Alimenta quidem, quæ filiis tuis præſtitiſti, tibi reddi non juſta ratione poſtulas: cùm id exigente materna pietate feceris. Si quid autem in rebus eorum utiliter & probabili more impendiſti, ſi non & hoc materna liberalite, ſed recipiendi animo feciſſe te oſtenderis, id negotiorum geſtorum actione conſequi potes. *l. 11. C. eod.* See the two following Articles.

[l] Si paterno affectu privignas tuas aluiſti, ſeu mercedes pro his aliquas magiſtris, expendiſti, ejus erogationis tibi nulla repetitio eſt. Quod ſi, ut repetiturus ea quæ in ſumptum miſiſti, aliquid erogaſti, negotiorum geſtorum tibi intentanda eſt actio. *l. 15. C. de neg. geſt.* See the following Article.

[m] Neſcunius Apollinaris Julio Paulo ſalutem. Avia nepotis ſui negotia geſſit. Defunctis utriuſque, aviæ hæredes conveniebantur à nepotis hæredibus negotiorum geſtorum actione. Reputabant hæredes aviæ alimenta præſtita nepoti. Reſpondebatur, aviam jure pietatis de ſuo præſtitiſſe: nec enim aut deſideraſſe ut decernerentur alimenta, aut decreta eſſent. Præterea conſtitutum eſſe dicebatur, ut ſi mater aluiſſet, non poſſet alimenta quæ pietate cogente de ſuo præſtitiſſet, repetere. Ex contrario dicebatur, tunc hoc rectè dici ut de ſuo mater aluiſſe probaretur: at in propoſito, aviam, quæ negotia adminiſtrabat, veriſimile eſſe de re ipſius nepotis eum aluiſſe. Tractatum eſt numquid utróque patrimonio erogata videantur? Quæro, quid tibi juſtius videatur? Reſpondi; hæc Diſceptatio in factum conſiſtit. Nam & illud quod in matre conſtitutum eſt, non puto ita perpetuò obſervandum. Quid enim, ſi etiam proteſtata eſt ſe filium ideò alere, ut aut ipſum, aut tutores ejus conveniret? Pone, peregrè patrem ejus obiſſe, & matrem, dum in patriam revertitur, tam filium, quam familiam ejus exhibuiſſe. In qua ſpecie etiam in ipſum pupillum negotiorum geſtorum dandam actionem Divus Pius Antonius conſtituit. Igitur in re facti faciliùs putabo aviam, vel hæredes ejus audiendos, ſi reputare velint alimenta: maximè ſi etiam in rationem impenſarum ea retuliſſe aviam apparebit. Illud nequaquam admittendum puto, ut de utróque patrimonio erogata videantur. *l. 34. ff. de neg. geſt.*

A Thing may belong in Common to ſeveral Perſons two manner of ways. One is, when each of the Partners has his Right entire and undivided in the Whole Thing: Thus, all the Goods of an Inheritance are in ſuch a manner common to the Co-Heirs, that every Individual Thing in the Inheritance belongs to them all, till the Partition is made. The other way is, when every one of the Perſons to whom the Thing belongs in Common has his Share, or Portion of it regulated, altho' the Partition has not been made. Thus, a Teſtator may deviſe to two Perſons a Piece of Land, of which he appoints to one Legatee one Half to be taken on one ſide, and to the other Legatee his Half to be taken on the other ſide; which will render common to them both at leaſt that Part of the Land where the Bounds muſt be ſettled for ſeparating the one's Share from the other. And there will be formed Engagements between theſe Perſons; ſuch as that of obliging them to come to a Partition, and to make Reſtitution of what the one may chance to owe to the other, on account of Fruits which have been reaped out of the Common Eſtate.

We ſhall not make mention here of the Community of Goods, which is eſtabliſhed by ſeveral Cuſtoms between Huſband and Wife. For altho' that this Community be contracted without any expreſs Covenant, by the bare effect of the Marriage; yet it is a Matter which belongs properly to the ſaid Cuſtoms, which have differently eſtabliſhed the Rules of it in different Places: to which we may likewiſe apply the Rules of this Title, as alſo thoſe of the Title of Partnerſhip, according as they are applicable to it.

By what is ſaid here, that the Community of Goods between Huſband and Wife is a Matter which properly belongs to the Cuſtoms, is meant only that it is expreſſly eſtabliſhed by ſeveral Cuſtoms; which doth not hinder but that in the other Cuſtoms which make no mention of it, and in the Provinces which are governed by the *Roman* Law, the Parties may agree, by Contract of Marriage, on a Community of Goods between Huſband and Wife, as they might have done by the *Roman* Law, as appears from the *Sixteenth Law*, §. 3. *ff. de alim. & cib. leg.* But that was a Community, or Partnerſhip, ſettled by Agreement; and ſeeing all theſe Communities, whether ſettled by Cuſtom, or Agreement, have their Rules either in the Cuſtoms, or in the Contract of Partnerſhip, and in general in the Covenants of the Agreement; there remains nothing of this matter which is neceſſary to be added to what has been explained in the Title of Covenants, in that of Partnerſhip, and in the preſent Title.

[*The Law of* England *diſtinguiſhes thoſe Perſons who have Things in Common, into three diſtinct Claſſes; to wit,* Parceners, Jointenants, and Tenants in Common. *Parceners are of two ſorts; either according to the courſe of the Common Law, or according to Cuſtom. Parceners according to the Common Law are, where one ſeiſed of certain Lands or Tenements in Fee Simple, or in Taile, hath no Iſſue but Daughters, and dies, and the Daughters enter into the Lands or Tenements ſo deſcended to them, then they are called Parceners, and be but one Heir to their Anceſtor*[a]. *Or if the Perſon ſeiſed of the Lands dieth without Iſſue of his Body begotten, and the Lands deſcend to his Siſters, they are likewiſe Parceners, as is aforeſaid*[b]. *Parceners by the Cuſtom are, where a Man is ſeiſed of Lands in Gavelkind, as in* Kent, *and other Places franchiſed, and hath Iſſue divers Sons, and dies; then the Sons are Parceners by Cuſtom*[c].]

[*Jointenants are, where Lands and Tenements are conveyed to two Perſons by one joint Title; as if a Man give Lands to two Men, and to their Heirs*[d]. *Tenants in Common are, where two Perſons have Lands or Tenements by ſeveral Titles, and not by a Joint Title; and none of them knows his ſeveral*[e]. *There is this difference between Jointenants and Tenants in Common; that Jointenants have one joint Freehold, and Tenants in Common have ſeveral Freeholds. And if there be two or three Jointenants, and one hath Iſſue, and dies, then he, or thoſe Jointenants that over-live, ſhall have the Whole by Survivorſhip. Which Right of Survivorſhip doth not take place among Tenants in Common*[f].]

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[a] *Coke* 1 Inſt. fol. 163.

[b] *Coke* ibid. fol. 165.

[c] *Littleton* §. 265. Termes de la Ley, verb. Parceners.

[d] *Coke* 1 Inſt. fol. 180.

[e] *Coke* ibid. fol. 188.

[f] *Littleton* §. 280. Termes de la Ley, verb. Jointenants.

SECT. I.

How one and the ſame Thing may belong in Common to ſeveral Perſons, without a Covenant.

The CONTENTS.

1. *Donees, or Legatees of one and the ſame Thing.*
2. *Co-Heirs, and Co-Executors.*
3. *The Heir, or Executor of a Partner.*
4. *Purchaſers of Shares undivided.*
5. *Engagements ariſing from the Community of a Thing.*

I.

1. Donees, or Legatees of one and the ſame Thing.

A Thing may be common to two or more Perſons, altho' they have not entered into any Partnerſhip, nor made any Contract, nor done any thing on their part to make it common. Thus, two Donees, or Legatees of one and the ſame Thing, have it in common among them, without Partnerſhip, or Covenant[a].

[a] Communiter res agi poteſt citra ſocietatem: ut putà cùm non affectione ſocietatis incidimus in communionem, ut evenit in re duobus legata. *l.* 31. *ff. pro ſocio.* Si donatio communiter nobis obvenit. *d. l.* Sine ſocietate communis res eſt, veluti inter eos quibus eadem res teſtamento legata eſt. *l* 2. *ff. comm. divid.* Cùm ſine tractatu, in re ipſa & negotio communiter geſtum videtur. *l.* 32. *ff. pro ſocio. v.* §. 3. *inſt. de obl. quæ quaſi ex contr.* Hos conjunxit ad ſocietatem, non conſenſus, ſed res. *l.* 25. §. 16. *in f. ff. fam. erciſc.* See the ſecond Article of the ſecond Section of Partnerſhip.

II.

2. Co-Heirs, and Co-Executors.

The Co-Heirs of one and the ſame Inheritance, and Co-Executors of a Will, are united by the Rights and Charges of the Inheritance which they have in common. And the ſaid Union is formed without a Covenant[b].

[b] Si hæreditas communiter nobis obvenit. *l.* 31. *ff. pro ſocio.* Cum cohærede non contrahimus, ſed incidimus in eum. *l.* 25. §. 16. *ff. fam. erciſc.*

III.

3. The Heir, or Executor of a Partner.

The Heir or Executor of a Partner is united, without any Covenant, with the Partners of the deceaſed to whom he ſucceeds: and altho' he be not a Partner himſelf, yet this Union is an effect of the Right which he acquires in the thing that is common[c].

[c] Licet (hæres) ſocius non ſit, attamen emolumenti ſucceſſor eſt. *l.* 63. §. 8. *ff. pro ſocio.* See the third Article of the ſecond Section, and the whole ſixth Section of Partnerſhip.

IV.

4. Purchaſers of Shares undivided.

He who purchaſes a Share of a Right, or other Thing, belonging in common to ſeveral Perſons, enters into their common Ties, and Engagements, without Partnerſhip, or Covenant. And it is the ſame Thing, if ſeveral Purchaſers purchaſe every one of them ſingly and ſeparately different Shares undivided, of one and the ſame Thing[d].

[d] Aut ſi à duobus ſeparatim emimus partes eorum non ſocii futuri. *l.* 31. *ff. pro ſocio.*

V.

5. Engagements ariſing from the Community of a Thing.

In the Caſes of the foregoing Articles, and in all other Events of the like Nature, which render one and the ſame Thing common to two or more Perſons without a Covenant, there is formed among them divers Engagements by the bare Effect of their Intereſt in the Thing that is common to them. And theſe Engagements ſhall be explained in the following Section[e].

[e] Alter eorum alteri tenetur communi dividundo judicio. §. 3. *inſt. de obl. quæ quaſi ex contr.* In re ipſa & negotio. *l.* 32. *ff. pro ſocio.* Hos conjunxit ad ſocietatem non conſenſus, ſed res. *l.* 25. §. 16. *in f. ff. fam. erciſc.*

SECT. II.

Of the mutual Engagements of thoſe who have ſome Thing in Common together, without a Covenant.

The CONTENTS.

1. *General Engagements of thoſe who have a Thing in Common.*
2. *Care of the Common Thing.*
3. *Communication of the Profits.*
4. *Reimburſement of Money advanced, with the Intereſt.*
5. *Damage done to the Common Thing.*
6. *One Proprietor cannot, without the conſent of the others, make any Innovation in the Common Thing.*
7. *The Penalty of making a change, againſt the will of the other Proprietors.*
8. *If the Change has been ſuffered by the other Proprietors.*
9. *Change made without the knowledge of one of the Parties concerned.*
10. *He who has once conſented to the Change, cannot afterwards complain of it.*
11. *Engagement to divide the Common Thing.*

12. *If the Common Thing cannot be divided.*
13. *A Charge laid upon one of the Lands that are divided.*
14. *Wrong done in the Partition.*
15. *Warranty between the Co-Partners.*
16. *The Deeds belonging to the Common Things, in whoſe hands to be depoſited.*
17. *Of Things which it is not lawful to put into the partition.*
18. *Things ill gotten.*

I.

1. General Engagements of thoſe who have a Thing in Common.

THE Engagements of thoſe who have ſome Thing in common among them without a Covenant, are in general: To divide it when any one of the Parties concerned deſires it: To do one another Juſtice as to the Gains and Loſſes: To account for the Profits which they have made, and for the Expences laid out on the Common Thing: To anſwer every one for his own proper deed, and for the Damage which he ſhall have occaſioned to the Common Thing; according as theſe Engagements, and their Conſequences, ſhall be explained in the Rules which follow[a].

[a] In communi dividundo judicio nihil provenit, ultra diviſionem rerum ipſarum quæ communes ſunt: & ſi quid in his damni datum factúmve eſt: ſive quid eo nomine aut abeſt alicui ſociorum aut ad eum pervenit ex re communi. *l.* 3. *ff. comm. divid.* Idem eorum etiam, quæ vobis permanent communia, fieri diviſionem providebit: tam ſumptuum, ſi quis de vobis in res communes fecit, quàm fructuum: item doli & culpæ (cùm in communi dividundo judicio hæc omnia venire non ambigatur) rationem, ut in omnibus æquabilitas ſervetur, habiturus. *l.* 4. *in f. C. eod.* Inter eos communicentur commoda & incommoda. *l.* 19. *in f. ff. fam. erciſc.*

II.

2. Care of the Common Thing.

While the Thing belonging in common to Co-Heirs, or others, remains undivided, the Proprietor who has it in his Cuſtody, is obliged to take the ſame care of it as if it were wholly his own: and he will be anſwerable not only for all Fraud and Deceit which he ſhall be guilty of, but likewiſe for Faults contrary to the Care that is required of him. But he is not bound to the ſame diligence as he is who takes upon himſelf voluntarily the Charge of the Affair of another Perſon; becauſe, in the preſent caſe, it is his own Intereſt which has engaged him in an Affair in which he was concerned, and it is only by chance that he happens to be engaged in a Thing in which another Perſon has an Intereſt. So that he is bound only to take the ſame care of the common Thing, as of his own proper Concerns[b].

[b] Non tantùm dolum, ſed & culpam in re hæreditaria præſtare debet cohæres. Quoniam cùm cohærede non contrahimus, ſed incidimus in eum. Non tamen diligentiam præſtare debet qualem diligens paterfamilias, quoniam hic propter ſuam partem, cauſam habuit gerendi: & ideò negotiorum geſtorum, actio non competit. Talem igitur diligentiam præſtare debet, qualem in ſuis rebus. Eadem ſunt ſi duobus res legata ſit. Nam & hos conjunxit ad ſocietatem non conſenſus, ſed res. *l.* 25. §. 16. *ff. fam. erciſc.* Cætera eadem ſunt, quæ in familiæ erciſcundæ judicio tractavimus. *l.* 6. §. 11. *ff. comm. divid.*

III.

3. Communication of the Profits.

He who has had the enjoyment of the Common Thing, ought to communicate all the Fruits, and all the Profits which he has made by it. For without this Communication, the Equality which ought to be obſerved among all the Co-Partners would be violated[c].

[c] Si ſocius ſolus aliquid ex ea re lucratus eſt, velut operas ſervi, mercedéſve, hoc judicio eorum omnium ratio habetur. *l.* 11. *in f. ff. comm. divid. l.* 4. §. 3. *eod.* Sive locando fundum communem, ſive colendo, de fundo communi quid ſocius conſecutus ſit, communi dividundo judicio tenebitur. *l.* 6. §. 2. *eod.* Tam ſumptuum quàm fructuum (fieri diviſionem) *l.* 4. *C. eod.* Ut in omnibus æquabilitas ſervetur. *d. l. in f.*

IV.

4. Reimburſement of Money advanced, with the Intereſt.

If one of the Proprietors of a Thing, or Affair, that is in common among them, has been at any neceſſary Expence about it; ſuch as Reparations, the Charges of a Law-Suit, and the like, he will recover the ſame with Intereſt from the time that he advanced the Money[d]. For theſe Expences have preſerved the Thing, or have rendred it more valuable, and may have been chargeable to the Perſon who has advanced the Money.

[d] Sicut autem ipſius rei diviſio venit in communi dividundo judicio, ita etiam præſtationes veniunt. Et ideò, ſi quis impenſas fecerit, conſequatur. *l.* 4. §. 3. *ff. comm. divid. l.* 11. *eod.* Qui ſumptus neceſſarios probabiles in communi lite fecit, negotiorum geſtorum actionem habet. l. 31. §. *ult. ff. de neg. geſt.* Si quid unus ex ſociis neceſſariò de ſuo impendit in communi negotio, judicio ſocietatis ſervabit & uſuras. *l.* 67. §. 2. *ff. pro ſocio. l.* 52. §. 10. *eod.* Sumptuum quos unus ex hæredibus bona fide fecerit, uſuras quoque conſequi poteſt à cohærede, ex die moræ, ſecundùm reſcriptum Imperatorum Severi & Antonini. *l.* 18. §. 3. *ff. fam. erciſc.*

V.

5. Damage done to the common Thing.

Thoſe who have an Affair, or other Thing, in common together, are mutually accountable to one another for their Management, and their Conduct in relation to it; and every one of them muſt anſwer for the Damage, or Loſs, which they may have occaſioned to the Common Thing[e].

[e] In hoc judicium venit quod communi nomine actum eſt, aut agi debuit ab eo qui ſcit ſe ſocium habere. *l.* 14. *ff. comm. divid.* Venit in communi dividundo judicium, etiam ſi quis rem communem deteriorem fecerit, fortè arbores ex fundo excidendo. *l.* 8. §. 2. *ff. eod. l.* 19. *C. fam. erciſc.*

VI.

6. One Proprietor cannot, without the conſent of the others, make any Innovation in the Common Thing.

None of the Proprietors of a Common Thing can make any Change in it, without the approbation of all Parties concerned: and any one of them alone may, in oppoſition to all the reſt, hinder the Innovation[f]. For every one of them is at liberty to preſerve his Right ſuch as it is. But this is to be underſtood of Changes which are not neceſſary for the Preſervation of the Thing. For it would not be reaſonable to let the Thing periſh thro' the Caprice of one of the Proprietors.

[f] Sabinus, in re communi neminem dominorum jure facere quicquam, invito altero poſſe. Unde manifeſtum eſt prohibendi jus eſſe. In re enim pari, potiorem cauſam eſſe prohibentis conſtat. *l.* 28. *ff. comm. divid.* Quod omnes ſimiliter tangit, ab omnibus comprobetur. *l.* 5. *in f. C. de auth. præſt. Altho' this Text has relation to another Subject, yet it may be applied here.*

VII.

7. The Penalty of making a change, againſt the will of the other Proprietors.

If one of the Proprietors makes a change in the Common Thing without neceſſity, the other oppoſing it; he ſhall be obliged to reſtore things to the condition in which they were at firſt, if it can be done; and to make good all the Damages which he ſhall have occaſioned[g].

[g] Manifeſtum eſt prohibendi jus eſſe. *l.* 28. *ff. comm. divid.* See the Text cited on the following Article.

VIII.

8. If the Change has been ſuffered by the other Proprietors.

If the Change has been known, and ſuffered, altho' without an expreſs conſent; he who has ſuffered it, cannot oblige the other Proprietor to reſtore the things to their firſt condition[h].

[h] Sed etſi in communi prohiberi ſocius à ſocio, ne quid faciat, poteſt: ut tamen factum opus tollat, cogi non poteſt: ſi, cum prohibere poterat, hoc prætermiſit. *l.* 28. *ff. comm. divid.*

IX.

9. Change made without the knowledge of one of the Parties concerned.

If one of the Proprietors makes ſome change in the abſence, or without the knowledge of the others, which occaſions them ſome Loſs, or which they have juſt cauſe not to approve of; he ſhall be obliged to reſtore things as they were[i], in ſo far as is poſſible, and as Equity ſhall require. And if he has cauſed any Damage, he ſhall be bound to make it good.

[i] Quòd ſi quid, abſente ſocio, ad læſionem ejus fecit, tunc etiam tollere cogitur. *l.* 28. *ff. comm. divid.*

X.

10. He who has once conſented to the Change, cannot afterwards complain of it.

He who having ſeen the change has conſented to it, cannot afterwards complain of it, even altho' he ſhould ſuffer from it ſome Loſs, or Damage[l].

[l] Si facienti conſenſit, nec pro damno habet actionem. *l.* 28. *ff. comm. divid.*

XI.

11. Engagement to divide the Common Thing.

It is always free for every one of thoſe who have any Thing in Common among them, to divide it: and altho' they may agree to put off the Partition to a certain time, yet they can make no ſuch Agreement as never to come to a Partition[m]. For it would be contrary to Good Manners, that the Proprietors ſhould be forced to have always an occaſion of falling out, by reaſon of the undivided Poſſeſſion of a Common Thing.

[m] In communione, vel ſocietate nemo compellitur invitus detineri. Quapropter aditus præſes provinciæ, ea quæ communia tibi cum ſorore perſpexerit, dividi providebit. *l. ult. C. comm. divid. l.* 29. *in f. ff. eod. l.* 43. *ff. fam. erciſc.* Si conveniat, ne omninò diviſio fiat, hujuſmodi pactum nullas vires habere manifeſtiſſimum eſt. Sin autem intra certum tempus, quod etiam ipſius rei qualitati prodeſt, valet. *l.* 14. §. 2. *ff. eod.*

XII.

12. If the Common Thing cannot be divided.

If the Things which are to be ſhared cannot be divided into equal Portions, the Co-Partners may make their Portions equal by Returns of Money, or otherwiſe. And if the Common Thing be indiviſible, ſuch as an Office, or a Houſe which cannot be divided without great Loſs, or too great an Inconvenience, it may be left to one of the Proprietors alone for a Price, which ſhall be divided among them all: in which caſe the Thing is to be ſold by Cant, or Auction. And even Strangers may be admitted to bid for it, if any one of the Proprietors, who either is not willing, or perhaps not able, to bid for it himſelf, deſires that it may be ſo[n].

[n] Cum regionibus dividi commodè aliquis ager inter ſocios non poteſt, vel ex pluribus ſinguli, æſtimatione juſtâ factâ, unicuique ſociorum adjudicantur, compenſatione invicem factâ, eoque cui res majoris pretii obvenit cæteris condemnato ad licitationem nonnunquam etiam extraneo emptore admiſſo: maximè ſi ſe non ſufficere ad juſta pretia alter ex ſociis ſua pecunia vincere vilius licitantem

profiteatur. *l. 3. C. comm. divid. l. 1. C. eod.* Si familiæ erciſcundæ, vel communi dividundo judicium agatur, & diviſio tam difficilis ſit, ut pene impoſſibilis eſſe videatur, poteſt judex in unius perſonam totam condemnationem conferre, & adjudicare omnes res. *l. 55. ff. fam. erciſc.*

XIII.

13. *A Charge laid upon one of the Lands that are divided.* If in a Partition of ſeveral Lands, or of one Piece of Land into two or more Portions, it be neceſſary to ſubject one of the ſaid Portions, or one of the Lands, to ſome Service, for the uſe of the others; ſuch as a Paſſage, a Draught of Water, or other the like Service; the Arbitrators, or ſkilful Perſons, who ſhall be named to adjuſt the ſeveral Shares or Portions, may impoſe the Service on the Land which ought to be charged with it [o]. In which caſe, the condition of the Co-Partners is to be made equal ſome other way, either by a Return of Money, or by giving a greater Share of the Land to the Perſon who is burdened with the Service, or by other Ways.

[o] Sed etiam cum adjudicat, poterit imponere aliquam ſervitutem, ut alium alii ſervum faciat, ex iis quos adjudicat. *l. 22. §. 3. ff. fam. erciſc.*

XIV.

14. *Wrong done in the Partition.* If there happens to be any conſiderable Wrong done in the Partition to any of the Parties concerned, even altho' they be of Age, whether it be by the means of ſome Fraud in one of the Co-Partners, or even altho' nothing can be laid to the charge of either, the ſaid Wrong ſhall be remedied by a new Partition [p].

[p] Majoribus etiam, per fraudem, vel dolum, vel perperam ſine judicio factis diviſionibus ſolet ſubveniri. Quia in bonæ fidei judiciis, quod inæqualiter factum eſſe conſtiterit, in melius reformabitur. *l. 3. C. comm. utr. jud.*

By the Uſage in France, *the Wrong done in a Partition ought to be between a Third and a Fourth Part, in order to entitle the Party aggrieved to a new Partition.*

XV.

15. *Warranty between the Co-Partners.* After the Partition of the Things which were in common, each of the Co-Partners is in the place of a Seller to the other: and they ought reciprocally to warrant to one another their Portions againſt Evictions. Thus, for Example, if the Creditor to an Inheritance, of which the Effects have been divided among the Co-Heirs, executes his Mortgage againſt one of them, after the Partition of the Eſtate; the other Co-Heirs ought to warrant him againſt the ſaid Mortgage for their reſpective Portions, even altho' no mention had been made of Warranty in the Partition [q].

[q] Diviſionem prædiorum vicem emptionis obtinere, placuit. *l. 1. C. comm. utr. jud.* Si familiæ erciſcundæ judicio, quo bona paterna inter te ac fratrem tuum æquo jure diviſa ſunt, nihil, ſuper evictione rerum ſingulis adjudicatarum ſpecialiter inter vos convenit: id eſt, ut unuſquiſque eventum rei ſuſcipiat, rectè poſſeſſionis evictæ detrimenta, fratrem & cohæredem tuum pro parte agnoſcere præſes provinciæ, per actionem præſcriptis verbis, compellet. *l. 14. C. fam. erciſc.* (Judex familiæ erciſcundæ) curare debet, ut de evictione caveatur, his quibus adjudicat. *l. 25. §. 21. ff. fam. erciſc.*

XVI.

16. *The Deeds belonging to the Common Things, in whoſe hands to be depoſited.* The Deeds and Writings appertaining to the Common Things, which are common to all the Co-Partners, may be left in the Cuſtody of one of them, who takes charge of them, and gives his Co-Partners collated Copies of them, promiſing to produce the Originals whenever it ſhall be neceſſary. Thus, among Co-Heirs, the Writings remain in the hands of the principal Heir. But if there be no reaſon for preferring one of them to the reſt, or that they cannot agree among themſelves, they may caſt Lots who ſhall have the keeping of them, or the Judge may determine the matter, or the Writings may be depoſited in the hands of a Publick Notary, who may give every one of the Parties concerned an Authentick Copy. But it is not uſual to put it to Cant, or Auction, who ſhall have the keeping of the Deeds [r].

[r] Si quæ ſunt cautiones hæreditariæ, eas judex curare debet, ut apud eum maneant, qui majore ea parte hæres ſit. Cæteri deſcriptum, & recognitum faciant: cautione interpoſitâ, ut cum res exegerit, ipſæ exhibeantur. Si omnes iiſdem ex partibus hæredes ſint, nec inter eos conveniat, apud quem potiùs eſſe debeant, ſortiri eos oportet: aut ex conſenſu, vel ſuffragio eligendus eſt amicus, apud quem deponantur: vel in æde ſacra deponi debent. *l. 5. ff. fam. erciſc. l. 4. §. ult. eod.* De inſtrumentis quæ communia fratrem veſtrum tenere proponitis, rector provinciæ aditus, apud quem hæc collocari debeant exiſtimabit. *l. 5. C. comm. utr. Jud.*

Nam ad licitationem rem deducere, ut qui licitatione vicerit hæc habeat inſtrumenta hæreditaria, non placet neque mihi, neque Pomponio. *l. 6. ff. fam. erciſc. V. l. ult. ff. de fide inſtr.*

XVII.

17. *Of Things which it is not lawful to put into the Partition.* If among the Common Goods which are to be divided between two or more Perſons, there happens to be Things of ſuch a Nature as that they cannot ſerve but to ill purpoſes, ſuch as Poiſons, of which no good uſe can be made, Books of Magick, and other things of the like Nature; they ſhall not enter into the Partition, but the Co-Partners, or the Judge, if the matter comes to his knowledge, ought to diſpoſe of them in ſuch a manner as that no bad uſe may be made of them [ſ].

[f] Mala medicamenta, & venena veniunt quidem in judicium: ſed judex omninò interponere ſe in his non debet. Boni enim & innocentis viri officio eum fungi oportet. Tantumdem debebit facere & in libris improbatæ lectionis: magicis fortè, vel his ſimilibus. Hæc enim omnia protinus corrumpenda ſunt. *l.* 4. §. 1. *ff. fam. erciſc.*

XVIII.

18. Things ill gotten. Things which have been acquired by evil ways, ſuch as Theft, Robbery, Sacrilege, do not likewiſe enter into the Partition, but ſhall be reſtored to thoſe to whom they belong[t].

[t] Sed & ſi quid ex peculatu, vel ex ſacrilegio acquiſitum erit, vel vi, aut latrocinio, aut aggreſſura, hoc non dividetur. *l.* 2. §. 4. *ff. fam. erciſc.*

TITLE VI.

Of thoſe who have Lands, or Tenements, bordering upon one another.

THERE is another kind of Engagement without Covenant, which is formed between the Proprietors of Lands and Tenements, confining upon one another, by the bare effect of the Situation of thoſe Lands and Tenements, which obliges the Proprietors to ſettle the Boundaries of their ſeveral Lands and Tenements, if they are uncertain; or to keep to their reſpective Poſſeſſions within the Bounds already marked out, if any ſuch there be.

SECT. I.

How Lands, or Tenements, border and confine upon one another.

The CONTENTS.

1. *Difference between Houſes and Lands.*
2. *The diſtance from the Confines, for planting, building, or making any other Work.*
3. *A Partition-Wall, and a Wall that belongs wholly to one.*
4. *Lands ſeparated by a High-Way.*
5. *Lands with a Brook running thro' them.*
6. *Several Views for regulating the Confines.*
7. *Who may ſue for a Regulation of the Confines.*
8. *The queſtion about the Confines is to be diſcuſſed after that relating to the Poſſeſſion.*

I.

1. Difference between Houſes and Lands. THE uſe of Boundaries is chiefly for Lands, where there is no Building to regulate the Extent of them: but Houſes, and Places incloſed with Walls, whether in Town, or Country, have their Limits ſettled by ancient Walls, whether they be Partition-Walls belonging in common to the Neighbours, or Walls belonging peculiarly to one of them alone[a].

[a] Hoc judicium locum habet in confinio prædiorum ruſticorum: ſin urbanorum diſplicuit. Neque enim confines hi, ſed magis vicini dicuntur: & ea communibus parietibus plerumque diſterminantur. Et ideò, etſi in agris ædificia juncta ſint, locus huic actioni non erit. Et in urbe hortorum latitudo contingere poteſt: ut etiam finium regundorum agi poſſit. *l.* 4. §. 10. *ff. fin. regund.* See the following Art.]

II.

2. The diſtance from the Confines, for planting, building, or making any other Work. Altho' the Lands confining together be diſtinguiſhed by the Line which ſeparates them, and is the Boundary of them, which is marked out by Land-Marks; and that the Total of every one of the Lands bordering upon one another, belongs entirely, and as far as to the outmoſt Extent of the Confines, to him who is Proprietor of it; yet he cannot however enjoy his Land in ſuch a manner, as to be at liberty either to plant, build, or do what he has a mind to, cloſe upon the Confines, but, according to the Nature of the Plantation, Building, or other Work, he ought to keep the diſtance which is regulated by the Cuſtom, and Uſage of the Place[b].

[b] Sciendum eſt, in actione finium regundorum illud obſervandum eſſe, quod ad exemplum quodammodo ejus legis ſcriptum eſt, qurm Athenis Solon dicitur tuliſſe, nam illic ita eſt, Ἐάν τις αἱμασιὰν παρ' ἀλλοτρίῳ χωρίῳ ὀρύγῃ, τὸν ὅρον μὴ παραβαίνειν. Ἐὰν τειχίον, πόδα ἀπολείπειν. Ἐὰν δὲ οἴκημα, δύο πόδας. Ἐὰν δὲ τάφον, ἢ βόθρον ὀρύττῃ, ὅσον τὸ βάθος ᾖ, τοσοῦτον ἀπολείπειν. Ἐὰν δὲ φρέαρ, ὀργυιάν. Ἐλαίαν δὲ καὶ συκῆν, ἐννέα πόδας ἀπὸ τοῦ ἀλλοτρίου φυτεύειν. Τὰ δὲ ἄλλα δένδρα, πέντε πόδας. Id eſt, ſi quis ſepem ad alienum prædium fixerit, infoderitque, terminum ne excedito. Si maceriam, pedem relinquito. Si verò domum, pedes duos. Si ſepulchrum, aut ſcrobem foderit, quantum profunditatis habuerint, tantum ſpatii relinquito. Si puteum, paſſum latitudinis. At verò oleam, aut ficum, ab alieno ad novem pedes plantato. Cæteras arbores ad pedes quinque. *l. ult. ff. fin. regund.* See the eighth Article of the ſecond Section of Services.

We have not put down in this Article, the ſeveral diſtances which are to be obſerved in planting, building, or making other Works. For our Uſage is different from *the Law quoted on this Article; and in this matter we obſerve the Uſage and Cuſtoms of the Places.*

III.

3. A Partition-Wall, and a Wall that belongs wholly to one.

When a Wall is juſt on the Confines, it is a Partition-Wall; and being common to the two bordering Lands, or Houſes, it ſerves as a Boundary to them[c]. But he who builds on his own proper Ground, has the Wall to himſelf, provided he keeps the neceſſary diſtance from the Wall that is common to both[d].

[c] (Prædia urbana) communibus parietibus plerumque diſterminantur. *l.* 4. §. 10. *ff. fin. reg.*

[d] *See the preceding Article.*

IV.

4. Lands ſeparated by a High-Way.

Lands which are ſeparated by a High-Way, do not border upon one another: and the Proprietors of thoſe Lands have no occaſion to ſettle their Limits; unleſs a change of the High-Way ſhould happen to make it neceſſary[e].

[e] Sive via publica intervenit, confinium non intelligitur: & ideò finium regundorum agi non poteſt. Quia magis in confinio meo via publica, vel flumen ſit, quàm ager vicini. *l.* 4. *in f. & l.* 5. *ff. fin. regund.* See the ſixth Article of the firſt Section of Engagements which are formed by Accidents.

V.

5. Lands with a Brook running thro' them.

The Rivulets which are not of Publick Uſe, and which are the Property of particular Perſons, whoſe Lands they run acroſs, do not regulate the Limits of the ſaid Lands; but each Proprietor has his own Bounds, ſuch as they are ſettled by his Title, or Poſſeſſion[f].

[f] Sed ſi rivus privatus intervenit, finium regundorum agi poteſt. *l.* 6. *ff. fin. regund.*

VI.

6. Several Views for regulating the Confines.

If there be any uncertainty about the Confines of Lands, or Houſes, whether in Town, or Country, they are regulated by the Titles, when there are any which deſcribe either the Place of the Confines, or the Extent which the ſaid Lands ought to have: By ancient Land-Marks: By ancient Acknowledgments, or other the like Proofs. And becauſe that after the date of the Titles, or Deeds, there may happen divers Changes in the Confines; they are alſo regulated by Poſſeſſion, and by the Regard which ought to be had to thoſe Changes. As if a Proprietor of two Lands which had their reſpective Bounds, in the Sale of one of them marks out other Bounds to it than it had before; or if other Changes happen to be made by different Purchaſes, or Succeſſions, which confound or diſtinguiſh the Lands. And in a word, we may regulate the Confines by any other Ways which may lead us to the Knowledge of them[g].

[g] In finalibus quæſtionibus vetera monumenta, cenſus auctoritas ante litem inchoatam ordinati ſequenda eſt: modò ſi non varietate ſucceſſionum, & arbitrio poſſeſſorum fines, additis vel detractis agris, poſtea permutatos probetur. *l.* 11. *ff. fin. regund. l.* 2. *C. eod.* Eos terminos, quantùm ad dominii quæſtionem pertinet, obſervari oportere fundorum, quos demonſtravit is, qui utriuſque prædii dominus fuit, cùm alterum eorum venderet. Non enim termini qui ſingulos fundos ſeparabant, obſervari debent: ſed demonſtratio adfinium, novos fines inter fundos conſtituere. *l.* 12. *ff. fin. reg.* Succeſſionum varietas, & vicinorum novi conſenſus additis vel detractis agris alterutro, determinationis veteris monumenta ſæpe permutant. *l.* 2. *C. eod.*

VII.

7. Who may ſue for a Regulation of the Confines.

Tenants for a long Term of Years, Uſufructuaries, Mortgagees, may, as well as Proprietors, bring their Action to have the Confines ſettled between them and the Poſſeſſors of the Neighbouring Lands[h].

[h] Finium regundorum actio in agris vectigalibus, & inter eos, qui uſumfructum habent, vel fructuarium & dominum proprietatis vicini fundi, & inter eos qui jure piguoris poſſident, competere poteſt. *l.* 4. §. 9. *ff. fin. regund.*

VIII.

8. The Queſtion about the Confines, is to be diſcuſſed after that relating to the Poſſeſſion.

If the ſame Parties who are at Law about the Confines, conteſt likewiſe the Poſſeſſion of the Places whoſe Confines are in debate, it will be neceſſary in the firſt place, to determine the Poſſeſſion[i]. For the Queſtion relating to the Confines, concerns the Property, which ought not to be decided till after the Right of Poſſeſſion is determined[l].

[i] Si quis ſuper ſui juris locis prior de finibus detulerit querimoniam, quæ proprietatis controverſiæ cohæret, priùs poſſeſſionis quæſtio finiatur. *l.* 3. *C. fin. reg.*

[l] *See the ſeventeenth Article of the firſt Section of Poſſeſſion.*

SECT. II.

Of the reciprocal Engagements of the Proprietors, or Poſſeſſors of Lands and Tenements, bordering upon one another.

The CONTENTS.

1. *Diſtance from the Confines for planting, or building.*
2. *Enchroachment beyond the Confines.*
3. *If no Land-Marks appear.*

4. Of him who removes the Land-Marks.
5. Power of thoſe who are appointed to ſettle the Confines.

I.

1. Diſtance from the Confines for planting, or building. THE Proprietor, or other Poſſeſſor of Lands, in making a Plantation, a Building, or other Work, ought to keep the diſtances between his Work and the Confines, according as they are regulated by Cuſtom, and Uſage[a]. And if he tranſgreſſes therein, he will be obliged to demoliſh his Building, pluck up his Plantation, and reſtore Things to the condition in which they ought to be, and to make good the Damages which his Undertaking ſhall have occaſioned[b].

[a] *See the ſecond Article of the firſt Section.*

[b] Culpa & dolus exinde præſtantur. *l.* 4. §. 2. *ff. fin. regund.* Sed & ſi quis judici non pareat in ſuccidenda arbore, vel ædificio in fine poſito deponendo, parteve ejus, condemnabitur. *d. l.*4. §. 3.

II.

2. Encroachment beyond the Confines. If the Poſſeſſor of an Eſtate encroaches upon his Neighbour's Ground, beyond the Confines, he will be liable for the Damages occaſioned by his Undertaking[c], and to make Reſtitution of the Fruits, or other Profits, from the time of his Uſurpation. But he who ſhall have tranſgreſſed his Bounds, and enjoyed the Fruits of his Neighbour's Ground innocently, thinking that it was his own, will be obliged to reſtore the Fruits only from the time of the Legal Demand[d].

[c] In judicio finium regundorum etiam ejus ratio ſit quod intereſt. Quid enim, ſi quis aliquam utilitatem ex eo loco percepit, quem vicini eſſe appareat? Iniquè damnatio eo nomine fiet? *l.* 4. §. 1. *ff. fin. regund.*

[d] Poſt litem conteſtatam etiam fructus venient in hoc judicio: nam & culpa & dolus exinde præſtantur. Sed ante judicium percepti non omnimodò hoc in judicium venient: aut enim bona fide percepit, & lucrari eum oportet, ſi eos conſumpſit: aut mala fide, & condici oportet. *l.* 4. §. 2. *ff. fin. regund.*

III.

3. If no Land-Marks appear. If the Confines of two Eſtates become uncertain, whether by the Deed of the Proprietor, or Poſſeſſor of one of the Eſtates, or by an Accident; as, if an Inundation has carried away the Land-Marks, or that ſome other Accident has taken away the knowledge of the Separation of the Eſtates; it will be neceſſary to ſet new Land-Marks, by the advice of ſkilful Perſons, or according to the Titles of the Eſtates, or by the other Ways which have been mentioned in the ſixth Article of the firſt Section; and he who ſhall have encroached upon the other, ſhall be bound to make Reſtitution of the Fruits, or other Revenues, and of the Damages, if there be occaſion[e].

[e] Si irruptione fluminis fines agri confudit inundatio: ideoque uſurpandi quibuſdam loca, in quibus jus non habent, occaſionem præſtat: præſes provinciæ alieno eos abſtinere, & domino ſuum reſtitui, terminoſque per menſorem declarari jubet. *l.* 8. *ff. fin. regund.* Ad officium de finibus cognoſcentis pertinet, menſores mittere, & per eos dirimere ipſam finium quæſtionem, ut æquum eſt, ſi ita res exigit, oculiſque ſuis ſubjectis locis. *d. l.* §. 1.

IV.

If the Land-Marks have been removed by the Act of one of the Poſſeſſors, he ſhall not only be bound to make Reſtitution of the Fruits, and of the Damages; but he may likewiſe be proſecuted for this Treſpaſs, and he ſhall be condemned to ſuch Puniſhment as the Fact ſhall deſerve according to the circumſtances[f]. *4. Of him who removes the Land-Marks.*

[f] Divus Hadrianus in hæc verba reſcripſit: quin peſſimum factum ſit, eorum qui terminos finium cauſa poſitos, propulerunt, dubitari non poteſt. De pœna tamen modus ex conditione perſonæ, & mente facientis magis ſtatui poteſt, &c. *l.* 2. *& toto titulo. ff. de term. mot. l.* 4. §. 4. *ff. fin. regund. v. l.* 4. *C. eod.*

V.

The Arbitrators, or ſkilful Perſons, appointed to ſettle the Confines, may, according to the circumſtances of the Condition of the Places, of the Obſcurity of the Bounds, and of the Conveniency of both Proprietors, either divide what is in diſpute, if the Right of each Party be uncertain; or adjudge it wholly to one of them, if there be ground for it; or bound the Eſtates in another place, leaving on one ſide as much as is taken off on the other, or obliging him who happens to be the Gainer by this Change, to make ſome Return to his Neighbour[g]. *5. Power of thoſe who are appointed to ſettle the Confines.*

[g] Judici finium regundorum permittitur, ut, ubi non poſſit dirimere fines, adjudicatione controverſiam dirimat. Et ſi forte, admovendæ veteris obſcuritatis gratia, per aliam regionem fines dirigere judex velit, poteſt hoc facere, per adjudicationem, & condemnationem. Quo caſu, opus eſt, ut ex alterutrius prædio alii adjudicandum ſit. Quo nomine is cui adjudicatur, invicem pro eo quod ei adjudicatur, certa pecunia condemnandus eſt. Sed & loci unius controverſia in partes ſcindi adjudicationibus poteſt: prout cujuſque dominium in eo loco judex compererit. *l.* 2. §. 1. *l.* 3. *& l.* 4. *ff. fin. regund.*

TITLE VII.

Of thoſe who receive what is not their due, or who happen to have in their Poſſeſſion the Thing of another, without a Covenant.

Different ways of having the Thing of another, without a Covenant.

IT may fall out by divers Accidents, that one may chance to have in his Poſſeſſion the Thing of another, and be obliged to reſtore it, altho' there have been no Covenant between them to form this Engagement. Thus, he to whom one pays, through Miſtake, a Sum of Money which was not due to him, is obliged to reſtore it. Thus, he who believing himſelf to be the only Heir, had taken Poſſeſſion of all the Effects of an Inheritance, is obliged to reſtore to the others who have Right to the ſame Inheritance, that which comes to their Share. Thus, he who finds a Thing that has been loſt, ought to reſtore it to the Owner. Thus, the Poſſeſſor of a Piece of Ground, on which Things have been caſt that have been carried away by a Flood, ought to reſtore them, or to let the Owner come and take them away.

We ſee by theſe Examples, that it happens two ways, that one may have the Thing of another without a Covenant. For one may have it either by a mere Caſualty, as in the two laſt Caſes; or by a conſequence of a voluntary Act, as in the two firſt Inſtances.

The Subject Matter of this Title.

In what manner ſoever it be that one has in his Poſſeſſion the Thing belonging to another, whether thro' mere Accident, or by a conſequence of ſome voluntary Act, the Engagements are almoſt the ſame. But we have not thought it proper to mix and confound theſe two ſorts of Events together; and we treat only here of ſuch Events as make one Perſon to have in his Poſſeſſion the Thing of another, without Covenant, by the conſequence of ſome voluntary Act, as it happens to him who receives what is not his due. For the other way of having the Thing of another, by a bare Caſualty, is a part of the Subject Matter of the ninth Title, where we treat in general of the Engagements which are formed by Accidents; whether the Accident puts into the Poſſeſſion of one Perſon the Thing of another, as in the two Caſes which have been juſt now mentioned; or that without that there be formed another ſort of Engagement, as happens to him whoſe Goods have been ſaved in a danger of Shipwreck, by the Loſs of other Goods which have been thrown over-board to ſave the Ship; for he whoſe Goods have been ſaved, ought to bear his Share of the Loſs; and this Engagement is formed altho' one has not the Thing of another. So that the Reader will have in the ninth Title, and in this, all the Rules which concern the different ways in which one Perſon may have in his Poſſeſſion the Thing of another: and the ninth Title will contain moreover the other ſorts of Engagements which are formed by Accidents.

Seeing there is an infinite Number of Caſes in which it may happen, that by the Conſequence of ſome voluntary Act, whether lawful or unlawful, one may chance to have in his Poſſeſſion the Thing of another without Covenant; it is ſufficient to ſee in ſome Caſes the Rules belonging to this Matter, which it will be eaſy to apply to all the Caſes that may fall out.

SECT. I.

Some Examples of the Caſes which are the Subject Matter of this Title, and which have nothing in them that is unlawful.

The CONTENTS.

1. *He who receives what is not due to him, is obliged to reſtore it.*
2. *Of Payment made by him who thought himſelf to be a Debtor, and was not.*
3. *Of Payment made by a third Perſon, for the Debtor.*
4. *The Creditor does not give back what has been paid him before the Term.*
5. *If one by miſtake, or willingly, pays what is not due.*
6. *Payment made in a doubtful caſe.*
7. *Of him who owes one of two Things.*
8. *Example of another kind.*
9. *Another Example.*
10. *Reſtitution of a Thing which one has without a juſt Title.*
11. *Payment of a Debt, which it was in the Debtor's Power not to have paid.*

I.

1. He who receives what is not due to him, is obliged to reſtore it.

HE who receives payment of what is not due to him, even altho' he were truly perſuaded that it were due to him, and that he who pays it were of the ſame mind likewiſe, acquires no manner of Right to what is paid him in this manner; but he ought to reſtore it. Thus, he who has received a Legacy by virtue of a Teſtament which appears afterwards to be forged, or of no validity, ought to reſtore what he has received on that account. And it would be the ſame thing, altho' the Teſtament were not forged, or invalid, if the Legacy happened to be revoked by a Codicil, which did not appear till after the Payment[a].

[a] Si quid ex teſtamento ſolutum ſit, quod poſteà falſum, vel inofficioſum, vel irritum, vel ruptum apparuerit, repetetur. *l.* 2. §. 1. *de cond. ind.* Si poſt multum temporis—— codicilli diù celati, prolati: qui ademptionem contineant legatorum ſolutorum: vel deminutionem, per hoc, quia aliis quoque legata relicta ſunt, (ſolutum ex teſtamento repetetur.) *l.* 2. §. 1. *ff. de cond. ind.* Is cui quis per errorem non debitum ſolvit, quaſi ex contractu debere videtur. §. 6. *inſt. de obl. qua quaſ. ex contr.*

II.

2. Of Payment made by him who thought himſelf to be a Debtor, and was not.

If a Creditor receives Payment from the hands of one, who thinking himſelf to be his Debtor, was not really indebted to him, and paid only in the belief that he acquitted his own Debt; this Payment does not acquit the true Debtor, and obliges him who receives it to make Reſtitution of what is paid him barely thro' this miſtake. Thus, for Example, if a Preſumptive Heir being informed of the death of his Relation to whom he had a Right to ſucceed, and knowing nothing of a Teſtament which cuts him off from the whole Inheritance, pays off a Debt owing by the deceaſed, before he intermeddles with the Goods of the Succeſſion, thinking thereby to diſcharge himſelf as being Heir, and laying out his own Money to that end: the Creditor who ſhall have received that Money, ſhall be bound to reſtore it, and ſhall retain his Right, or Demand, upon the Eſtate of the deceaſed[b]. But if the ſaid Creditor had deſtroyed the Title by which he inſtructed his Debt, as if it was a Bond which he had torn in pieces, ſo that his Debt would be either loſt, or in danger of being ſo, the Payment in this caſe would ſubſiſt: and he who paid the Money would have himſelf to blame for it, and he would have his Action againſt the Heir, or Executor, for recovering what he had paid for his behoof.

[b] Indebitum eſt non tantùm, quod omninò non debetur: ſed & quod alii debetur, ſi alii ſolvatur: aut ſi id quod alius debeat, alius quaſi ipſe debeat, ſolvat. *l.* 65. §. *ult. ff. de condict. indeb.* Quamvis debitum ſibi quis recipiat, tamen ſi is qui dat, non debitum dat, repetitio competit. Veluti, ſi is qui hæredem ſe, vel bonorum poſſeſſorem falsò exiſtimans, creditori hæreditario ſolverit. Hic enim neque verus hæres liberatus erit: & is, quod dedit, repetere poterit. Quamvis enim debitum ſibi quis recipiat: tamen ſi is qui dat, non debitum dat, repetitio competit. *l.* 19. §. 1. *ff. de cond. indeb.* See the ſeventh Article of the firſt Section of the Vices of Covenants.

This Rule is to be underſtood of the Caſe where he who believed himſelf to be Heir, or Executor, and who was not, had paid out of his own pocket, before he intermeddled with the Goods of the Succeſſion, and where all things relating to the Succeſſion were yet entire. We muſt not confound the Caſe of this Rule with that of the following Rule.

III.

3. Of Payment made by a third Perſon, for the Debtor.

If a third Perſon pays to a Creditor what he knows to be owing to him by another, the ſaid Creditor will not be obliged to reſtore it, for he has received only what was his due; and this third Perſon may have been willing to acquit the true Debtor[c].

[c] Repetitio nulla eſt ab eo qui ſuum recepit: tametſi ab alio, quàm vero debitore, ſolutum eſt. *l.* 44. *ff. de cond. indeb.*

IV.

4. The Creditor does not give back what has been paid him before the Term.

If a Debtor pays before the Term, even altho' the thing were not to be due till after his death; the Creditor who receives the ſaid Payment, altho' he had no Right to demand it, may nevertheleſs retain it. For the Debtor might, if he thought fit, pay before it was due, and he has paid only what he owed[d]. But if it was a conditional Debt, which depended on the Event of ſomething which had not as yet happened, and which might perhaps never happen, he who had received Payment of it thro' ſome miſtake, could not retain it; for he was not as yet a Creditor. But if the Condition were ſuch, that it muſt neceſſarily happen, there would be no Recovery of ſuch Payment[e].

[d] In diem debitor adeò debitor eſt, ut ante diem ſolutum repetere non poſſit. *l.* 10. *ff. de cond. indeb.* Si cùm moriar dare promiſero, & anteà ſolvam, repetere me non poſſe, Celſus ait. Quæ ſententia vera eſt. *l.* 17. *eod.* See the fifth Article of the firſt Section of Payments.

[e] Sub conditione debitum, per errorem ſolutum pendente quidem conditione repetitur. *l.* 16. *ff. de cond. indeb.* Quòd ſi ea conditione debetur, quæ omnimodò extatura eſt, ſolutum repeti non poteſt: licet ſub alia conditione, quæ an impleatur incertum eſt, ſi ante ſolvatur, repeti poſſit, *l.* 18. *eod.*

V.

5. If one by miſtake, or willingly, pays what is not due. He who pays thro' miſtake what he thought he owed, and what he did not really owe, may recover it, whether it be that the Thing was never in effect due, or that the Thing having been due, ſome Event had happened which annulled the Debt, and which was unknown to the Debtor. As, for Example, if a Debtor having paid his Debt to the Heir of his Creditor, there appeared afterwards a Teſtament by which the Creditor had forgiven the Debt: But he who knowing he has means whereby to defend himſelf againſt his Creditor, does nevertheleſs pay willingly, cannot demand what he has paid. For it was in his power to renounce the Reaſons, or Defences, which he may have had to avoid paying the Debt[f].

[f] Si quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt. Sed ſi ſciens ſe non debere, ſolvit: ceſſat repetitio. *l.* 1. §. 1. *ff. de cond. indeb.* Indebitum autem ſolutum accipimus, non ſolùm ſi omninò non debeatur, ſed etſi per aliquam exceptionem perpetuam peti non poterat: quare hoc quoque repeti poterit, niſi ſciens ſe tutum exceptione, ſolvit. *l.* 26. §. 3. *ff. eod.*

VI.

6. Payment made in a doubtful caſe. He who being in a doubt whether he owes or not, pays at all adventures to free himſelf, in caſe it ſhould appear that he were really indebted, may recover what he ſhall have paid, if it be found in reality that he owed nothing; unleſs it ſhall appear that in the doubt the Parties had a mind to put an end to their Diſpute by the ſaid Payment, and that it was in lieu of a Tranſaction. For in this caſe the Payment ſubſiſts[g].

[g] Pro dubietate eorum, qui mente titubante indebitam ſolverint pecuniam, certamen legumlatoribus incidit, idne quod ancipiti animo perſolverint, poſſint repetere an non. Quod nos decidentes, ſancimus, omnibus, qui incerto animo indebitam dederint pecuniam, vel aliam quandam ſpeciem perſolverint, repetitionem non denegari: & præſumptionem tranſactionis non contra eos induci: niſi hoc ſpecialiter ab altera parte approbetur. *l. ult. C. de cond. indebit.*

VII.

7. Of him who owes one of two Things. If he who owed one of two Things, has given them both, either by Miſtake, or out of Ignorance, he who has received them ſhall not have the Liberty to chuſe which of the two he has a mind to keep; but the Debtor ſhall retain the Right of chuſing, and of leaving with the Creditor the Thing which he pleaſes to give him, and of taking back the other[h].

[h] Si quis ſervum certi nominis, aut quamdam ſolidorum quantitatem, vel aliam rem promiſerit: & cum licentia ei fuerat unum ex his ſolvendo liberari, utrumque per ignorantiam dependerit: dubitabatur, cujus rei daretur à legibus ei repetitio, utrumne ſervi, an pecuniæ, & utrum ſtipulator, an promiſſor habeat hujus rei facultatem. Et Ulpianus quidem —— nobis hæc decidentibus Juliani, & Papiniani ſententia placet, ut ipſe habeat electionem recipiendi, qui & dandi habuit. *l. pen. C. de cond. indebit.*

VIII.

8. Example of another kind. He who happens to be in Poſſeſſion of a Thing belonging to another, whether it be Moveable, or Immoveable, by what Title ſoever he poſſeſſes it, whether by Sale, Donation, or other Title, is obliged to reſtore it to the Owner, whenever he appears, and makes out his Right. Thus, the Purchaſer of a piece of Ground, which is recovered from him at Law by the right Owner, is obliged to reſtore it to him: and this Engagement is of the Number of thoſe that are formed without a Covenant[i].

[i] *See the tenth Section of the Contract of Sale.*

IX.

9. Another Example. The Heir, who during the abſence of his Co-Heir, or believing himſelf to be ſole Heir, takes Poſſeſſion of all the Goods, obliges himſelf, without a Covenant, to reſtore to the other his Share of the Inheritance, whenever he ſhall appear[k].

[k] *See the ninth Article of the third Section of Intereſt, Coſts and Damages,* &c.

X.

10. Reſtitution of a Thing which one has without a juſt Title. He who happens to have the Thing of another without a juſt Cauſe, or to whom a Thing was given for a Cauſe which ceaſes, or upon a Condition which does not happen; having no longer any Cauſe for keeping it, ought to reſtore it. Thus, he who had received a Dowry for a Marriage which does not take effect, or which is annulled, ought to reſtore that which was given only upon that account[l]. Thus, with much greater reaſon, are they who have received Money, or any other Thing, for an unjuſt Cauſe, bound to reſtore it.

[l] Conſtat id demùm poſſe condici alicui, quod vel non ex juſta cauſa ad eum pervenit, vel redit ad non juſtam cauſam. *l.* 1. §. *ult. ff. de cond. ſine cauſa.* Nihil refert utrumne ab initio ſine cauſa quid datum ſit, an cauſa propter quam datum ſit, ſecuta non ſit. *l.* 4. *eod.* Fundus dotis nomine traditus, ſi nuptiæ inſecutæ non fuerint, condictione repeti poteſt. *l.* 7. §. *ult. ff. de cond. cauſ. dat. l.* 8. *eod. l.* 1. §. 1. *ff. de cond. ob turp. vel injuſt. cauſ.*

One may receive ſomething for an unjuſt Cauſe, without a Covenant, as by Concuſſion, or other Violence.

And one may likewiſe receive ſomething by an unlawful Covenant: Concerning which the Reader may conſult the laſt Article of the fourth Section of the Vices of Covenants, and the Section which immediately follows this.

XI.

11. Payment of a Debt, which it was in the Debtor's power not to have paid.

The Debtors who acquit voluntarily Debts which they might have procured to be declared null in ſtrictneſs of Law, altho' Natural Equity made them juſt Debts, cannot afterwards deny the Debt which they have once approved of[m]. Thus, for Example, if a married Woman who had entred into Bond without the approbation or conſent of her Husband, or even with his Conſent, in the Cuſtoms where a Wife cannot be bound, acquits, in her Widowhood, her Obligation, which would have been declared null and void in Law, ſhe cannot afterwards call in queſtion the Payment which ſhe had made of the ſaid Debt. Thus, a Minor being arrived at the Years of Majority, and paying then a Debt, againſt which he might have been relieved, cannot demand back what he has paid. For in theſe Caſes, there was a Natural Obligation which the Debtor had power to acquit.

SECT. II.

Other Examples of the ſame Matter, in Caſes of unlawful Facts.

BY unlawful Facts, we underſtand here, not only thoſe which are prohibited by ſome expreſs Law, but all thoſe which are contrary to Equity, Honeſty, or Good Manners, altho' there be no written Law which makes mention of them. For whatever is contrary to Equity, Honeſty, or Good Manners, is contrary to the Principles both of Divine and Humane Laws.

The CONTENTS.

1. *Three ſorts of unlawful Facts.*
2. *A Fact unlawful only on the part of him who gives.*
3. *A Fact that is unlawful only on the part of the Receiver.*
4. *A Fact unlawful both on the part of the Giver, and of the Receiver.*

I.

1. Three ſorts of unlawful Facts.

IT may happen three ways, that by an unlawful Fact, one may receive a Sum of Money, or other Thing, from another Perſon. For the Fact may be unlawful, either only on the part of him who gives, or only on the part of him who receives, or on the part both of the Giver and Receiver[a]. Thus, he who, under pretext of Civility, ſhould make a Preſent to one who he knew would be his Judge, or Arbitrator, and who on his part was altogether ignorant of the Motive of the ſaid Preſent, would give unlawfully what the ſaid Perſon might receive without any Offence to Juſtice. Thus when any Perſon, either by himſelf, or others, exacts a Sum of Money, or other Things, to hinder him from committing ſome greater Violence, or makes one deliver up to him the Titles of ſome Debt, or ſome Right, which he owes; the ſaid Fact is only unlawful on the part of the Perſon who commits the Violence, and not on the part of him who ſuffers it. Thus when a Perſon receives Money of another, either himſelf, or by a third Hand, to commit ſome Crime, ſome Offence, or ſome Injuſtice; the Fact is unlawful, both on the part of him who receives, and of him who gives.

II.

2. A Fact unlawful only on the part of him who gives.

If the Fact be unlawful only on the part of him who gives, he who has received will not be obliged to give it back, unleſs it be that the Circumſtances regulate his Duty in another manner. Thus in the caſe of him who had received a Preſent, being ignorant of the unjuſt Motive of giving it, as has been explained in the firſt Article; if the ſaid Motive chanced afterwards to come to his knowledge, he would be obliged either to abſtain from the Function of Judge, or Arbitrator, or to give back the Preſent which he had received, or even to do both the one and the other, according as Prudence and Equity might require, under the Circumſtances of the Quality of the Perſons, and of that of the Fact[b].

[m] Naturales obligationes non eo ſolo æſtimantur, ſi actio aliqua earum nomine competit, verùm etiam eo, ſi ſoluta pecunia repeti non poſſit. *l.* 10. *ff. de obl. & act.* See the fourth Article of the firſt Section of Payments.

[a] Omne quod datur, aut ob rem datur, aut ob cauſam. Et ob rem, aut turpem, aut honeſtam. Turpem autem: aut ut dantis ſit turpitudo, non accipientis: aut ut accipientis duntaxat, non etiam dantis: aut utriuſque. *l.* 1. *ff. de condict. ob turp. vel inj. cauſ.*

[b] *This is a Sequel of the firſt Caſe explained in the foregoing Article.* Ut dantis ſit turpitudo. *l.* 1, *ff. de cond. ob turp. vel injuſt. cauſ.*

III.

3. A Fact that is unlawful only on the part of the Receiver.

When the Fact is unlawful only on the part of him who has received a Thing for an unjuſt Cauſe, he who has given it may recover it again, altho' the Receiver have performed what he was bound to by his Engagement[c]. And nothing can excuſe the Receiver from making Reſtitution, even altho' the Thing were not demanded of him, nor from the other Puniſhments which the Fact may deſerve, if it comes before a Court of Juſtice.

[c] Quod ſi turpis cauſa accipientis fuerit, etiamſi res ſecuta ſit, repeti poteſt. *l. 1. §. 2. ff. de cond. ob turp. vel inj. cauſ.* Perpetuò Sabinus probavit veterum opinionem exiſtimantium, id quod ex injuſta cauſa apud aliquem ſit, poſſe condici. In qua ſententia etiam Celſus eſt. *l. 6. ff. eod.*

IV.

4. A Fact unlawful both on the part of the Giver, and of the Receiver.

If the Fact be unlawful both on the part of him who gives, and on the part of him who receives, the Giver ſhall loſe deſervedly what he has employed to ſo ill a purpoſe, and ſhall have no Action for recovering it[d]. And the Receiver cannot retain this unjuſt Profit: and even altho' he had executed the unlawful Engagement for which he had received the Money, or other Thing, he ſhall be obliged to make Reſtitution to the Perſon to whom it may be due; and moreover be liable to the other Puniſhments which he may have deſerved.

[d] Ubi enim & dantis & accipientis turpitudo verſatur, non poſſe repeti dicimus. *l. 3. ff. de cond. ob turp. vel injuſt. cauſ.* See the third, fourth, and fifth Articles of the fourth Section of the Vices of Covenants, and the Remark on the ſaid fifth Article.

SECT. III.

Of the Engagements of him who hath ſomething belonging to another Perſon, without a Covenant.

The CONTENTS.

1. *Reſtitution of Money, with Intereſt, if there be ground for it.*
2. *Care of the Thing.*
3. *Reſtitution of the Fruits.*
4. *Of the Augmentation happened to the Thing which is to be reſtored.*
5. *If he who had a Thing belonging to another, has alienated it.*

I.

1. Reſtitution of Money, with Intereſt, if there be ground for it.

THE Engagement of him who happens to have a Sum of Money belonging to another Perſon, whether it be that he had received it in payment of a Debt that was not due, or that he had come by it ſome other way, conſiſts in reſtoring the ſaid Money without Intereſt[a], except from the time of the Demand, provided he has acted honeſtly and fairly. But if there was on his part any knaviſh dealing, he ſhall be obliged to pay the Intereſt of the Money from the time that he began to act knaviſhly.

[a] Pecuniæ indebitæ, per errorem, non ex cauſâ judicati ſolutæ, eſſe repetitionem jure condictionis, non ambigitur. Si quid igitur probare potueris patrem tuum, cui hæres extitiſti, amplius debito creditori ſuo perſolviſſe: repetere potes. Uſuras autem ejus ſummæ præſtari tibi fruſtrà deſideras. Actione enim condictionis ea ſola quantitas repetitur, quæ indebita ſoluta eſt. *l. 1. C. de cond. ind.*

II.

2. Care of the Thing.

If it be any other thing beſides Money that is to be reſtored, he who begins to know of his Engagement to make Reſtitution, ought to take care of the Thing, and to preſerve it, till he reſtore it. But if the Thing happens to be damaged, or even periſhes, whilſt the Poſſeſſor was verily perſuaded that it was his own, and before it had been demanded of him, and he without blame for not reſtoring it; he would not be accountable for it, even altho' the Thing had periſhed thro' his Negligence. For his condition ought to be the ſame as if he had been the Owner of the Thing. But after the Demand, if he was in delay, he would be anſwerable for every thing that ſhould happen even without any fault of his.

[b] Non ſolùm autem rem reſtitui, verùm & ſi deterior res ſit facta, rationem judex habere debebit. Finge enim debilitatum hominem, vel verberatum, vel vulneratum reſtitui: utique ratio per judicem habebitur, quantò deterior ſit factus. *l. 13. ff. de rei vind.* Si ſervus petitus, vel animal aliud demortuum ſit, ſine dolo malo & culpa poſſeſſoris, pretium non eſſe præſtandum, plerique aiunt. Sed eſt verius, ſi forte diſtracturus erat petitor ſi accepiſſet, moram paſſo debere præſtari. Nam ſi ei reſtituiſſet, diſtraxiſſet, & pretium eſſet lucratus. *l. 15. §. ult. eod.* Si homo ſit qui poſt conventionem reſtituitur, ſi quidem à bonæ fidei poſſeſſore, puto cavendum eſſe de dolo ſolo: debere cæteros etiam de culpa ſua: inter quos erit & bonæ fidei poſſeſſor, poſt litem conteſtatam. *l. 45. eod.*

III.

3. Reſtitution of the Fruits.

If it is Land, or Houſes, which is to be reſtored, or any other Thing which produces ſome Revenue, the Poſſeſſor who is bound to reſtore the Thing, is bound alſo to reſtore with it the Fruits, or Revenues, which he has reaped, either only from the time of the Demand, or even for the whole time of his Enjoyment of it, according to the Nature of the Cauſe which had transferred the Thing into his hands, and the Circumſtances[c].

[c] Indebiti ſoluti condictio naturalis eſt: & ideo etiam quod rei ſolutæ acceſſit, venit in condictionem. Ut puta partus qui ex ancilla natus ſit, vel quod alluvione acceſſit. Imò & fructus quos is, cui ſolutum eſt, bona fide percepit, in condictionem veniunt. *l. 15. ff. de cond. indeb. l. 38. §. 2. de uſur.* Ei qui indebitum repetit, & fructus & partus reſtitui debent. *l. 65. §. 5. ff. de cond. indeb.*

There are many Caſes in which the Honeſty and fair Dealing of the Poſſeſſor does not diſcharge him from the Reſtitution of the Fruits. See the ninth, tenth, and fourteenth Articles of the third Section of Intereſt, Coſts and Damages, &c. Vid. l. 7. §. ult. ff. & l. 12. ff. de cond. cauſ. dat.

The Laws quoted upon this Article have not relation to all the Caſes explained in the firſt Section, but only to the Caſe of him who has received a Thing that was not due to him: and if it produces any Fruits, or other Revenues, theſe Laws oblige the Poſſeſſor, without any diſtinction, altho' he have enjoyed the Thing honeſtly and fairly, to reſtore the Fruits, altho' he who had received Money that was not due to him, is not bound to pay the Intereſt of it, as has been ſaid in the firſt Article of this Section. But we thought that this Rule, which may be juſt in certain Caſes, might in other Caſes prove a hardſhip which would be unjuſt, even when it is reſtrained to that which ſhall have been given, not being due. Thus, for Example, if an Executor delivers to a poor Legatee a Piece of Ground which had been left him by a Codicil, and after that the ſaid Legatee had enjoyed it for many years, the Codicil appears to have been forged, but without the Legatee's having had any hand in the Forgery; but he having enjoyed the Land honeſtly and fairly, and having conſumed the Fruits of it in the Maintenance of his Family; and ſuppoſing the ſaid Legatee could not reſtore the Fruits without being ruined, or very much incommoded thereby; would it be unjuſt to diſcharge him from this Reſtitution; which a Legatee, who is rich, and at his eaſe, might be bound to for this reaſon, that he ought not to profit by the Enjoyment of a Thing to which he had no Right, and of which the true Owner had been deprived by a falſe Title? It is upon the View of theſe ſeveral Events, and of the other different Cauſes which may oblige one to make Reſtitution of the Fruits, or diſcharge him from it, that we have thought that the uſe of the Rule ought to be left to the Prudence of the Judge, according to the Cauſe which gave occaſion to the Poſſeſſor's Enjoyment of the Thing, and the Circumſtances.

IV.

4. *Of the Augmentation happened to the Thing which is to be reſtored.* If the Thing which is to be reſtored chanced to be augmented, while it was in the Poſſeſſion of him who is bound to reſtore it; as if a Herd of Cattle was increaſed in Number, or a Piece of Land adjoining to a River become greater, the Whole muſt be reſtored[d].

[d] Ut putà partus qui ex ancilla natus ſit, vel quod alluvione acceſſit. *l. 15. ff. de condict. ind.*

V.

5. *If he who had a Thing belonging to another, has alienated it.* If he who had a Thing belonging to another, believing in good earneſt that he himſelf was the true Owner of it, had under this honeſt ſincere Perſuaſion alienated the Thing, he would be bound only to reſtore what Profit he had made by it, ſuch as the Price which he got for it, if the Thing was ſold, altho' he had not ſold it for the full Value[e].

[e] Hominem indebitum (dedi) & hunc ſine fraude modico diſtraxiſti: nempe hoc ſolum refundere debes, quod ex pretio habes. *l. 26. §. 12. ff. de condict. ind.*

SECT. IV.

Of the Engagements of the Maſter of the Thing.

The CONTENTS.

The Maſter ought to refund what has been laid out on the Preſervation of the Thing.

The Maſter ought to refund what has been laid out on the Preſervation of the Thing. HE whoſe Thing has been in the Poſſeſſion of another, and who recovers it, even altho' it were from one who had detained it knowing himſelf not to be the true Owner of it, is obliged to refund the Poſſeſſor of all that he has uſefully laid out in preſerving the Thing: And if there be Fruits to be reſtored, out of them muſt be deducted the Expences which the Poſſeſſor has been at in gathering them[a].

[a] Ei qui indebitum repetit, & fructus & partus reſtitui debent deducta impenſa. *l. 65. §. 4. de condict. indebit.*

Quod in fructus redigendos impenſum eſt, non ambigitur ipſos fructus deminuere debere. *l. 46. ff. de uſur.* See the eleventh Article of the third Section of Intereſt, Coſts and Damages, *&c.* and the Remark on the ſaid Article.

⁂

TITLE

TITLE VIII.

Of DAMAGES *occaſioned by* FAULTS *which do not amount to a Crime, or Offence.*

The Subject Matter of this Title.

WE may diſtinguiſh three ſorts of Faults from which ſome Damage may proceed. Thoſe which amount to a Crime, or Offence: Thoſe of the Perſons who fail in the performance of the Engagements which they are bound to by Covenant; ſuch as a Seller who does not deliver the Thing ſold; a Tenant who does not make the Repairs which he is bound to by his Leaſe. And thoſe which have no relation to Covenants, and which do not amount to a Crime, or an Offence; As if out of wantonneſs one throws out any thing at the window which ſpoils a Suit of Cloaths: If Beaſts, for want of being carefully watched, do any Damage: If a Houſe is ſet on Fire thro' Imprudence: If a Building that is gone to decay, for want of being repaired falls upon another, and damages it.

Of theſe three ſorts of Faults, it is only theſe of the laſt kind which are the Subject Matter of this Title. For Crimes and Offences ought not to be blended with Civil Matters; and all that relates to Covenants, has been explained in the firſt Book.

The Reader may, with reſpect to the Matter of this Title, conſult that of Intereſt, Coſts and Damages, *&c.*

SECT. I.

Of that which is thrown out of a Houſe, or which may fall down from it, and do ſome Damage.

The CONTENTS.

1. *He who inhabits the Houſe, is liable for the Damage.*
2. *The Prohibitions of throwing out any thing out of Houſes, regard the Surety of all ſorts of Places.*
3. *The Maſter of the Houſe liable to a Fine on this account.*
4. *If any one is killed, or hurt.*
5. *If ſeveral Perſons inhabit the ſame Place.*
6. *If one has the whole Houſe, and lets out Chambers.*
7. *Of thoſe who take into their Houſes Scholars, or other Perſons.*
8. *If any thing has been thrown out with deſign to do hurt.*
9. *Prohibition to have any thing hung out, which may fall, and do miſchief.*
10. *If the fall of the thing that is hung out does any harm.*
11. *Tiles falling from the Roof of a Houſe.*

I.

1. He who inhabits the Houſe is liable for the Damage.

HE who inhabits a Houſe, whether he be the Proprietor of it, Tenant, or other, is liable for the Damage which is cauſed by any thing thrown out, or poured out of any place of the ſaid Houſe, whether by Day or by Night. And he ought to anſwer for it to him who ſhall have ſuffered the Damage, whether it was he himſelf that threw it out, or any of his Family, or Domeſticks, even altho' it were in his abſence, or without his knowledge[a].

[a] Prætor ait de his qui dejecerint, vel effuderint. *Unde in eum locum quo vulgò iter fiat, vel in quo conſiſtitur, dejectum, vel effuſum quid erit, quantum ex ea re damnum datum, factumve erit, in eum qui ibi habitaverit, in duplum judicium dabo.* l. 1. ff. de his qui effud. vel dejec. Habitator ſuam, ſuorumque culpam præſtare debet. *l. 6. §. 2. eod.* Inſciente Domino. *d. l. 1.* Labeo ait locum habere hoc edictum, ſi interdiù dejectum ſit, non nocte: ſed quibuſdam locis & nocte iter fit. *l. 6. §. 1. eod.* See the following Articles.

II.

2. The Prohibitions of throwing out any thing out of Houſes, regard the Surety of all ſorts of Places.

Seeing the Prohibitions of throwing, or pouring out any thing out of Houſes, have regard to the Surety of the Places where the Damage may happen; they are not therefore limited to the Streets, to Squares, and other Publick Places; but they extend to all the Places where this Imprudence may be attended with any Damage[b].

[b] Summa cum utilitate id prætorem edixiſſe, nemo eſt qui neget. Publicè enim utile eſt, ſine metu & periculo per itinera commeari. Parvi autem intereſſe debet, utrum publicus locus ſit, an verò privatus, dummodo per eum vulgò iter fiat: quia iter facientibus proſpicitur, non publicis viis ſtudetur. Semper enim ea loca per quæ vulgò iter ſolet fieri, eamdem ſecuritatem debent habere. *l. 1. §. 1. & 2. ff. de his qui effud. vel dejec.* In eum locum quo vulgò iter fit, vel in quo conſiſtitur. *d. l. 1.*

III.

3. The Maſter of

Beſides the making good the Damage which ſhall have been cauſed by what

has

the Houſe liable to a Fine on this account. has been thrown, or poured out, he who dwells in the Houſe will be condemned to the Penalty which the Civil Policy may have eſtabliſhed[c], or to ſuch other Penalty as the Judge ſhall think fit to inflict according to the circumſtances[d].

[c] In duplum judicium dabo. *l.* 1. *ff. de his qui effud. vel dejec.*

[d] *The Penalties are arbitrary in* France.

IV.

4. *If any one is killed, or hurt.* If that which has been thrown out cauſes the death of any perſon, or wounds him, the perſon who did it will be tried for it in a Criminal Proſecution. And he ſhall be puniſhed according to the Nature of the Fact, and will be liable to make good the Damage that is done. And the Maſter of the Houſe will likewiſe be liable to a Fine, and to ſuch Damages, or other Penalty, as he may appear to deſerve according to the circumſtances[e].

[e] Si eo ictu homo liber periſſe, dicetur, quinquaginta aureorum judicium dabo, ſi vivet nocitumque ei eſſe dicetur, quantum ob eam rem æquum Judici videbitur, eum cum quo agetur condemnari, tanti judicium dabo. *l.* 1. *ff. de his qui effud. vel dejec.*

V.

5. *If ſeveral Perſons inhabit the ſame Place.* If ſeveral Perſons inhabit the ſame Place from whence any thing hath been thrown, or poured out, every one of them will be anſwerable for the whole Damage; unleſs it can be known who has cauſed it, either which of the Maſters, or of the Perſons for whom each Maſter is anſwerable. But if their Habitation be diſtinct, every one is only anſwerable for what ſhall be thrown out of the Places which he occupies[f].

[f] Si plures in eodem cœnaculo habitent, unde dejectum eſt, in quemvis hæc actio dabitur: cùm ſanè impoſſibile eſt ſcire quis dejeciſſet, vel effudiſſet, & quidem in ſolidum. *l.* 1. §. *ult. l.* 2. *& l.* 3. *ff. de his qui effud. vel dejec.* Si verò plures, diviſo inter ſe cœnaculo, habitent, actio in eum ſolum datur, qui inhabitat eam partem, unde effuſum eſt. *l.* 5. *eod.* See the following Article.

VI.

6. *If one has the whole Houſe, and lets out Chambers.* Altho' the Proprietor, or principal Tenant of a Houſe, occupies only a ſmall part of it, if he lets Chambers, or lodges in ſome of them one of his Friends, he ſhall be anſwerable for the Fact of the perſon whom he receives into his Houſe. But if it appear out of what Room the thing has been thrown, the Action may be brought either againſt the perſon who lodges in the ſaid Room, or againſt him who has the whole Houſe[g]. And this laſt will have his Recourſe againſt the other.

[g] Idem erit dicendum & ſi quis amicis ſuis modica hoſpitiola diſtribuerit. Nam & ſi quis cœnaculariam exercens ipſe maximam partem cœnaculi habebat, ſolus tenebitur. Sed & ſi hoſpitaculi habeat, ſolus tenebitur. Sed ſi quis cœnaculi, ipſe ſolus æquè tenebitur, ſed ſi quis cœnaculariam exercens modicum ſibi hoſpitium retinuerit, reſiduum locaverit pluribus, omnes tenebuntur, quaſi in hoc cœnaculo habitantes unde dejectum, effuſumve eſt. Interdum tamen (quod ſine captione actoris fiat) oportebit prætorem æquitate motum, in eum potiùs dare actionem, ex cujus cubiculo vel exedra dejectum eſt, licet plures in eodem cœnaculo habitent. Quod ſi ex mediano cœnaculi quid dejectum ſit, verius eſt omnes teneri. *l.* 5. §. 1. *&* 2. *ff. de his qui effud. vel dejec.* See the foregoing Article.

The Civil Policy of Towns, takes notice only of thoſe who occupy the Houſes, becauſe they conſider them as Inhabitants, who are anſwerable to the Publick for the Perſons whom they receive into their Houſes, as to what concerns the matter of Policy which is here treated of.

VII.

7. *Of thoſe who take into their houſes Scholars, or other Perſons.* Schoolmaſters, Tradeſmen, and others who take into their Houſes Scholars, Apprentices, or other Perſons, to inſtruct them in ſome Art, Manufacture, or Trade, are anſwerable for the Fact of thoſe Perſons[h].

[h] Si horrearius aliquid dejecerit, vel effuderit, aut conductor apothecæ, vel qui in hoc dumtaxat conductum locum habet, ut ibi opus faciat, vel doceat, in factum actioni locus eſt, etiam ſi quis operantium dejecerit vel effuderit, vel ſi quis diſcentium. *l.* 5. §. 3. *ff. de his qui effud. vel dejec.*

VIII.

8. *If any thing has been thrown out with deſign to do hurt.* All the foregoing Articles are to be underſtood of that which has been thrown down, or poured out, through careleſſneſs, and without any deſign. But if it has been done with deſign, the Injury, the Offence, or Crime, will be chaſtiſed with ſeverer Puniſhments, according to the Nature of the Fact, and the Circumſtances[i].

[i] Interdùm injuriæ appellatione damnum culpa datum ſignificatur, ut in lege Aquilia dicere ſolemus. *l.* 1. *ff. de injur.*

IX.

9. *Prohibition to have any thing hung out, which may fall and do miſchief.* If there be any thing hung out from the Roof of a Houſe, from a Window, or any other Place, from whence the fall of it may do ſome harm, or damage, he who inhabits the Houſe, or Place, from whence it is hung out, will be condemned in ſuch Fine as ſhall have been regulated by the Policy of the Town, or ſuch as ſhall be inflicted by the Judge, according to the circumſtances; even altho' the thing did not fall, and altho' it had been put there by another than the Maſter of the Houſe. For it is for the Publick Intereſt, that Peo-

ple ſhould walk ſecurely, and without danger from Accidents of this kind[l].

[l] Prætor ait, *Ne quis in ſuggrunda, protectóve, ſupra eum locum quo vulgò iter fiet, inve quo conſiſtetur, id poſitum habeat, cujus caſus nocere cui poſſit. Qui adverſus ea fecerit, in eum ſolidorum decem in factum judicium dabo*. l. 5. §. 6. ff. de his qui effud. vel dejec. Hoc edictum ſuperioris portio eſt, conſequens etenim fuit, prætorem etiam in hunc caſum proſpicere, ut ſi quid in his partibus ædium periculosè poſitum eſſet, non noceret. *d. l. 5.* §. 7. Ait prætor, *Ne quis in ſuggrunda, protectóve.* Hæc verba, *Ne quis*, ad omnes pertinent, vel inquilinos, vel dominos ædium, ſive inhabitent, ſive non, habent tamen aliquid expoſitum his locis. *d. l. 5.* §. 8. Poſitum habere etiam is rectè videtur, qui ipſe quidem non poſuit, verùm ab alio poſitum patitur. Quare ſi ſervus poſuerit, dominus autem poſitum patiatur, non noxali judicio dominus, ſed ſuo nomine tenebitur. *d. l. 5.* §. 10. Prætor ait, *cujus caſus nocere poſſet*. Ex his verbis manifeſtatur non omne quidquid poſitum eſt, ſed quidquid ſic poſitum eſt, ut nocere poſſit. *d. l. 5.* §. 11.

X.

10. *If the fall of the thing that is hung out does any harm.*

If the thing that is hung out happens to fall, and cauſes any miſchief, he who inhabits the Houſe will be bound to make good the Damage, over and above the Penalty which he would be liable to, altho' no Accident had happened from the hanging out of the thing[m].

[m] Coërcetur autem qui poſitum habuit, ſive nocuit id quod poſitum erat, ſive non nocuit. *l. 5.* §. 11. *ff. de his qui effud. vel dejec.*

XI.

11. *Tiles falling from the Roof of a Houſe.*

If Tiles fall from the Roof of a Houſe which was in good caſe, and by the bare effect of a Storm, the Damage which may happen by ſuch Fall is an Accident for which the Proprietor, or Tenant, of the Houſe cannot be made accountable. But if the Roof was in a bad condition, he who was bound to keep it in repair, may be liable to make good the Damage that has happened, according to the circumſtances[n].

[n] Servius quoque putat, ſi ex ædibus promiſſoris, vento tegulæ dejectæ damnum vicino dederint, ita eum teneri, ſi ædificii vitio id acciderit, non ſi violentia ventorum, vel qua alia ratione, quæ vim habet divinam. Labeo & rationem adjicit, quod ſi hoc non admittatur, iniquum erit. Quod enim tam firmum ædificium eſt, ut fluminis, aut maris, aut tempeſtatis, aut ruinæ, aut incendii, aut terræ motus vim ſuſtinere poſſit? *l. 24.* §. 4. *l. 43. ff. de dam. inf.*

Altho' the Laws quoted upon this Article, relate to the Caſe of a Neighbour who had taken proper Care to prevent the danger; yet would it not be juſt that a Proprietor, or Tenant, of a Houſe ſhould be puniſhed for a Negligence which had been followed by ſuch an Accident? See the 22d Chapter of *Deuteronomy*, Verſe the 8th.

SECT. II.

Of Damage done by Living Creatures.

THE Order which links Mankind in Society together, obliges them not only to do no manner of Harm themſelves to any Mortal whatſoever, but likewiſe obliges every one to keep what is in his Poſſeſſion in ſuch a condition that no body may receive from it any Hurt, or Damage; which implies the duty of keeping up Living Creatures that any one has in his Poſſeſſion, ſo as that they may not be able to hurt the Perſons of Men, nor to cauſe them any Loſs or Damage in their Goods.

The moſt frequent Damage which is cauſed by Living Creatures, is that which Cattle do in the Country, by feeding in Places where, or at Times when the Owners of them have no Right of Paſturage. Seeing what concerns theſe ſorts of Damages is otherways regulated by the Cuſtoms of many Places than it was by the *Roman* Law, we ſhall put down here only ſome General Rules which may be of common Uſe, and not what is contained in the *Roman* Law contrary to the Cuſtoms, nor yet what is particular in the Cuſtoms relating to this Matter. Thus, for Example, it was not permitted by the *Roman* Law to impound Cattle which had done any Damage[a]; but this ſome Cuſtoms do allow of, as alſo of keeping them ſometime for a Proof of the Damage: and they likewiſe inflict a Fine on the Owners, or Poſſeſſors, of ſuch Cattle, altho' the Damage have been done only by Cattle that have ſtrayed, or made their eſcape from their Keeper.

[a] *L. 39.* §. 1. *ff. ad Legem Aquil.*

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8. *Of Dogs who bite.*
9. *Of wild Beaſts.*

10. *If a Beaſt does hurt, being provoked.*
11. *If the Beaſt hath been ſtirred up by another Beaſt.*
12. *If one Beaſt kills another, belonging to another Maſter.*

I.

1. The Maſter of the Cattle is anſwerable for the Damage which they do.

IF any Cattle that is kept, or that has eſcaped out of Cuſtody, has depaſtured in a Place where the Maſter of the Cattle had not the Right of Paſturage, or at a time when the Paſturage was not permitted, he ſhall be accountable for the Damage which his Cattle ſhall have cauſed[a].

[a] Si quadrupes pauperiem feciſſe dicatur, actio ex lege duodecim tabularum deſcendit. *l.* 1. *ff. ſi quadr. paup. fec. dic.*

De his quæ per injuriam depaſta contendis, ex ſententia legis Aquiliæ agere minimè prohiberis. *l. ult. C. de lege Aquil.* Si quid ex ea re damnum cepit, habet proprias actiones. *l.* 39. §. 1. *ff. ad leg. Aquil.* *V. Exod.* xxii. 5.

II.

2. He is alſo liable to a Fine.

If any one depaſtures his Cattle in a Ground which is not liable to Paſturage, or at a time when the Paſturage ought to ceaſe, the Maſter, or other Poſſeſſor, of the Cattle will not only be liable to make good the Damage, but likewiſe condemned in a Fine, ſuch as the Fact may deſerve, according to the circumſtances[b].

[b] Si quis ovium vel equarum greges in ſaltus rei dominicæ alienus immiſerit, fiſco illicò vindicentur. *l.* 1. *C. de fund. & ſalt. rei dom.* Inſignis authoritas tua, hac conditione à publicis pratis, ac amænis paſcuis animalia militum prohiberi præcipiat, ut univerſi cognoſcant, de emolumentis eorum, tuique officii facultatibus duodecim libras auri, fiſci commodis exhibendas, ſi quiſquam poſthac memorata prata mutilare tentaverit. Non mitiore decernenda pœna, ſi etiam prata privatorum Antiochenorum fuerint devaſtata. *l.* 2. *C. de paſc. publ. & privat. l. ult. eod.*

III.

3. Other Damage beſides that of grazing in another man's Ground.

If Cattle that is kept, or not kept, does any other Damage beſides that of feeding in another man's Ground, as if they break, or damage Trees, the Maſter, or other Poſſeſſor, will be obliged to make good the Damage, and will likewiſe be fined, if there be ground for it[c].

[c] Si quid ex ea re damnum cepit, habet proprias actiones. *l.* 39. §. 1. *ff. ad leg. Aquil.*

IV.

4. The Cattle ought to be driven out of another Man's Ground, without hurting them.

He who ſhall have taken the Cattle of another Perſon feeding in his Ground, or doing any other Damage; cannot uſe any Violence that may hurt the Cattle, nor drive them out in any other manner than he would do his own. And if he cauſes any Damage to the ſaid Cattle, he ſhall be bound to make it good[d].

[d] Quintus Mucius ſcribit, equa cùm in alieno paſceretur in cogendo, quòd prægnans erit, ejicit. Quærebatur dominus ejus poſſetne cum eo qui coëgiſſet lege Aquilia agere, quia equam ejiciendo ruperat. Si percuſſiſſet; aut conſultò vehementiùs egiſſet, viſum eſt agere poſſe. Pomponius, quamvis alienum pecus in agro ſuo quis deprehendiſſet, ſic illud expellere debet, quomodò ſi ſuum deprehendiſſet: quoniam ſi quid ex ea re damnum cepit, habet proprias actiones. Itaque qui pecus alienum in agro ſuo deprehenderit, non jure id includit: nec agere illud aliter debet quàm ut ſuprà diximus, quaſi ſuum: ſed vel abigere debet ſine damno, vel admonere dominum ut ſuum recipiat. *l.* 39. *ff. ad legem Aquil.*

By the Cuſtoms of ſome Places it is allowed to impound the Cattle that do any Damage, as has been obſerved in the Preamble.

V.

5. Of him who cannot keep in his Horſe, or other Beaſt.

As to all other Damage which may be done by Beaſts, he who is the Owner, or who has the Charge of them, will be anſwerable for it, if he could, or ought to have prevented the Evil. Thus a Mule-Driver, a Waggoner, or other Carrier, who hath not ſtrength or ſkill enough to hold in a mettleſome Horſe, or an unruly Mule, will be liable for the Damage which they ſhall cauſe. For he ought not to have undertaken what he had not ſkill, or ſtrength enough to perform: Thus he who by overloading a Horſe, or other Beaſt, or by not avoiding a dangerous Step, or by ſome other Fault, occaſions a Fall which cauſes Damage to ſome Paſſenger, will be made accountable for the ſaid Fact. And in all theſe Caſes, he who ſuffers the Damage, ſhall have his Action againſt the Carrier, or againſt the perſon who imployed him[e].

[e] Mulionem quoque, ſi per imperitiam impetum mularum retinere non potuerit, ſive alienum hominem obtriverint, vulgò dicitur culpæ nomine teneri. Idem dicitur, & ſi propter infirmitatem ſuſtinere mularum impetum non potuerit. Nec videtur iniquum ſi infirmitas culpæ adnumeretur: cùm affectare quiſque non debeat in quo vel intelligit, vel intelligere debet infirmitatem ſuam alii periculoſam futuram. Idem juris eſt in perſona ejus qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem, retinere non poterit. *l.* 8. §. 1. *ff. ad leg. Aquil.* Si propter loci iniquitatem, aut propter culpam mulionis, aut ſi plus juſto onerata quadrupes, in aliquem onus everterit: hæc actio ceſſabit, damnique injuriæ agetur. *l.* 1. §. 4. *ff. ſi quadr. paup. fec. dic.*

VI.

6. Of an Ox that puſhes with his Horns.

If an Ox has a trick of puſhing with his Horns, and wounds any one, or cauſes any other Damage, the Maſter who has neglected to ſhut up this Ox, or to give ſuch warning that people might avoid him, ſhall be anſwerable for the Harm he ſhall do[f].

[f] Quidam boves vendidit, ea lege uti daret experiundos: poſtea dedit experiundos: emptoris ſervus in experiundo percuſſus ab altero bove cornu eſt. Quærebatur, num venditor emptori damnum præſtare deberet. Reſpondi, ſi emptor boves emptos haberet, non debere præſtare: ſed ſi non haberet emptos, tum ſi culpa hominis factum eſſet ut à bove feriretur, non debere præſtari: ſi vitio bovis, debere. *l. 52. §. 3. ff. ad leg. Aquil.* V. Exod. xxi. 29, 36.

VII.

7. Of Horſes who bite, or kick. Thoſe who have Horſes, or Mules, which kick, or bite, ought either to warn people of their being vicious, or to take care to have them well watched, to prevent all Occaſions of Danger; otherwiſe they will be made liable for the Damage which they ſhall happen to do[g].

[g] Itaque, ut Servius ſcribit, tunc hæc actio locum habet, cùm commota feritate nocuit quadrupes. Putà ſi equus calcitroſus calce percuſſerit; aut bos cornu petere ſolitus, petierit; aut mula propter nimiam ferociam. *l. 1. §. 4. ff. ſi quadrup. paup. fec. dic.* Agaſo cùm in tabernam equum deduceret, mulam equus olfecit, mula calcem rejecit, & crus Agaſonis fregit. Conſulebatur, poſſetne cum domino mulæ agi, quòd ea pauperiem feciſſet; reſpondi, poſſe. *l. ult. eod.* Si cùm equum permulſiſſet quis, vel palpatus eſt, & calce eum percuſſerit, erit actioni locus. *l. 1. §. 7. eod.*

We muſt take care, in applying this laſt Text, not to impute too eaſily to the Maſter of a Horſe, or of any other Beaſt, the Accidents which may have been occaſioned by the Imprudence of thoſe to whom they happen. Thus, for Example, if one who is ignorant whether a Horſe kicks or not, goes too near him without neceſſity, and lays his hand on his Crupper, ſtanding within reach of a Kick, it is an act of Imprudence, becauſe one ought to miſtruſt: and ſuch an Imprudence may occaſion the Horſe's ſtriking, where no blame could be imputed to the Maſter of the Horſe.

VIII.

8. Of Dogs who bite. If a Dog who has a trick of biting is not kept up, or if he gets looſe; for want of being well looked after, and wounds any one; the Maſter of the Dog will be liable to make good the Damage. And that with much more reaſon, if it was a Dog who ought to be chained up, and who was not put out of a condition of hurting thoſe who might come near him thro' inadvertency[h].

[h] Sed & ſi canis cùm duceretur ab aliquo, aſperitate ſua evaſerit, & alicui damnum dederit: ſi contineri firmius ab alio poterit, vel ſi per eum locum induci non debuit, hæc actio ceſſabit, & tenebitur qui canem tenebat. *l. 1. §. 5. ff. ſi quadr. paup. fec. dic.* Si quis aliquem evitans, magiſtratum forte, in taberna proxima ſe immiſiſſet, ibique à cane feroce læſus eſſet, non poſſe agi canis nomine quidam putavit: at ſi ſolutus fuiſſet, contra. *l. 2. §. 1. eod.*

IX.

9. Of wild Beaſts. Thoſe who have wild Beaſts, ſuch as Lions, Tygers, Bears, and others of the like kind, ought to keep them in ſuch a manner that it be not in their power to do any harm; and they ſhall anſwer for all the Damage, that is occaſioned by their not being ſtrictly kept up[i].

[i] *This is a conſequence of the foregoing Article.* In beſtiis autem propter naturalem feritatem, hæc actio locum non habet. Et ideò, ſi urſus fugit, & ſic nocuit, non poteſt quondam dominus conveniri: quia deſinit dominus eſſe, ubi fera evaſit. Et ideò, & ſi eum occidi, meum corpus eſt. *l. 1. §. 10. ff. ſi quadr. paup. fec. dic.*

To juſtify the Impunity of the Maſter of this Bear, we muſt ſuppoſe that it was without the Maſter's Fault that the Bear got looſe, as if any one had maliciouſly ſet him at liberty, when the Maſter could not be blamed for it. For if the Bear gets looſe thro' the Maſter's Fault, it is both equitable, and alſo for the Publick Good, that he be made anſwerable for a Fault of ſuch Conſequence. And ſeeing he profits by the Uſe which he can make of this Beaſt, ſeeing he was the Maſter of it, and may even claim it as his Property, having purchaſed it either with his Money, or by his Induſtry, and having ſpent his Time, and Labour, to draw ſome Profit from it; he ought to anſwer for it.

X.

10. If a Beaſt does hurt, being provoked. If a Dog, or other Creature, bites, or does any other Damage, only becauſe he has been provoked, or egged on; he who ſhall have given occaſion to the Evil that has happened, ſhall be accountable for it: and if it be the ſame perſon who has ſuffered the Evil, he ought to blame himſelf for it[l].

[l] Item cum eo qui canem irritaverat, & effecerat ut aliquem morderet, quamvis eum non tenuit, Proculus reſpondit, Aquiliæ actionem eſſe. *l. 11. §. 5. ff. ad leg. Aquil. l. 1. §. 6. ff. ſi quadr. paup. fec. dic. V. d. l. §. 7.*

XI.

11. If the Beaſt hath been ſtirred up by another Beaſt. If the Beaſt which has done the Damage hath been exaſperated and ſtirred up by another Beaſt, the Maſter of this Beaſt which ſtirred up the other to do the Damage, ſhall be accountable for it[m].

[m] Et ſi alia quadrupes aliam concitavit, ut damnum daret: ejus, quæ concitavit nomine, agendum erit. *l. 1. §. 8. ff. ſi quadr. paup. fec. dic. v. d. l. §. 7.*

XII.

12. If one Beaſt kills another, belonging to another Maſter. If two Rams, or two Oxen, belonging to two different Maſters, happen to run at one another, and one of them kills the other, the Maſter of the Ox, or Ram, which was the firſt Aggreſſor, will be obliged either to abandon the

Beaſt which has done the Damage, or to make good the other's Loſs[n].

[n] Cùm arietes vel boves commiſiſſent, & alter alterum occidit: Quintus Marcius diſtinxit, ut ſi quidem is periiſſet qui aggreſſus erat, ceſſaret actio: ſi is qui non provocaverat, competeret actio. Quamobrem, eum tibi aut noxam ſarcire, aut in noxam dedere oportere. *l.* 1. §. 11. *ff. ſi quadr. paup. fec. dic.*

SECT. III.

Of the Damage which may happen by the Fall of a Building, or of any new Work.

SEeing in this Matter our Uſage is different from the Diſpoſition of the *Roman* Law, and that we do not obſerve the Rule, which directed him whoſe Building was in danger of being damaged by the Fall of another Building gone to decay, to be put into Poſſeſſion of the ruinous Building, if the Owner thereof did not give him Surety for the Damage that was to be apprehended from it[a]; we have endeavoured to turn and accommodate to our Uſage the Rules of the *Roman* Law, according as they may be applied to it.

[a] Si intra diem à prætore conſtituendum non caveatur, in poſſeſſionem ejus rei mittendus eſt. *l.* 4. §. 1. *ff. de damn. inf.*

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I.

1. The Owner of the ruinous Building may be ſummoned to demoliſh or repair it.

IF a Building is in danger of falling, the Proprietor of the adjoining Houſe, or Tenement, ſeeing his own Building in hazard of being damaged by the Fall of the other, may ſummon the Owner of the ruinous Building, either to pull it down, or to repair it, ſo as that there may be no more danger from it[a]. And ſeeing it is an Evil to come, which may happen every moment, and which it is neceſſary to prevent, if he does not give ſpeedy ſatiſfaction, the Magiſtrate will give Order about it, according to the Rules which follow.

[a] Damnum infectum eſt damnum nondùm factum, quod futurum veremur. *l.* 2. *ff. de damn. inf.* Hoc edictum proſpicit damno nondùm facto. *l.* 7. §. 1. *eod.* Prætor ait, damni infecti ſuo nomine promitti; alieno ſatiſdari, jubebo. *d. l.* 7. Res damni infecti celeritatem deſiderat: & periculoſa dilatio. *l.* 1. *eod.* Hoc edictum proſpicit damno nondùm facto. *l.* 7. §. 1. *eod. l.* 2. *eod.*

II.

2. Permiſſion from the Judge to provide againſt the Danger.

If the Proprietor of the Building, whoſe Fall may do hurt to his Neighbour, after having been legally ſummoned to prevent the Evil, neglects to take care of it, he whoſe Tenement is in danger from the Fall of the other, may demand proviſionally, that he himſelf may be permitted to do whatever ſkilful Perſons ſhall judge neceſſary to prevent the Fall of the ſaid Building, whether by propping it up, or demoliſhing it, if there be occaſion, and he ſhall recover from the Proprietor of the decayed Building, the Expences which he ſhall have laid out on this account[b].

[b] Eum cui ità non cavebitur, in poſſeſſionem ejus rei cujus nomine ut caveatur poſtulabitur, ire & cùm juſta cauſa eſſe videbitur, etiam poſſidere jubebo. *l.* 7. *ff. de damn. inf.* Caſſius ſcribit, eum qui damni infecti ſtipulatus eſt, ſi propter metum ruinæ ea ædificia quorum nomine ſibi cavit, fulſit impenſas ejus rei ex ſtipulatu conſequi poſſe. *l.* 28. *eod. l.* 15. §. 34. *eod.*

III.

3. He will recover Damages againſt the negligent Proprietor.

If during the delay of the Proprietor who is condemned, or ſummoned, to demoliſh, or prop up, his Building, it chances to fall, he will be liable to Damages, according to the circumſtances[c].

[c] In eum qui neque caverit, neque in poſſeſſione eſſe, neque poſſidere paſſus erit, judicium dabo: ut tantum præſtet, quantum præſtare eum oporteret,

teret, ſi de ea re ex decreto meo, ejuſve cujus de ea re juriſdictio fuit, quæ mea eſt, cautum fuiſſet. *l.* 7. *ff. de damn. inf.* In hac ſtipulatione venit quanti ea res erit. *l.* 28. *eod.* In eadem cauſa eſt detrimentum quoque propter emigrationem inquilinorum, quod ex juſto metu factum eſt. *d. l.* 28. Sed etſi conducere hoſpitium nemo velit propter vitium ædium, idem erit dicendum. *l.* 29. *eod.*

If becauſe of the danger from the Fall of a ruinous Building, or of the Damage which its Fall may have cauſed to an adjoining Houſe, the Proprietor, or Tenants, of the ſaid Houſe have been forced to quit their Dwelling, and that the ſaid Houſe has either been thrown down by the Fall of the other, or ſo damaged that it is not in a condition of being inhabited; the Proprietor of the Building which cauſed the Damage, will be be liable not only to pay the Damages occaſioned by the Fall, or to repair the Miſchief that is done to the neighbouring Houſe; or will he likewiſe be obliged to make good to the Landlord the Loſs of his Rent? And all theſe Reparations of Damages, muſt they take place in all ſorts of Caſes, without diſtinction of the different circumſtances that may chance to be in the different Caſes? And if it ſhould happen, for Example, that the Owner of the ruinous Houſe were at a great diſtance, and had been long abſent, or that not having wherewithal to repair, or prop up his Houſe, he had made anſwer to the Summons, that he himſelf not being able to do what was deſired of him, he therefore intreated his Neighbour, who was a Perſon of Wealth and Subſtance, to prop up the Building himſelf, or to make the neceſſary Repairs, offering him, for the Security of the Expences he ſhould be at, the Mortgage of the Houſe, and this Neighbour refuſing to do any thing therein, the Houſe fell; would it not be equitable, under theſe circumſtances, to mitigate the Damage, or even to acquit the ſaid Proprietor from paying any Damages at all? But if we ſuppoſe a Proprietor rich and negligent, who being ſummoned to prop up his Building, has ſuffered it to fall upon the Houſe of a poor Neighbour, ought not this Negligence to be puniſhed by an intire Satisfaction, both for the Loſs of the Houſe, and also of the Rent?

IV.

4. If the Building falls before the Proprietor has been warned to repair it.

If the Building falls before any Warning has been given to the Proprietor, he will not be obliged to make good the Damage, if he is willing to abandon both the Ground, and Materials of the Building: in which caſe he will not be obliged ſo much as to carry off the Rubbiſh. For he who has ſuffered the Damage ought to blame himſelf for not having timely enough provided againſt the danger which he might have eaſily foreſeen. But if the Proprietor will have back the Materials of his Building, or keep the Ground on which it ſtood, he ſhall be bound to make good all the Damage cauſed by the Fall of his Building, altho' no Warning had been given him to repair it before it fell. And he will alſo be obliged in this caſe to remove from his Neighbour's Ground, not only the Materials of the Building which may ſerve again, but likewiſe all the Rubbiſh which will be of no uſe[d].

[d] Unicuique licet damni infecti nomine rem derelinquere. *l.* 10. §. 1. *ff. de neg. geſt.*

Evenit ut nonnunquàm damno dato nulla nobis competat actio, non interpoſita antea cautione: veluti, ſi vicini ædes ruinoſæ ceciderint. Adeò ut pleriſque placuerit, nec cogi quidem eum poſſe ut rudera tollat: ſi modò omnia quæ jaceant pro derelicto habeat. *l.* 6. *ff. de damn. inf.* Hoc edictum proſpicit damno nondùm facto, cùm cæteræ actiones ad damna quæ contigerunt ſarcienda pertineant: ut in legis Aquiliæ actione, & aliis. De damno verò facto, nihil Edicto cavetur. Cùm enim animalia quæ noxam commiſerunt, non ultrà nos ſolent onerare, quàm ut noxæ ea dedamus: multò magis ea quæ anima carent, ultra nos non deberent onerare: præſertim cùm res quidem animales, quæ damnum dederint, ipſæ extent, ædes autem ſi ruina ſua damnum dederunt, deſierint extare, unde quæritur, ſi antequam caveretur, ædes deciderunt, neque dominus rudera velit egerere, eáque derelinquat, an ſit aliqua adversùs eum actio? & Julianus conſultus, ſi priuſquam damni infecti ſtipulatio interponeretur, ædes vitioſæ corruiſſent, quid facere debet is in cujus ædes rudera decidiſſent, ut damnum ſarciretur: reſpondit, ſi dominus ædium quæ ruerunt, vellet tollere, non aliter permittendum, quàm ut omnia, id eſt, ut quæ inutilia eſſent auferret: nec ſolum de futuro, ſed & de præterito damno cavere eum debere. Quòd ſi dominus ædium quæ deciderunt, nihil facit, interdictum reddendum ei, in cujus ædes rudera decidiſſent, per quod vicinus compelletur, aut tollere, aut totas ædes pro derelicto habere. *l.* 7. §. 1. & 2. *ff. eod.* See the fourth and fifth Articles of the ſecond Section of the Title of Engagements formed by Accidents.

V.

5. Of the ſuperfluous Ornaments of a Building that is thrown down by the Fall of another.

If by the Fall of a Building which had thrown down another, there be ground for recovering Damages, and if there was Painting, Carving, or other Ornaments ſerving barely for Pleaſure, in the Place which was thrown down by the Fall of the other Building; the Things of this kind being of ſuperfluous Uſe, would not be eſtimated at their full Value. But the ſaid Eſtimation would be made with Moderation, and with a Temperament of Juſtice and Humanity, according as the Quality of the Fact which may have given occaſion to the Damage, that of the Perſons, and the other Circumſtances might require[e].

[e] Ex damni infecti ſtipulatione non oportet infinitam vel immoderatam æſtimationem fieri, ut putà ob tectoria, & ob picturas: licet enim in hæc magna erogatio facta eſt, attamen ex damni infecti ſtipulatione moderatam æſtimationem faciendam: quia honeſtus modus ſervandus eſt, non immoderata cujuſque luxuria ſubſequenda. *l.* 40. *ff. de damn. inf.*

We muſt obſerve here the difference between this Caſe and that of the fourth Article of the fourth Section of Services, where he who throws down a Partition Wall, to make it ſufficient for the uſe of the Service, owes nothing for the value of the Paintings which his Neighbour had on the ſaid Wall. For in the caſe of that fourth Article, each Proprietor had a Right to pull down, and rebuild, the Partition Wall, according as the uſe of the Service required, and conſequently is not liable to Damages. And he who was at the Expence of theſe ſuperfluous Things, ought to blame himſelf for having expoſed them to this Accident, by putting them on a Wall, to which another had an equal Right with himſelf. But in the preſent Caſe, it is quite the contrary; for it is by the Fault of the Neighbour, that his Building has thrown down the other.

VI.

6. When a Houſe is thrown down by an Accident, after the Owner has been warned to repair it.

If a Houſe which was going to decay, and for preventing the Fall of which the Neighbour had given Warning to its Owner, is afterwards thrown down by an Accident, ſuch as a Flood, or a violent Storm of Wind, and the Fall of it throws down the adjoining Houſe, the Proprietor of the Houſe whoſe Fall throws down the other, will not be accountable for this Accident; unleſs it be that the Flood, or Storm, has thrown down the Houſe only becauſe of the bad condition it was in[f].

[f] Idem ait, ſi damni infecti ædium mearum nomine tibi promiſero, deinde hæ ædes vi tempeſtatis in tua ædificia ceciderint, eáque diruerint: nihil ex ea ſtipulatione præſtari, quia nullum damnum vitio mearum ædium tibi contingit: niſi forte ita vitioſæ meæ ædes fuerint, ut qualibet vel minima tempeſtate ruerint. *l.* 24. §. 10. *ff. de damn. inf.*

VII.

7. If the decayed Houſe belongs to ſeveral Owners.

If the Building, whoſe Fall hath cauſed ſome Damage, belongs to ſeveral Owners, they will not be anſwerable each for the Whole Damage; but every one in proportion to the Share which he had in the Houſe that is fallen[g].

[g] Si plurium ſint ædes quæ damnosè imminent, utrùm adversùs unumquemque dominorum in ſolidum competit, an in partem? & ſcribit Julianus, quod & Sabinus probat, pro dominicis partibus conveniri eos oportere. *l.* 40. §. 3. *ff. de damn. inf. l.* 5. §. 1. *eod.*

VIII.

8. *New Works prohibited.*

Thoſe who make any new Work, that is, who make any Change in the condition of the Places[h], whether it be in Eſtates lying in the City, or Country, whether in Places belonging to particular Perſons, or in thoſe of Publick Uſe, ought to ſerve their own Conveniency in ſuch a manner as not to treſpaſs in the leaſt on the Right of other Perſons concerned in the Change which they pretend to make[i]. For altho' one may make upon his own Eſtate whatever Changes he ſtands in need of, and often even although they may be hurtful to other Perſons, as ſhall be explained in the following Article; yet one cannot make thoſe Alterations which another Perſon may have a Right to hinder. Thus, altho' one may raiſe his Houſe higher, and thereby prejudice his Neighbour, by taking away his Proſpect; yet he who is ſubject to the Service of not raiſing his Building higher, has not any more that Liberty, while the Service can have its Uſe[l]. Thus he who with regard to a Spring of Water in his Eſtate, or a Rivulet running thro' his Grounds, might let it diſcharge it ſelf according to the Natural Courſe which the Waters ſhould take, may have loſt this Liberty by the Right which a Neighbour may have acquired to have this Water conveyed into his Lands by a Canal, or Conduit, which is to diſcharge it ſelf in a certain place[m]. And if in theſe Caſes the Proprietor of a Piece of Ground makes any new Work therein which is hurtful either to his Neighbour, or even to others, whoſe Eſtates are at ſome diſtance from his, but who have a Right to hinder him from making the ſaid new Work; he will be obliged to reſtore Things to their firſt Eſtate, and to repair the Damage which he may have cauſed by his Innovation[n].

[h] Opus novum facere videtur qui aut ædificando, aut detrahendo aliquid, priſtinam faciem operis mutat. *l.* 1. §. 11. *ff. de oper. nov. nunt.*

[i] Sic debet meliorem ſuum agrum facere, ne vicini deteriorem faciat. *l.* 1. §. 4. *ff. de aqua & aq. plu. arc.* Prodeſſe ſibi unuſquiſque, dum alii non nocet, non prohibetur. *d. l.* §. 11.

[l] *See the ninth Article of the ſecond Section of Services, and the fourth Article of the ſixth Section of the ſame Title.*

[m] *See the third Article of the third Section of Services, and the firſt Article of the fourth Section of the ſame Title.*

[n] Quem in locum nuntiatum eſt, nequid operis novi fieret, qua de re agitur, quod in eo loco, antequam nuntiatio miſſa fieret, aut in ea cauſa eſſet, ut remitti deberet, factum eſt, id reſtituas. *l.* 20. *ff. de op. nov. nunt.* Quod ſi ita reſtitutum non erit, quanti ea res erit tantam pecuniam dabit. *l.* 21. §. 4. *eod.* Non ſolùm proximo vicino, ſed etiam ſuperiori opus facienti nuntiare opus novum potero. Nam & ſervitutes quædam intervenientibus mediis locis, vel publicis, vel privatis eſſe poſſunt. *l.* 8. *eod.* Sive autem intra oppida, ſive extra oppida, in villis vel agris opus novum fiat, nuntiatio ex hoc edicto locum habet, ſive in privato, ſive in publico opus fiat. *d. l.* 1. §. 14.

IX.

9. *A new Work which one has a Right to make, altho' it may prejudice his Neighbour.*

He who in making a new Work upon his own Eſtate uſes his Right, without treſpaſſing either againſt any Law, Cuſtom, Title, or Poſſeſſion, which may ſubject him to any Service towards his Neighbours, is not anſwerable for the Damage which they may chance to ſuſtain thereby, unleſs it be that he made that Change meerly with a View to hurt others, without any Advantage to himſelf. For in this caſe, it would be a pure act of Malice, which Equity would not allow of. But if the Work were uſeful to him, as if he made in his Eſtate any lawful Repairs, to ſecure it againſt the Overflowings of a Torrent, or River, and that his Neighbour's Grounds were thereby the more expoſed to the Flood, or ſuffered from thence any other Inconvenience, he could not be made anſwerable for it. Thus he who digging for Water in his own Ground, ſhould thereby drain a Well, or Spring, in his Neighbour's Ground, would be liable to no Action of Damages on that ſcore[o]. For in theſe and the like Caſes, theſe Events are Caſualties, and Natural Effects of the Condition into which he who makes the Changes has had a Right to put the Things. And it is not his Act which cauſes the Damage.

[o] Marcellus ſcribit cum eo qui in ſuo fodiens, vicini fontem avertit, nihil poſſe agi: nec de dolo actionem. Et ſanè non debet habere, ſi non animo vicino nocendi, ſed ſuum agrum meliorem faciendi, id fecit. *l.* 1. §. 12. *ff. de aq. & aq. plu. arc. l.* 21. *eod.* In domo mea puteum aperio, quo aperto venæ putei tui præciſæ ſunt: an tenearis? Trebatius non teneri me damni infecti: neque enim exiſtimari, operis mei vitio damnum tibi dari, in ea re, in qua jure meo uſus ſum. *l.* 24. §. 12. *ff. de damn. inf.* See the ninth Article of the ſecond Section of Services. Idem Labeo ait, ſi vicinum flumen torrentem averterit, ne aqua ad eum perveniat: & hoc modo ſit effectum, ut vicino noceatur, agi cum eo aquæ pluviæ arcendæ non poſſe. *Aquam* enim *arcere*, hoc eſſe curare ne influat. Quæ ſententia verior eſt: ſi modò non hoc animo fecit, ut tibi noceat, ſed ne ſibi noceat. *l.* 2. §. 9. *ff. de aq. & aq. plu. arc.* Neque malitiis indulgendum eſt. *l.* 38. *ff. de rei vind.*

X.

10. A Work which one cannot do to the prejudice of his Neighbour.

If the Work which a Proprietor would make in his own Ground, be contrary to any Law, or Cuſtom, or if it be an Undertaking that is againſt a Title, or Poſſeſſion, to the prejudice of a Neighbour who might thereby ſuffer ſome Damage, the Neighbour may hinder him from making it, and will likewiſe recover Damages for what he ſhall have ſuffered thereby. Thus he who digging in his own Ground beyond the diſtance which is allowed, ſhould endanger the Foundation of his Neighbour's Houſe, would be anſwerable for it[p].

[p] Si tam altè fodiam in meo ut paries tuus ſtare non poſſit, damni infecti ſtipulatio committitur. *l.* 24. §. 12. *ff. de damn. inf.*

XI.

11. One cannot change the ancient Courſe of the Waters.

If Rain-Water, or other Waters, have their Courſe regulated from one Ground to another, whether it be by the Nature of the Place, or by ſome Regulation, or by a Title, or by an ancient Poſſeſſion, the Proprietors of the ſaid Grounds cannot innovate any thing as to the ancient Courſe of the Waters. Thus, he who has the Upper Grounds cannot change the Courſe of the Water, either by turning it ſome other way, or rendring it more rapid, or making any other Changes in it, to the prejudice of the Owner of the Lower Grounds. Neither can he who has the Lower Eſtate do any thing that may hinder his Grounds from receiving the Water which they ought to receive, and that in the manner which has been regulated[q]. But the Changes which happen naturally without the Hand of Man, and which cauſe ſome Loſs to one of the Neighbours, and Profit to the other, ought either to be ſuffered or remedied, according to the Rules which ſhall be explained in the ſubſequent Title[r].

[q] *See the fifth and ſixth Articles of the firſt Section of the following Title.*

[r] In ſumma tria ſunt per quæ inferior locus ſuperiori ſervit, lex, natura loci, vetuſtas, quæ ſemper pro lege habetur, minuendarum litium cauſa. *l.* 2. *ff. de aqu. & aq. plu. arc.* Item ſciendum eſt, hanc actionem vel ſuperiori adverſus inferiorem competere, ne aquam quæ natura fluat, opere facto inhibeat per ſuum agrum decurrere: & inferiori adverſus ſuperiorem, ne aliter aquam mittat, quàm fluere natura ſolet. *l.* 1. §. 13. *eod.* Toties locum habet (hæc actio) quoties manufacto opere agro aqua nocitura eſt: cùm quis manu fecerit quò aliter flueret, quàm natura ſoleret: ſi fortè immittendo eam aut majorem fecerit, aut citatiorem, aut vehementiorem, aut ſi comprimendo redundare effecit. *l.* 1. §. 1. *ff. de aq. & aq. plu. arc.* Quòd ſi natura aqua noceret, ea actione non continetur. *d.* §. 1. *in f.* Iidem aiunt ſi aqua naturaliter decurrat, aquæ pluviæ actionem ceſſare. Quòd ſi opere facto aqua aut in ſuperiorem partem repellitur, aut in inferiorem derivatur, aquæ pluviæ arcendæ actionem competere. *l.* 1. §. 10. *ff. de aqua & aq. pluv. arc.*

XII.

12. Prohibition to innovate.

He who pretends that a new Work which another undertakes is prejudicial to him, ought to apply himſelf to the Judge, who may prohibit him, either to begin the Work, or to continue it, if it is begun, till Judgment be given whether the Work ought to be permitted, or forbid. And theſe Prohibitions may be granted proviſionally, upon the bare Complaint of the new Undertaking, if it be any ways doubtful whether it may do hurt or not[ſ].

[ſ] Hoc edicto promittitur, ut, ſive jure, ſive injuria opus fieret, per nuntiationem inhiberetur, deinde remitteretur prohibitio hactenus, quatenus prohibendi jus is qui nuntiaſſet, non haberet. *l.* 1. *ff. de oper. nov. nunt.*

XIII.

13. The Building in publick Places forbid.

The building of new Works in Publick Places is forbid, and that with much more Reaſon than thoſe which are made in Places belonging to private Perſons. And ſuch Attempts are puniſhed by Fines, or other Penalties, according to the Nature of the Fact, and the Circumſtances[t].

SECT. IV.

Of other Kinds of Damages occaſioned by Faults, without either Crime, or Offence.

See upon this Subject, the ſecond Section of the Title of Intereſt, Damages, &c.

The CONTENTS.

1. *Damage occaſioned by Faults, without an Intention of doing Harm.*
2. *Failure of Deliverance of a Thing to the Owner.*
3. *Damage cauſed by an innocent Fact.*
4. *Precautions to be uſed in Works, from whence any Damage may happen.*
5. *Ignorance of what one is obliged to know.*
6. *Fire.*
7. *Damage done to avoid a danger.*
8. *Damage which another perſon might have prevented.*
9. *Damage happening by an Accident, which was preceded by ſome Fact that gave occaſion to it.*
10. *Damage cauſed by an Accident preceded by a Fault.*

I.

1. *Damage occaſioned by Faults, without an Intention of doing Harm.*

ALL the Loſſes, and all the Damages which may happen by the act of any Perſon, whether out of Imprudence, Raſhneſs, Ignorance of what one ought to know, or other Faults of the like Nature, however trivial they may be, ought to be repaired by him whoſe Imprudence, or other Fault, has given Occaſion to it. For it is a Wrong that he has done, even altho' he had no Intention to do harm. Thus, he who playing imprudently at Mall, in a Place where there might be danger for thoſe that were paſſing by, chances to hurt any one, will be anſwerable for the Harm which he ſhall have cauſed[a].

II.

2. *Failure of Deliverance of a Thing to the Owner.*

The Failure in the performance of an Engagement, is alſo a Fault which may give Occaſion to Damages, which the Party who fails will be liable to. Thus a Seller who refuſes to deliver what he has ſold, a Depoſitary, who delays to reſtore the Thing depoſited with him, an Executor, who detains the Thing bequeathed; and all thoſe who having in their Poſſeſſion a Thing which they ought to deliver up, refuſe or delay to do it, are liable not only for the Damages which their Delay ſhall have occaſioned, but alſo for the Value of the Thing, if it periſhes, after they ſhall have been in Fault for not delivering it; even altho' the Thing ſhould periſh by ſome Accident. For that Accident might not have happened to the Thing, if it had been in the hands of the Owner, or he might have diſpoſed of it before it periſhed[b].

III.

3. *Damage cauſed by an innocent Fact.*

If there happens any Damage by an unforeſeen Conſequence of an innocent Fact, when no blame can be charged on the Author of the Fact; he will not be anſwerable for ſuch a Conſequence. For this Event will have ſome other Cauſe joined with that of the Fact, whether it be the Imprudence of the Perſon who has ſuffered the Damage, or ſome Accident. And it is either to this Imprudence, or to this Accident, that the Damage ought to be imputed. Thus, for Example, if any one goes to croſs a Publick Mall whilſt People are playing in it, and that the Ball being already ſtruck, chances to hurt him; the innocent Fact of the Perſon who ſtruck the Ball, does not make him anſwerable for an Event, which ought to be imputed either to the Imprudence of the Perſon to whom it has happened, if he could not be ignorant that that was a Publick Mall, or to a meer Accident, if that Fact was altogether unknown to him, and if nothing of Imprudence could be imputed to him who, ſtruck the Ball[c].

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[t] Nuntiatio ex hoc edicto locum habet, ſive in privato, ſive in publico opus fiat. *l.* 1. §. 14. *ff. de oper. nov. nunt.* Publici juris tuendi gratia. *d. l.* 1. §. 16. Nuntiamus autem —— ſi quid contra leges, edictave principum, quæ ad modum ædificiorum facta ſunt, fiet, vel in ſacro, vel in loco religioſo, vel in publico, ripáve fluminis, quibus ex cauſis & interdicta proponuntur. *d. l.* §. 17.

[a] Interdùm injuriæ appellatione damnum culpa datum ſignificatur, ut in lege Aquilia dicere ſolemus. *l.* 1. *ff. de injur.* Injuriam autem hic accipere nos oportet, non quemadmodùm circa injuriarum actionem, contumeliam quamdam, ſed quod non jure factum eſt, hoc eſt contra jus —— Igitur injuriam hic damnum accipiemus culpa datum, etiam ab eo qui nocere noluit. *l.* 5. §. 1. *ff. ad leg. Aquil.* Si per luſum à jaculantibus ſervus fuerit occiſus, Aquiliæ locus eſt. *l.* 9. §. *ult. eod.* Nam luſus quoque noxius in culpa eſt. *l.* 10. *eod.* In lege Aquilia & leviſſima culpa venit. *l.* 44. *eod.*

[b] Quod te mihi dare oporteat, ſi id poſteà perierit, quàm per te factum erit, quominùs id mihi dares, tuum fore id detrimentum conſtat. *l.* 5. *ff. de reb. cred.* See the ſeventeenth Article of the ſecond Section, and the third Article of the ſeventh Section of the Contract of Sale, and the tenth Article of the third Section of a Depoſitum.

IV.

4. Precautions to be uſed in Works from whence any Damage may happen.

Thoſe who make any Works, or do any other Thing from whence may enſue ſome Damage to other Perſons, will be anſwerable for the Damage, if they have not taken the neceſſary Precautions to prevent it. Thus Maſons, Carpenters and others, who, by the help of Scaffolds and Machines carry up their Materials: thoſe who from the top of a Tree cut down the Branches of it, ought to give warning to the Perſons whom their Work might put in danger: and if they do it not, and that timely, they will be anſwerable for the Damage which ſhall happen from thence, and be liable to other Penalties, according to the circumſtances. Thus Huntſmen, or others, who dig Holes, or Ditches, for catching of Wild Beaſts, in the High Ways, or in other Places, where they have no Right to do it, will be anſwerable for the Damage which ſhall happen thereby[d].

V.

5. Ignorance of what one is obliged to know.

We muſt reckon among the Damages cauſed by Faults, thoſe which happen thro' Ignorance of Things which one ought to know. Thus when an Artificer, for want of knowing what belongs to his Profeſſion, commits a Fault which cauſes ſome Damage, he is anſwerable for it. Thus, if it happens that a Carman not having rightly laid the Stones which he has loaded on his Cart, one of them falls out, and does ſome harm, he muſt anſwer for it[e].

VI.

6. Fire.

Fire never happens almoſt without ſome Fault, at leaſt that of Imprudence, or Negligence: and thoſe thro' whoſe Fault, let it be never ſo ſlight, a Fire has happened, will be anſwerable for all the Damage it does[f].

VII.

7. Damage done to avoid a danger.

It happens ſometimes that a voluntary Fact cauſes Damage, and yet that he who is the Cauſe thereof is not anſwerable for it. Thus, for Example, if a ſudden Guſt of Wind drives a Ship upon the Anchor-Cables of another Ship, or upon the Nets of Fiſhermen, and the Maſter of the Ship that is thus drove by

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[c] Si cùm alii in campo jacularentur, ſervus per eum locum tranſierit, Aquilia ceſſat. Quia non debuit per campum jaculatorium iter intempeſtivè facere. *l. 9. §. ult. ff. ad leg. Aquil.*

Item Mela ſcribit, ſi cùm pila quidam luderent, vehementiùs quis pila percuſſa in tonſoris manus eam dejecerit, & ſic ſervi quem tonſor radebat, gula ſit præciſa adjecto cultello: in quocumque eorum culpa ſit, eum lege Aquilia teneri. Proculus in tonſore eſſe culpam. Et ſanè, ſi ibi tondebat ubi ex conſuetudine ludebatur, vel ubi tranſitus frequens erat, eſt quod ei imputetur. Quamvis nec illud malè dicatur, ſi in loco periculoſo ſellam habenti tonſori ſe quis commiſerit, ipſum de ſe queri debere. *l. 11. eod.* See the ninth Article.

[d] Si putator ex arbore ramum cùm dejecerit, vel machinarius, hominem prætereuntem occidit: ita tenetur, ſi is in publicum decidat, nec ille proclamavit, ut caſus ejus evitari poſſet. Sed Mucius etiam dixit, ſi in privato idem accidiſſet, poſſe de culpa agi. Culpam autem eſſe, quod cùm à diligente provideri poterit, non eſſet proviſum, aut tùm denuntiatum eſſet, cùm periculum evitari non poſſit. Secundùm quam rationem non multùm refert per publicum, an per privatum iter fieret: cùm plerumque per privata loca vulgò iter fiat. Quòd ſi nullum iter erit, dolum dumtaxat præſtare debet, ne immittat in eum quem viderit tranſeuntem. Nam culpa ab eo exigenda non eſt: cùm divinare non potuerit, an per eum locum aliquis tranſiturus ſit. *l. 31. ff. ad leg. Aquil.* Præterea, ſi foſſam feceris in ſylva publica, & bos meus in eam inciderit, agere poſſum hoc interdicto, quia in publico factum eſt. *l. 7. §. 8. ff. quod vi. aut. clam.* Qui foveas urſorum, cervorúmque capiendorum cauſa faciunt, ſi in itineribus fecerunt, eóque aliquid decidit factumque deterius eſt, lege Aquilia obligati ſunt. At ſi in aliis locis ubi fieri ſolent, fecerunt, nihil tenentur. *l. 28. ff. ad leg. Aquil.*

[e] Celſus etiam imperitiam culpæ adnumerandam libro octavo digeſtorum ſcripſit. Si quis vitulos paſcendos, vel ſarciendum quid poliendúmve conduxit, culpam præſtare eum debere, & quod imperitia peccavit, culpam eſſe, quippe ut artifex conduxit. *l. 9. §. 5. ff. locat.*

Imperitia quoque culpæ adnumeratur. Veluti ſi medicus ideò ſervum tuum occiderit, quia malè eum ſecuerit, aut perperam ei medicamentum dederit. *§. 7. inſt. de leg. Aquil. l. 7. §. ult. l. 8. ff. ad leg. Aquil.* Si ex plauſtro lapis ceciderit, & quid ruperit vel fregerit, Aquiliæ actione plauſtrarium teneri placet: ſi malè compoſuit lapides, & ideò lapſi ſunt. *l. 27. §. 33. eod.* See the fifth Article of the ſecond Section.

[f] Plerumque incendia culpa fiunt inhabitantium. *l. 3. §. 1. ff. de off. præf. vig.* Qui ædes acervúmve frumenti juxta domum poſitum combuſſerit, vinctus, verberatus, igni necari jubebitur, ſi modò ſciens prudenſque id commiſerit: ſi verò caſu, id eſt negligentia, aut noxiam ſarcire jubetur, aut ſi minùs idoneus ſit, leviùs caſtigatur. *l. 9. ff. de incend.* In lege Aquilia & leviſſima culpa venit. *l. 44. ff. ad leg. Aquil.* Si fornacarius ſervus coloni ad fornacem obdormiſſet, & villa fuerit exuſta: Neratius ſcribit ex locato conventum præſtare debere, ſi negligens in eligendis miniſteriis fuit. Cæterùm, ſi alius negligenter ignem ſubjecerit fornaci, alius negligenter cuſtodierit: an tenebitur, qui ſubjecerit? Nam qui cuſtodiit, nihil fecit: qui rectè ignem ſubjecit, non peccavit. Quid ergo (eſt?) puto utilem competere actionem, tam in eum, qui ad fornacem obdormivit, quàm in eum qui negligenter cuſtodiit. Nec quiſquam dixerit in eo, qui obdormivit, rem eum humanam paſſum: cum deberet vel ignem extinguere, vel ita munire, ne evagaretur. *l. 27. §. 9. ff. ad leg. Aquil.*

the Wind not being able to diſentangle himſelf any other way, orders his Men to cut the Cables, and the Nets; he will not be anſwerable for this Damage which the ſaid Accident rendred neceſſary. And it is the ſame thing with reſpect to thoſe, who in a Fire not being able to ſave a Houſe which is juſt going to take fire, throw down the ſaid Houſe in order to preſerve the others. For in theſe kinds of Events, it is the Accident which cauſes the Loſs, and every one bears that part of it which falls to his Share[g].

[g] Item Labeo ſcribit, ſi cùm vi ventorum navis impulſa eſſet in funes anchorarum alterius, & nautæ funes præcidiſſent: ſi nullo alio modo, niſi præciſis funibus, explicare ſe potuit, nullam actionem dandam: idemque Labeo, & Proculus & circa retia piſcatorum, in quæ navis inciderat, æſtimaverunt. *l.* 29. §. 3. *ff. ad leg. Aquil.*

Quod dicitur damnum injuria datum Aquilia perſequi, ſic erit accipiendum, ut videatur damnum injuria datum, quod cum damno injuriam attulerit: niſi magna vi cogente fuerit factum, ut Celſus ſcribit, circa eum qui incendii arcendi gratia, vicinas ædes intercidit. Nam hîc ſcribit, ceſſare legis Aquiliæ actionem. Juſto enim metu ductus, ne ad ſe ignis perveniret, vicinas ædes intercidit. Et ſive pervenit ignis, ſive ante extinctus eſt, exiſtimat legis Aquiliæ actionem ceſſare. *l.* 49. §. 1. *eod. V. l.* 3. §. 7. *ff. de incend. l.* 7. §. 4. *ff. quod vi aut clam.* See the ſecond Article of the ſecond Section of Intereſt, Coſts, and Damages.

We have not put down in this Article for the Caſe of Fire, the Example given in this Law, of a private Perſon who throws down his Neighbour's Houſe adjoining to his own; for that Liberty preſuppoſes a Neceſſity of doing it for the Good of the Publick, of which a private Perſon ought not to be Judge. But in ſuch Caſes Orders are given thereabout by the Magiſtrates, or by the Multitude, who ſeeing the imminent Danger, have a Right to provide againſt it.

VIII.

8. Damage which another perſon might have prevented.

Thoſe who having it in their power to prevent a Damage which ſome Duty obliged them to prevent, have neglected to do it, may be made anſwerable for it according to the circumſtances. Thus, a Maſter who ſees and ſuffers the Damage done by his Servant, when he might have hindred it, is anſwerable for it[h].

[h] Quoties ſciente domino ſervus vulnerat, vel occidit, Aquilia dominum teneri dubium non eſt. Scientiam hîc pro patientia accipimus, ut qui prohibere potuit, teneatur ſi non fecerit. *l.* 44. §. 1. *& l.* 45. *ff. ad leg. Aquil. l.* 4. *C. de nox. act.*

IX.

9. Damage happening by an Accident, which was preceded by ſome Fact that gave occaſion to it.

When any Loſs, or Damage, happens from an Accident, and when the Fact of ſome Perſon, which is mixed with the Accident, has been either the Cauſe, or Occaſion of the ſaid Event; it is by the Nature of the Fact, and by the Connexion which it may have with what has happened, that we ought to judge, whether the ſaid Perſon ſhould be made to anſwer for the Damage, or ſhould be acquitted of it. Thus, in the Caſes of the firſt and fourth Articles of this Section, the Event is imputed to him whoſe Fact has occaſioned ſome Damage: Thus, on the contrary, in the Caſes of the third and ſeventh Articles, the Event is not imputed[i]. Thus, for another Caſe different from thoſe of all theſe Articles, if a Perſon who takes upon him the Care of the Affairs of another without his knowledge, or a Tutor, Guardian, or other Adminiſtrator, having received a Sum of Money for the uſe and benefit of the Perſon whoſe Affairs were under his Management, lays up the ſaid Money by him for ſome time, without putting it to any uſe, when he might have paid off with it Debts which his Adminiſtration obliged him to acquit, whether to other Creditors, or to himſelf, if he was likewiſe a Creditor: and if it happens that the ſaid Money is carried off by Robbers, or periſhes thro' Fire, or that the Value of the Species be diminiſhed; that Loſs might fall upon the ſaid Perſon, if he had no reaſon to keep the Money by him, and if it was his Fault that he did not imploy it, either to pay what was owing to himſelf, or to diſcharge other Creditors, or to apply it to other Uſes: or the Loſs may fall upon the Perſons for whoſe account the Money was received, if any juſt Cauſe had induced the Receiver to defer the imploying of it. And this will depend on the Nature of the Conduct which the ſaid Perſon ſhall have obſerved, and on the other Circumſtances, which may either oblige him to make good the Loſs, or diſcharge him of it[l].

[i] *See the firſt and fourth Articles, as alſo the third and ſeventh of this Section.*

[l] Debitor meus, qui mihi quinquaginta debebat, deceſſit. Hujus hæreditatis curationem ſuſcepi, & impendi decem: Deinde redacta ex venditione rei hæreditariæ centum in arca repoſui: hæc ſine culpa mea perierunt: quæſitum eſt an ab hærede, qui quandoque extitiſſet, vel creditam pecuniam quinquaginta petere poſſim, vel decem quæ impendi. Julianus ſcribit, in eo verti quæſtionem ut animadvertamus, an juſtam cauſam habuerim ſeponendorum centum: nam ſi debuerim & mihi & cæteris hæreditariis creditoribus ſolvere, periculum non ſolum ſexaginta, ſed & reliquorum quadraginta (millium) me præſtaturum: decem tamen, quæ impenderim retenturum. Id eſt ſola nonaginta reſtituenda. Si verò juſta cauſa fuerit, propter quam integra centum cuſtodirentur, veluti periculum erat, ne prædia in publicum committerentur, ne pœna trajectitiæ pecuniæ augeretur, aut ex compromiſſo committeretur: non ſolum decem quæ in hæreditaria negotia impenderim, ſed etiam quinquaginta quæ mihi debita ſunt, ab hærede me conſequi poſſe. *l.* 13. *ff. de negot. geſt.*

Si quis in ſtipulam ſuam vel ſpinam, comburendæ ejus cauſa, ignem immiſerit: & ulterius evagatus, & progreſſus ignis alienam ſegetem, vel vineam læſerit: requiramus, num imperitia ejus, aut negligentia id accidit. Nam ſi die ventoſo id fecit, culpæ reus eſt. Nam & qui occaſionem præſtat, damnum feciſſe videtur. In eodem crimine eſt & qui non obſervavit ne ignis longiùs procederet. At ſi omnia quæ oportuit, obſervaverit, vel ſubita vis venti longiùs ignem produxit, caret culpa. *l.* 30. §. 3. *ff. ad leg. Aquil.*

We have not inſerted in this Article the Caſe related in this thirtieth Law. §. 3. ff. ad leg. Aquil. *which declares, that if he who cauſed his Stubble to be burnt, had taken all the precautions that were neceſſary, he would not be anſwerable for the burning of his Neighbour's Corn, which was occaſioned by a ſudden Guſt of Wind. For it would ſeem that that Event ought to have been foreſeen, and that it might have even been prevented, by plucking up by the Roots all the Stubble that was near to the Neighbour's Corn, or putting off the burning of the Stubble till Harveſt was over: and in a word, that in all ſuch Caſes where we ought not to do the thing intended without taking the neceſſary precautions for preventing the Damage which may enſue from thence to other Perſons, we ought either quite to abſtain from that which may cauſe any Damage, or take upon our ſelves the Event, if we run the hazard of it. And likewiſe the Law of God ſeems in this caſe to oblige, without any diſtinction, him who has kindled the Fire, to repair the Damage which it ſhall have cauſed.* If Fire break out, and catch in Thorns, ſo that the ſtacks of Corn, or the ſtanding Corn, or the Field be conſumed therewith; he that kindled the Fire ſhall ſurely make Reſtitution, *Exod.* xxii. 6.

X.

10. *Damage cauſed by an Accident, preceded by a Fault.* If the Accident is a Conſequence of an unlawful Fact, and if there follows from it any Damage; he whoſe Fact has given occaſion to it, will be liable to make good the Damage; and that with much more reaſon, than if the Accident were only a Conſequence of ſome Imprudence, as in the Caſes of the fourth Article. Thus, for Example, if a Creditor takes, without the Authority of Juſtice, a Pledge from his Debtor againſt his conſent, and if the ſaid Pledge chances to periſh by ſome Accident in the hands of that Creditor, he ſhall be accountable for it[m].

[m] Qui ratiario crediderat, cùm ad diem pecunia non ſolveretur, ratem in flumine ſua auctoritate detinuit: poſteà flumen crevit, & ratem abſtulit: ſi invito ratiario retinuiſſet, ejus periculo ratem fuiſſe, reſpondit. *l.* 30. *ff. de pign. act.*

TITLE IX.

Of ENGAGEMENTS *which are formed by* ACCIDENTS.

We ſhall ſee in this Title a kind of Involuntary Engagements, and which have no other Cauſe beſides mere Accidents. By Accidents is meant, the Events which do not depend on the Will of thoſe to whom they happen, whether the ſaid Events be the Cauſe of Gain, or of Loſs. Thus, to find a Treaſure, and to loſe one's Purſe, are Accidents of theſe two kinds.

Accidents happen either by the Act of Man, ſuch as a Robbery, a Fire: or by a pure Effect of the Providence of God, and of the ordinary Courſe of Nature, ſuch as Thunder, Lightning, a Shipwrack, an Inundation: Or by an Effect proceeding partly from a Natural Cauſe, and partly from the Act of Man, ſuch as a Fire which happens by ſtacking up Hay before it is well dried.

We muſt likewiſe diſtinguiſh in the Accidents in which the Act of Man has a ſhare, two ſorts of Facts. One is of thoſe in which there is ſome Fault; as if one playing at Mall in a High Way, wounds a Perſon that is going by. And the other is of thoſe which are innocent, and where nothing can be imputed to the Author of the Fact; as if the ſame caſe had happened in a Publick Mall, thro' the fault of him who croſſing it raſhly was wounded.

When the Accident is a Conſequence of ſome Fault which has given occaſion to it, he whoſe Fact has been the Cauſe, or Occaſion of the Accident, ought to repair the Damage cauſed by it. In which caſe, his Engagement is more the Effect of his Fault, than of the Accident; and this ſort of Engagements is a part of the Subject Matter of the foregoing Title. But in the preſent Title, we ſhall ſpeak only of ſuch Engagements as have no other Cauſe beſides that of a mere Accident. The Accidents which are not attended with any Fault, may have divers Conſequences with reſpect to Engagements. Sometimes they diſſolve the Engagements: Thus, a Seller is diſcharged from the Obligation to deliver the Thing ſold, if it periſhes without his Fault, when it is not long of him that it has not been delivered: and the Buyer will nevertheleſs be liable to pay the Price[a]. Sometimes the Accident leſſens the Engagement, as when a Farmer ſuffers a conſiderable Loſs by an unuſual Barrenneſs, by a Shower of Hail, by a Froſt, or other Accidents[b]. At other times the Accident makes no change in the Engagement, altho' it cauſes Loſs. Thus, if it happens that he who had borrowed Money, loſes it by a Robbery, by Fire, or other Accident; he is nevertheleſs obliged to repay it, as much as if he had imployed it uſefully[c]. And in fine, it happens by another Effect of Accidents, that they form Engagements between one Perſon and another. And it is this laſt Effect of Accidents which ſhall be the Subject Matter of this Title; the others having their places in the Matters to which they have relation.

[a] *See the twenty firſt Article of the ſecond Section of the Contract of Sale.*

[b] *See the fourth and following Articles of the fifth Section of Letting and Hiring.*

[c] *See the ſecond Article of the third Section of the Loan of Things to be reſtored in Kind.*

When we ſpeak here of the Engagements which ariſe from Accidents, we do not mean to comprehend under them that infinite multitude of Engagements under which God puts Men, by thoſe ſorts of Events which oblige them to render to one another the different Duties which the ſeveral Conjunctures demand of them; ſuch as to help him who is fallen, to aſſiſt with our Goods thoſe who have loſt theirs, and a thouſand others of the like Nature: But we treat only here of the Engagements which are ſuch that the Civil Laws allow thoſe who are under them to be conſtrain'd to the performance of them; as will appear from the ſeveral Examples which ſhall be produced in the firſt Section, which is made up of thoſe different Examples, in order to ſhew in which manner theſe ſorts of Engagements are formed: And in the ſecond Section we ſhall explain all their particular Conſequences.

SECT. I.

In what manner are formed the Engagements which ariſe from Accidents.

The CONTENTS.

1. *Of him who finds a Thing that is loſt.*
2. *Of that which is left on another's Ground by an Inundation.*
3. *Of that which is thrown into the Sea in a danger of Shipwrack.*
4. *Proviſion of Victuals in a common danger.*
5. *How the Change of Places which has happened by an Accident may be repaired.*
6. *If the Change cannot be repaired.*
7. *Mixture of Things belonging to ſeveral Perſons.*
8. *One may ſeek for what he has left in another's Ground.*
9. *Engagements reciprocal, or not reciprocal.*
10. *Loſs and Gain without Engagements.*
11. *Different Effects of Accidents, as to the Conſequence of the Loſs.*

I.

1. Of him who finds a Thing that is loſt.

HE who finds a Thing that is loſt, ought to reſtore it to its Owner, if he knows, or may know to whom it belongs: and if he keeps it without an intention to reſtore it, or without endeavouring to diſcover the Owner, he commits a Theft[a].

[a] Qui alienum quid jacens, lucri faciendi cauſa ſuſtulit, furti obſtringitur, ſive ſcit cujus ſit, ſive ignoravit. Nihil enim ad furtum minuendum facit, quòd cujus ſit ignoret. *l.* 43. §. 4. *ff. de furt.* Si jacens tulit non ut lucretur, ſed redditurus ei cujus fuit, non tenetur furti. *d. l.* §. 7. Thou ſhalt not ſee thy brother's ox, or his ſheep go aſtray, and hide thy ſelf from them, thou ſhalt in any caſe bring them again unto thy brother. And if thy brother be not nigh unto thee, or if thou know him not, then thou ſhalt bring it unto thine own houſe, and it ſhall be with thee, until thy brother ſeek after it, and thou ſhalt reſtore it to him again. In like manner ſhalt thou do with his aſs, and ſo ſhalt thou do with his raiment, and with all loſt thing of thy brother's, which he hath loſt, and thou haſt found, ſhalt thou do likewiſe, thou mayeſt not hide thy ſelf. *Deut.* xxii. 1, 2, 3. *Levit.* vi. 3.

The Engagements of him who finds a Thing, and of him to whom it belongs, ſhall be explained in the firſt and ſecond Articles of the ſecond Section.

We are not to reckon Treaſures in the number of Things loſt; for we call only that a Treaſure which having been hid, the Owner of it is not any more known. See concerning Treaſures, the ſeventh Article of the ſecond Section of Poſſeſſion.

II. If

II.

2. Of that which is left on another's Ground by an Inundation.

If an Inundation throws down a Houſe, and carries away the Materials, or Moveables of it into ſome Ground; the Proprietor, or Poſſeſſor of the ſaid Ground is obliged to let the Maſter of the ſaid Houſe have acceſs to the Ground, and to ſuffer him to carry away that which the Inundation hath left on it. And it would be the ſame thing with regard to a Boat, or any other thing carried away by the force of the Waters[b].

III.

3. Of that which is thrown into the Sea in a danger of Shipwrack.

If in a danger of Shipwrack it be found neceſſary to throw over-board a part of the Loading in order to ſave the reſt, thoſe whoſe Baggage, or Goods have been ſaved, are obliged to bear their Share of the Loſs of that which hath been thrown over-board for the common Safety[c], according to the Rules which ſhall be explained in the following Section.

IV.

4. Proviſion of Victuals in a common danger.

If in a Voyage by Sea, or upon any other the like occaſion, where many Perſons may chance to be in company together, the Proviſions of Victuals fall ſhort, and it be found that ſome of the Company have ſome Proviſions in ſtore for themſelves, when it is not poſſible to procure any for the other Paſſengers any other way; what ſome of the Company have in ſtore for their own particular uſe, becomes common to the whole Company[d].

V.

5. How the Change of Places which has happened by an Accident may be repaired.

If an Accident makes a Change in the State, or Condition of ſome Places, by which any one is damaged, and if it be juſt to reſtore things to their firſt Condition; this Event obliges thoſe in whoſe Ground any Work is to be made in order to reſtore things as they were at firſt, to give leave to him who ſuffers the Damage to do the Work, or to do it themſelves, or to contribute towards it, in caſe they be under an Obligation to do it. Thus, for Example, if a Running Water which croſſes the Grounds of ſeveral Perſons, flows back on the Upper Grounds becauſe of the Quantity of Dirt and Mud, which it carries along with it, or by reaſon of ſome other Obſtacle, thoſe who ſuffer Damage, or Inconveniency from it, may oblige the Proprietor of the Ground where the Courſe of the River ceaſes to be free, to ſuffer that the Things be reſtored to their firſt Condition, or to do that Work wholly himſelf, or to contribute towards it, according as he ſhall happen to be under an Obligation of doing the one or the other: And if there happen any other Changes of the like Nature which ought to be repaired, the ſame Equity requires, that thoſe who ſuffer any Damage by them, be allowed to reſtore the Things to the Condition they were in before. For altho' theſe Changes fall out naturally, and even without the Act of Man, yet if they can be remedied after they have happened, thoſe who ſuffer ſuch Loſſes ought not to be deprived of the Remedies that are lawful, and poſſible, provided that in re-eſtabliſhing the Things they do no Harm, or that they make good any Damage they may chance to do[e]. But if the Change were of ſuch a Nature, that it would not be juſt to reſtore the Things to their firſt Condition, as if a Flood having looſened the Rocks that were in a Ground, had tranſported them to another, and by that means had made one of the Grounds better than it was, and the other worſe; that Event being a pure Effect of the Divine Providence, which having changed the Face of the Places, hath likewiſe changed the Poſſeſſions of the Proprietors of the ſaid Grounds; none of the Proprietors can pretend to make any new Change in the Ground of the other, except by his conſent. And he cannot even do any thing in his own Ground, but that which he may do without encroaching on the Rights of his Neighbours.

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[b] Si ratis delata ſit vi fluminis in agrum alterius, poſſe eum conveniri ad exhibendum Neratius ſcribit. *l. 5. §. 4. ff. ad exhib.* See the third, fourth, and fifth Articles of the ſecond Section.

[c] Lege Rhodia cavetur, ut ſi levandæ navis gratiâ jactus mercium factus eſt, omnium contributione ſarciatur, quod pro omnibus datum eſt. *l. 1. ff. de leg. Rhod. de jactu.* See the ſixth and following Articles of the ſecond Section.

[d] Cibaria ſi quando defecerint in navigationem, quod quiſque habet in commune confertur. *l. 2. §. 2. in f. ff. de leg. Rhod.* See the eighth Article of the ſecond Section.

[e] Apud Namuſam relatum eſt, ſi aqua fluens iter ſuum ſtercore obſtruxerit, & ex reſtagnatione ſuperiori agro noceat, poſſe cum inferiore agi, ut ſinat purgari. Hanc enim actionem non tantùm de operibus eſſe utilem manufactis, verùm etiam in omnibus quæ non ſecundùm voluntatem ſint. Labeo contra Namuſam probat, ait enim naturam agri ipſam à ſe mutari poſſe. Et ideo, cùm per ſe natura agri fuerit mutata, æquo animo unumquemque ferre debere ſive melior, ſive deterior ejus conditio facta ſit. Idcirco, etſi terræ motu, aut tem-

peſtatis magnitudine, ſoli cauſa mutata ſit, neminem cogi poſſe ut ſinat in priſtinam loci conditionem redigi. Sed nos etiam in hunc caſum æquitatem admiſimus. *l.* 2. §. 6. *ff. de aqua & aq. pluv. arc. V. d. l.* §. 4. See the following Article.

VI.

6. If the Change cannot be repaired. If the Change of the Places that has happened by an Accident be irreparable, the Loſs, or the Gain, which ſhall follow from the ſaid Change will accrue to thoſe to whom the Event ſhall have been profitable, or hurtful, and there will lie no Obligation on the one to indemnify the other. Thus, for Example, if a River inſenſibly leaves one ſide, and extends it ſelf more towards the other, what Ground it takes away from one Proprietor is loſt to him, and what it leaves to the other is an Addition to his Eſtate[f]. Or if a River changes its Channel, the Places which it occupies by its new Courſe will be loſt to thoſe who were the Proprietors of them; and the Proprietors of the Lands adjoining to the old Channel will have the benefit of what ſhall be thereby added to their Grounds[g], and yet there is no Engagement formed between thoſe who gain by the Change, and thoſe who loſe by it, for the one does not acquire what the other loſes. And thoſe who by the Change of the Courſe of the River have loſt their Grounds, have no Right to the Lands which the River did once occupy for its Channel, and which it has abandoned. But they ought to bear with an Event which hath no other Cauſe beſides the Providence of God, which has deprived them of their Poſſeſſion[h].

[f] Si fluvius paulatim ità auferat, ut alteri parti applicet, id alluvionis jure ei quæritur, cujus fundo accreſcit. *l.* 1. *C. de alluv.* Quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Eſt autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ità paulatim adjicitur, ut intelligi non poſſit, quantùm quoquo temporis momento adjiciatur. §. 20. *inſt. de rer. diviſ.*

[g] Quod ſi naturali alveo in univerſum derelicto ad aliam partem fluere cœperit, prior quidem alveus eorum eſt, qui prope ripam ejus prædia poſſident, pro modo ſcilicet latitudinis cujuſque agri, quæ prope ripam ſit. §. 23. *eod.*

[h] Cùm per ſe natura agri fuerit mutata, æquo animo unumquemque ferre debere, ſive melior, ſive deterior ejus conditio facta ſit. *l.* 2. §. 6. *ff. de aqua & aq. plu. arc.* See the eighth Article of the ſecond Section of Poſſeſſion.

VII.

7. Mixture of Things belonging to ſeveral Perſons. When it happens that two or more Things belonging to ſeveral Maſters, are againſt their will, or without their knowledge, ſo mixed together, that they cannot eaſily and without inconvenience be ſeparated, ſo as to give back to every one his own; this Whole Maſs becomes Common to the Perſons whoſe Things are mixed; not ſo as for all of them to have a common undivided Right to the Whole, for the one has no Right to the Thing of the other that is mixed with his, but their Right is in proportion to the Share which every one has in the whole Maſs. And this Event forms among them the Engagement either to divide the Thing in the manner that is poſſible, or to do one another Juſtice otherwiſe, by valuing every one of the Things which have been mixed together. Thus, for Inſtance, if two Pieces of Gold, belonging to two Perſons, have been melted down into one Maſs, or that a Stuff hath been made of Wool belonging to ſeveral Owners, or that Things of different Kinds have been mixed together any other manner of way, ſuch as different Metals, or Liquors of different Sorts; in theſe Caſes, it is neceſſary either to divide the Thing, if it is poſſible to divide it, and to give to every one in proportion to the Value he has in the whole Maſs; or to make an Eſtimate of the Whole, and to divide the Price on the ſame foot. But if this Mixture hath been made voluntarily by the Owners of the Things, the Engagement in this caſe is formed by Covenant, and the Maſs is common among them, according to the Conditions which they have agreed on[i].

[i] Si duorum materiæ ex voluntate dominorum confuſæ ſint, totum id corpus quod ex confuſione fit, utriuſque commune eſt. Veluti ſi qui vina ſua confuderint, aut maſſas argenti, vel auri conflaverint. Sed etſi diverſæ materiæ ſint, & ob id propria ſpecies facta ſit, forte ex vino & melle mulſum, aut ex auro & argento electrum, idem juris eſt. Nam & hoc caſu communem eſſe ſpeciem non dubitatur. Quòd ſi fortuitu, & non voluntate dominorum confuſæ fuerint, vel ejuſdem generis materiæ, vel diverſæ, idem juris eſſe placuit. §. 27. *inſt. de rerum diviſ.*

VIII.

8. One may ſeek for what he has left in another's Ground. If by ſome Accident it happens that one hath hid in ſome ſecret place in a Ground belonging to another Perſon, either Money or other Things, which afterwards he, or his Heirs, are deſirous to carry away, the Owner of the Ground will be obliged to ſuffer them to take away their Things, provided they make good the Damage which they ſhall chance to do by removing them[l].

[l] Theſaurus meus in tuo fundo eſt, nec eum pateris me effodere.—Labeo ait, non eſſe iniquum juranti mihi non calumniæ cauſa id poſtulare, vel interdictum, vel judicium ita dari, ut, ſi per me non

ſtetit quominùs damni infecti tibi operis nomine caveatur, ne vim facias mihi, quominùs eum theſaurum effodiam, tollem, exportem. *l. 15. ff. ad exhib.*

The Caſe of the Law here quoted is not properly a Treaſure. See the ſeventh Article of the ſecond Section of Poſſeſſion.

IX.

9. Engagements reciprocal, or not reciprocal.

Of the Engagements which are formed by Accidents, ſome of them are reciprocal, and oblige one Party as well as the other: and others are obligatory only on one ſide. Thus in the Caſe of the firſt Article, if he who hath found a Thing that is loſt, knows the Owner of it, and can immediately reſtore it to him without being at any charges, the Obligation is only on his part. But if he has been at any Expence, either in advertiſing it, or having it cried, in order to find out the Owner, or for conveying it to him, the Owner in this caſe is bound to reimburſe the Finder of what he is out of pocket on his account. So that in this caſe the Engagement will be mutual; and in all the other caſes it is eaſy to diſcern whether the Engagement be reciprocal, or not [m].

[m] *This is a Conſequence of the foregoing Articles.*

X.

10. Loſs and Gain without Engagements.

All the Accidents which cauſe Gain, or Loſs, do not however form always Engagements. And if, for Example, a Ship, that in a Storm is driven againſt another, happens to damage it, that Accident does not lay the Maſter of the Veſſel that hath damaged the other, under any manner of Engagement, unleſs the Damage hath happened by the Maſter's Fault, or by the Fault of Perſons for whom he is anſwerable. For it is a bare effect of this Accident; and ſometimes even he who ſuffers Damage by an Accident, from whence there ariſeth Profit to another, cannot for all that pretend to any Indemnity on account of his Loſs, as in the caſes of the ſixth Article [n].

[n] Si navis tua impacta in meam ſcapham damnum mihi dedit, quæſitum eſt, quæ actio mihi competeret. Et ait Proculus, ſi in poteſtate nautarum fuit ne id accideret, & culpa eorum factum ſit, lege Aquilia cum nautis agendum.—— Sed ſi fune rupto, aut cùm à nullo regeretur navis, incurriſſet: cum domino agendum non eſſe. *l. 29. §. 2. ff. ad leg. Aquil. d. l. §. 4.*

XI.

11. Different Effects of Accidents, as to the Conſequence of the Loſs.

It follows from the foregoing Articles, that no general Rule can be given whereby to diſtinguiſh the Accidents from whence there may ariſe Engagements, whether on one ſide only, or on both, from thoſe which produce no manner of Engagement at all. But theſe differences depend on the Conjunctures which diverſify the Events, and which will guide us in making a right Judgment of the Obligations which every one of the Perſons whom the Conſequences of the Accident may concern, is under. Thus, when a Ship falls into the hands of Pirates, if ſhe is ranſomed, all the Parties concerned contribute towards the Ranſom in proportion to what they ſave: And there is formed among them an Engagement that is common to them all. But if the Pirates carry off only a part of the Loading of the Ship, without touching the reſt; the Loſs will fall on thoſe whoſe Goods have been taken away, and the Owners of what remains will not be obliged to bear their Share of the Loſs. And theſe two different Rules in Accidents of the ſame Nature, are founded on one and the ſame Principle that is common to theſe two ſeveral Events; namely, that the Loſs falls on the Owner of the Thing that is loſt. And it is for this Reaſon, that the Loſs of the Money which is given for ranſoming the Ship, is common to all thoſe who would have ſuffered by the Loſs of the Ship; and that the Loſs of the Goods that are taken away by Robbery falls on thoſe who are Owners of them [o].

[o] Si navis à Piratis redempta ſit: Servius, Ofilius, Labeo, omnes conferre debere aiunt. Quod verò prædones abſtulerint, eum perdere cujus fuerit, nec conferendum ei qui ſuas merces redemerit. *l. 2. §. 3. ff. de leg. Rhod.*

SECT. II.

Of the conſequences of the Engagements which are formed by Accidents.

The CONTENTS.

1. *Engagements of him who has found a Thing that is loſt.*
2. *Engagement of him who recovers what he had loſt.*
3. *The Right which one has to take out of another's Ground, any thing of his that has been thrown there by Accident.*
4. *Sequel of the foregoing Article.*
5. *Another Conſequence of the third Article.*

6. *Contribution for the Loſs of what is thrown into the Sea in a danger of Shipwrack.*
7. *Upon what foot the Contribution is paid.*
8. *Victuals pay no Contribution.*
9. *Precaution for the Security of the Contribution.*
10. *Of the Damage that happens to the Ship.*
11. *If becauſe of danger, the Maſts of the Ship are cut down, the Loſs of them is common.*
12. *No contribution due, if the Ship is caſt away.*
13. *If to lighten a Ship, that it may get into Port, Goods are unladed into a Lighter, and the Lighter be caſt away.*
14. *If in the ſame Caſe the Ship is caſt away, and not the Lighter.*
15. *If a Veſſel ſaved from Shipwrack by throwing Goods over-board, is caſt away in another place, and ſome of the Goods ſaved out of the Wrack.*
16. *If one recovers his Goods that were thrown over-board in the firſt Danger.*
17. *When the Things thrown over-board are recovered, the Contribution ceaſes.*
18. *If by the throwing of ſome Goods over-board, others which remain in the Ship are damaged.*

I.

1. Engagements of him who has found a Thing that is loſt.

HE who has found a Thing that is loſt, is obliged to preſerve it, and to take care of it, in order to reſtore it to its Owner. And if he does not know to whom it belongs, he ought to inform himſelf by ſuch ways as are in his power; even by making publick Intimation of it, in order to find out the Owner, if the Thing be worth the pains, and if it be conſiſtent with Prudence to take that courſe[a]. And when he does reſtore it, whether it be Money, or any other Thing, he cannot detain any part of it, nor demand any thing for having found it[b]. But he will recover only what Expences he has been at, as ſhall be explained in the following Article[c].

[a] *See the Texts cited on the firſt Article of the foregoing Section.*

Solent plerique etiam hoc facere, ut libellum proponant continentem inveniſſe, & redditurum ei qui deſideraverit. Hi ergo oſtendunt non furandi animo ſe feciſſe. *l.* 43. §. 8. *ff. de furt.* Quaſi redditurus ei qui deſiderâſſet, vel qui oſtendiſſet rem ſuam. *d.* §. *See the firſt Article of the firſt Section.* And with all loſt thing of thy brother's, which he hath loſt, and thou haſt found, ſhalt thou do likewiſe: thou mayeſt not hide thy ſelf. *Deut.* xxii. 3.

[b] Quid ergò, ſi εὕρετρα, id eſt, *inventionis præmia* quæ dicunt petat? Nec hic videtur furtum facere, etſi non probè petat aliquid. *l.* 43. §. 9. *ff. de furtis.*

Altho' he who reſtores a Thing which he has found, has no Right to demand any thing for it; yet nevertheleſs if the Finder be a poor body, he may take lawfully and honeſtly what the Owner *ſhall think fit to give him: altho' it would be very diſhonourable in any other perſon to receive the leaſt thing whatſoever on that account.*

II.

2. Engagement of him who recovers what he had loſt.

The Perſon to whom one reſtores the Thing which he had loſt, is obliged on his part to repay the Money that has been laid out, either in keeping the Thing, or in delivering it to him, as if it was ſome ſtrayed Beaſt which it was neceſſary to feed, or that the Carriage of the Thing from one Place to another had obliged the Perſon in whoſe Cuſtody it was to be at ſome Charges; or if any Money has been laid out in Advertiſements, or having the Thing cried, in order to give notice to the Owner. And if he who delivers the Thing to the Owner, be not the ſame Perſon who found it, and if he gave any thing to get it from the Finder, he will recover it of the Owner[c].

[c] Hæc æquitas ſuggerit. *l.* 2. §. 5. *in f. ff. de aqua & aq. pluv. arc.*

III.

3. The Right which one has to take out of another's Ground, any thing of his that has been thrown there by Accident.

The Proprietor of a Ground on which is thrown the Rubbiſh of a Building that is fallen down, or that which a Flood hath carried away from another's Ground, is obliged to ſuffer him who has had the Loſs, to take away what remains, and to allow him ſuch free acceſs to his Ground as is neceſſary for that end[d]. But upon the Conditions that are explained in the following Article.

[d] *See the Text cited upon the ſecond Article of the firſt Section, and thoſe which are cited on the following Article.*

De his quæ vi fluminis importata ſunt, an interdictum dari poſſit, quæritur? Trebatius refert, cum Tiberis abundâſſet, & res multas multorum in aliena ædificia detuliſſet, interdictum à prætore datum ne vis fieret dominis, quominus ſua tollerent, auferrent, modo damni infecti repromitterent, *l.* 9. §. 1. *ff. de damn. inf.*

IV.

4. Sequel of the foregoing Article.

In the Caſes of the foregoing Article, he who deſires to have back the Materials of his Building that is fallen down, or that which a Flood hath carried away from his Land, and thrown upon another man's Ground, is obliged on his part not only to indemnify the Proprietor

tor of the ſaid Ground, as to what damage ſhall happen to be done by his taking away the Things which have been thrown upon it, but he is moreover bound to repair all the Damage which has been already done to the Ground by the Things ſince they were caſt upon it[e]. But if he chuſes rather not to take away any thing, he will owe nothing; for if he abandons to the Proprietor of that Ground all that has been caſt upon it, he is not bound to make good a Damage that has happened by the bare effect of that Accident: and it is enough that he loſes what the Accident has carried away from him[f].

V.

5. Another Conſequence of the third Article.

If he whoſe Materials, or other Things, have been thrown by theſe Accidents on the Eſtate of another Perſon, be deſirous to take them away, he will be obliged, beſides the making Reparation for the Damage ſuſtained by the Owner of the Ground, to take away as well the unprofitable Stuff that can be of no manner of uſe, as that which is uſeful, and which he is deſirous to take away, and to clear intirely the Surface of the Ground on which the Things have been thrown[g].

VI.

6. Contribution for the Loſs of what is thrown into the Sea in a danger of Shipwrack.

When in order to lighten a Ship that is in danger of Shipwrack, part of the Cargo is thrown over-board, and the Ship by that means is ſaved, this Loſs is common to all thoſe who had any thing to loſe in that danger. Thus, the Maſter of the Ship, all thoſe whoſe Goods, or Effects, have been ſaved, and thoſe whoſe Goods have been thrown over-board, will bear every one of them their Share of the Loſs, in proportion to the Intereſt they had in the Whole. And if, for Example, the Ship and the whole Cargo was worth a Hundred Thouſand Crowns, and that what has been thrown over-board was valued at Twenty Thouſand Crowns; the Loſs being of a Fifth Part, every one of the Parties concerned will contribute a Fifth part of the Value of what they ſave; which will make in all Sixteen Thouſand Crowns; and by this Contribution thoſe who had loſt the Twenty Thouſand Crowns recovering Sixteen Thouſand of them, will be Loſers only of a Fifth Part, as all the others[h].

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[e] Ratis vi fluminis in agrum meum delatæ, non aliter poteſtatem tibi faciendam quam ſi de præterito quoque damno mihi caviſſes. *l.* 8. *ff. de incend. l.* 9. §. 3. *ff. de damn. inf.* Alfenus quoque ſcribit, ſi ex fundo tuo cruſta lapſa ſit in meum fundum, eamque petas, dandum in te judicium de damno jam facto. *d. l.* 9. §. 2.

[f] *See the Texts quoted on the fourth Article of the third Section of the Title of Damages occaſioned by Faults.*

[g] Nec aliter dandam actionem, quàm ut omnia tollantur, quæ ſunt prolapſa. *l.* 9. §. 2. *ff. de damn. inf.* Tollere non aliter permittendum quàm ut omnia, id eſt, & quæ inutilia eſſent, auferret. *l.* 7. §. *ult. eod.* See the fourth Article of the third Section of the Title of Damages occaſioned by Faults.

[h] Lege Rhodia cavetur, ut ſi levandæ navis gratia jactus mercium factus eſt, omnium contributione ſarciatur, quod pro omnibus datum eſt. *l.* 1. *ff. de lege Rhodia.* Placuit omnes quorum interfuiſſet jacturam fieri, conferre oportere: quia id tributum obſervatæ res deberent—— jacturæ ſummam pro rerum pretio diſtribui oportet. *l.* 2. §. 2. *eod.* Æquiſſimum enim eſt, commune detrimentum fieri eorum, qui propter amiſſas res aliorum conſecuti ſunt, ut merces ſuas ſalvas haberent. *d. l.* 2. Portio autem pro æſtimatione rerum quæ ſalvæ ſunt, & earum quæ amiſſæ ſunt, præſtari ſolet. *l.* 2. §. 4. *eod.*

Upon what foot is it that we muſt regulate the Contribution for indemnifying thoſe whoſe Goods, or other Effects, have been thrown over-board? It is ſaid in the ſecond Law, §. 4. ff. de Lege Rhodia, *that it ought to be on the foot of the Eſtimate as well of what is loſt, as of what is ſaved: that it is no matter that the Things loſt could have been ſold for more than they coſt, becauſe the buſineſs is to make up a Loſs which one has ſuſtained, and not a Gain which they have failed to make; but that as to the Things which have been ſaved, and which ought to bear their part of the Contribution, they ought to be valued, not upon the foot of what they coſt, but upon the foot of what they may be ſold for. This is the meaning of that Text, of which here follow the words.* Portio autem pro æſtimatione rerum, quæ ſalvæ ſunt, & earum quæ amiſſæ ſunt, præſtari ſolet. Nec ad rem pertinet, ſi hæ, quæ amiſſæ ſunt, pluris venire poterunt: quoniam detrimenti, non lucri fit præſtatio: ſed in his rebus, quarum nomine conferendum eſt, æſtimatio debeat haberi, non quanti emptæ ſint, ſed quanti venire poſſunt. *If it be juſt that the Eſtimate of the Things which are ſaved, ſhould be made upon the foot of what they may be ſold for, becauſe it is that Value which has been ſaved from the danger; why ſhould not that which has been loſt in order to ſave the reſt, be eſtimated on the ſame foot? And if we ſuppoſe in the caſe of two Merchants who had bought Goods of the ſame Kind, at the ſame Price, in the ſame Place, to be ſold again in the ſame Sea-Port Town whither the Ship was bound; that the Goods of one of the Merchants were thrown over-board to ſave the Ship at the Entry into the Port, where it was in danger of being caſt away; and that the Goods which are preſerved are ſold immediately in the ſaid Sea-Port-Town for more than they coſt, would it not be juſt that thoſe which have been loſt only to ſave the others, ſhould be valued on the ſame foot? ſince there was no reaſon for throwing over-board the Goods of one Merchant, more than the other, nor for diſtinguiſhing their Condition. To which we may add, that, as we ſhall obſerve on the fifteenth Article, the Contribution ought not to be made till after the Ship is got into Port, and in ſafety; and that as it is only then that the Contribution is to be made, it ſeems reaſonable that the Whole ſhould be eſtimated on the foot of what the Things are worth at the time of unloading, all charges being deducted. And it is probably for theſe very Reaſons that Regulations have been made, ordaining that the Goods which have been thrown over-board ſhould be eſtimated on the ſame foot as thoſe which have been ſaved, and according to the Price for which they ſhall be ſold*[*]. *But ſeeing the Goods are not all ſold in the Port where the Ship arrives, and that many of them are often to be farther tranſported by Sea, or Land, and have conſe-*

quently new dangers to undergo; and ſeeing there may happen many diminutions of the Profit in the Sales, and even Loſſes by ſeveral Accidents; it would be neither juſt, nor poſſible, to regulate the Contributions on the foot of what the Goods ſhall be ſold for, after that the Goods and Owners are diſperſed in ſeveral Places. So that the Contribution being to be made in the Port of Delivery, it ſeems a neceſſary conſequence that the Value of the Goods ſhould be ſettled in the ſaid Port; not upon the foot of what the Goods ſhall be ſold for, which it is impoſſible to know; nor upon the foot of what they coſt at firſt, as well for the Reaſons that have been already remarked, as becauſe it would not be poſſible to know juſtly the prime Coſt, and that ſuch a Valuation might be liable to a great many Cheats; but the Eſtimate ought to be made on the foot of the Price at which the Goods, and other Effects, may be reaſonably valued at their arrival in the Port, according to the ſeveral Views, and different Regards which may help us to make a juſt Eſtimate.

* See the Laws of *Oleron*, Art. 8. and the Ordinances of *Wisbuy*, Art. 20. and Art. 39.

VII.

7. Upon what foot the Contribution is paid.

Every thing that is ſaved from Shipwrack by throwing the Goods overboard into the Sea, pays Contribution according to its Value, without any diſtinction between that which is of leſs Burden, ſuch as Jewels, and that which is of greater, ſuch as Metals. For it is the Value, and not the Weight of the Thing that has been ſaved from periſhing, that comes into conſideration: and ſo the Maſter of the Ship contributes in proportion [k]; but thoſe on board the Ship do not contribute any thing for their Perſons [l]; except it be for their Cloaths, their Rings, and other Things which they have about them [m].

[k] Cùm in eadem nave varia mercium genera complures coëgiſſent, prætereaque multi vectores ſervi, liberique in ea navigarent: tempeſtate gravi ortâ neceſſariò jactura facta erat. Quæſita deinde ſunt hæc: an omnes jacturam præſtare oporteat, & ſi qui tales merces impoſuiſſent, quibus navis non oneraretur, veluti gemmas, margaritas: & quæ portio præſtanda eſt: & an etiam pro liberis capitibus dari oporteat: & qua actione ea res expediri poſſit. Placuit, omnes quorum interfuiſſet jacturam fieri, conferre oportere: quia id tributum obſervatæ res deberent. Itaque dominum etiam navis, pro portione obligatum eſſe. *l. 2. §. 2. ff. de leg. Rhod.*

[l] Corporum liberorum æſtimationem nullam fieri poſſe. *d.* §.

[m] Itidem agitatum eſt an etiam veſtimentorum cujuſque, & annulorum æſtimationem fieri oporteat, & omnium viſum eſt. *d.* §.

VIII.

ictuals ıo Contion.

The Proviſions which are put on board the Ship for no other end but to be conſumed during the Voyage, pay no Contribution [n]. For theſe kinds of Things are for the Common Uſe. But we muſt not place in this Rank Corn, Wine, and other Things of the like ſort, which are not put on board the Ship to be there conſumed, but are there as Goods to be tranſported from one Place to another.

[n] Niſi ſi qua conſumendi cauſâ impoſita forent: quo in numero eſſent cibaria: eò magis quòd ſi quando ea defecerint in navigationem, quod quiſque haberet, in commune conferret. *l. 2. §. 2. in f. de lege Rhod.* See the fourth Article of the firſt Section.

IX.

9. Precaution for the ſecurity of the Contribution.

Thoſe whoſe Goods have been thrown over-board to ſave the Ship, may, for their Security hinder the unloading of the Goods that remain on board the Ship, till they have paid their Proportion of the Loſs; or may procure them to be attached, in caſe they are landed [o].

[o] Servius reſpondit, ex locato agere cum magiſtro navis debere, ut cæterorum vectorum merces retineat, donec portionem damni præſtent. *l. 2. ff. de lege Rhod.*

X.

10. Of the Damage that happens to the Ship.

If the Ship is damaged by a Storm, and loſes any of her Maſts, Yards, or other Parts of the Ship, the Expence of refitting the Ship, and of repairing what was loſt, will fall upon the Maſter of the Ship; for this Expence is more for fitting out the Ship, than for preſerving the Goods, and the Maſter of the Ship is bound to furniſh it in a good condition for tranſporting the Things he takes charge of, in the ſame manner as Workmen furniſh their Tools, and bear the Loſs, if any of them breaks in the working [p].

[p] Si conſervatis mercibus, deterior facta ſit navis, aut ſi quid exarmaverit, nulla facienda eſt collatio: quia diſſimilis earum rerum cauſa ſit, quæ navis gratia parentur, & earum pro quibus mercedes aliquis acceperit. Nam etſi faber incudem, aut malleum fregerit, non imputaretur ei qui locaverit opus. *l. 2. §. 1. ff. de leg. Rhod.* Navis adverſâ tempeſtate depreſſa, ictu fluminis deuſtis armamentis, & arbore, & antenna, Hipponen delata eſt: ibique tumultuariis armamentis ad præſens comparatis, Oſtiam navigavit, & onus integrum pertulit. Quæſitum eſt, an hi quorum onus fuit, nautæ pro damno conferre debeant? Reſpondit non debere: hic enim ſumptus inſtruendæ magis navis, quàm conſervandarum mercium gratia factus. *l. 6. ff. de leg. Rhod.* See the following Article.

XI.

11. If because of danger the Maſts of the Ship are cut down, the Loſs of them is common.

If to prevent a Shipwrack, the Maſts and Yards are cut down and thrown over-board, or that other things are thrown over-board to lighten the Ship, that it may not periſh, that Loſs will be common. For it is not an Effect that the Storm hath cauſed, as if the Violence of the Storm had broke the Maſts, or Yards, or done any other Damage, which would be within the Caſe of the foregoing Article: but it is an

Effect of the Fear of the common Danger, and therefore the Loſs of it ought to be common[q].

[q] Cùm arbor aut aliud navis inſtrumentum removendi communis periculi cauſa dejectum eſt, contributio debetur. *l. 3. ff. de leg. Rhod. l. 5. §. 1. eod.* Si voluntate vectorum, vel propter aliquem metum id detrimentum factum ſit: hoc ipſum ſarciri oportet. *l. 2. §. 1. in f. eod.*

XII.

12. *No Contribution due, if the Ship is caſt away.* If the Ship is caſt away, and in the Wrack ſome ſave their Goods, or other Things, they will not be obliged to contribute any thing on their part towards making up the Loſs which the others ſuffer. For it is not by the Loſs of the Ship, and of the other Things which periſh, that they ſave theirs: but every one ſaves what he can out of the Common Wrack; and the Contribution takes place only when thoſe are to be indemnified whoſe Loſs hath ſaved what remains to the others[r].

[r] Amiſſæ navis damnum, collationis conſortio non ſarcitur per eos qui merces ſuas naufragio liberaverunt. Nam hujus æquitatem tunc admitti placuit, cùm jactus remedio cæteris in communi periculo, ſalva navi conſultum eſt. *l. 5. ff. de leg. Rhod.* Cùm depreſſa navis, aut dejecta eſſet: quod quiſque ex ea ſuum ſervaſſet, ſibi ſervare reſpondit, tanquàm ex incendio. *l. 7. ff. de lege Rhod.*

XIII.

13. *If to lighten a Ship, that it may get into Port, Goods are unladed into a Lighter, and the Lighter be caſt away.* If to lighten a Ship, that it may be able to enter into a River, or into a Port, it be neceſſary to take out a part of the Lading, and that what has been put on board a Lighter happens to periſh before it gets to Land; that Loſs will be common, and what has been left in the Ship muſt contribute to make up the Loſs. For it was for the Intereſt of the Ship, that the Goods were put on board the Lighter[s].

[s] Navis onuſtæ levandæ cauſa, quia intrare flumen vel portum non potuerat cum onere, ſi quædam merces in ſcapham trajectæ ſunt, ne aut extra flumen periclitetur, aut in ipſo oſtio, vel portu: eaque ſcapha ſummerſa eſt: ratio haberi debet inter eos qui in nave merces ſalvas habent cum his qui in ſcapha perdiderunt, perinde tanquam ſi jactura facta eſſet. *l. 4. ff. de lege Rhod.*

XIV.

14. *If in the ſame Caſe the Ship is caſt away, and not the Lighter.* If in the Caſe of the foregoing Article the Ship is caſt away, and the Lighter gets ſafely into Port, there will be no Contribution for the Goods loſt on board the Ship, but the Loſs will fall upon thoſe to whom the Goods appertained. For the unloading of the Goods into the Lighter was not done for the advantage of thoſe to whom the Goods belonged; and the Loſs of the Ship did no ways contribute to the ſaving of the Goods put on board the Lighter[t].

[t] Contrà, ſi ſcapha cum parte mercium ſalva eſt, navis periit: ratio haberi non debet eorum qui in navi perdiderunt. Quia jactus in tributum nave ſalva venit. *l. 4. ff. de leg. Rhod.*

If it had been agreed, when the Goods were unladed out of the Ship into the Lighter, that if the Ship alone, or the Lighter alone, ſhould happen to be caſt away, the Loſs of either ſhould be common; that Agreement would be executed, there being nothing unlawful in it. Might it be ſaid in the Caſe where the Ship is caſt away, when no ſuch Agreement had been made, that ſuch a Covenant was underſtood, altho' the Parties had forgot to make expreſs mention of it: and that the Ship having been lightned for the Good of all the Parties concerned, and the moſt valuable Goods, perhaps, put on board the Lighter, with a common Deſign of ſaving the whole Loading of the Ship, the Intention of all the Parties had been to make the Events common to all, and that as in the Caſe of the Lighter's being caſt away the Loſs of the Goods on board the Lighter was to be common to thoſe who had ſaved their Goods that were on board the Ship; the Condition ſhould be reciprocal, and that the Ship being caſt away, the Loſs ought likewiſe to affect thoſe who had ſaved their Goods that were on board the Lighter? Or muſt it not be ſaid on the contrary, according to the meaning of the Law quoted upon this Article, that the Goods having been unloaded into the Lighter, without any Agreement, and with no other View, but barely to lighten the Ship, that it might get into Port, the Intention of all Parties concerned was, that the Goods left on board the Ship ſhould anſwer for the danger of thoſe put on board the Lighter with deſign to ſave the Ship; and that if the ſaid Lightening of the Ship did not preſerve them from the Danger, that then every one ſhould bear his own Loſs?

XV.

15. *If a Veſſel ſaved from Shipwrack by throwing Goods over board, is caſt away in another place, and ſome of the Goods ſaved out of the Wrack.* If a Ship that has been ſaved from one danger of Shipwrack, by throwing ſome of the Goods over-board, happens afterwards to be caſt away in another place, and that by the help of Divers, or otherwiſe, a part of what was loſt in the Shipwrack is recovered; thoſe whoſe Goods have been recovered out of the Wrack muſt contribute to make up the Loſs of what has been thrown over-board in the firſt Danger[u]. For the Goods which are recovered out of the Wrack would have periſhed in the firſt Danger, had it not been for the Loſs of the Things that were then thrown over-board.

[u] Si navis quæ in tempeſtate jactu mercium unius mercatoris levata eſt, in alio loco ſubmerſa eſt: & aliquorum mercatorum merces per urinatores extractæ ſunt, data mercede: rationem haberi debere ejus, cujus merces in navigatione levandæ navis cauſa jactæ ſunt, ab his qui poſtea ſua per urinatores ſervaverunt, Sabinus æquè reſpondit. *l. 4. §. 1. ff. de leg. Rhod.*

It follows from this Rule, that the Contribution is not to be made till after the Ship is arrived in the Haven. For if the Veſſel which has been ſaved from Shipwrack, by throwing Goods over-board, periſhes after-

wards before it gets to Land, the Loſs of what was thrown over-board in the firſt Danger, becoming unprofitable to thoſe who ſuffer the ſecond Loſs, there will be no Contribution due from them. But if in the ſecond Loſs, any ſave a part of their Goods out of the Wrack, they will be bound to contribute according to the Rule explained in this Article.

[w] Sed hic videamus, num & ipſi conferre oporteat. Quid enim intereſt jactatas res meas amiſerim, an nudatas deteriores habere cœperim. Nam ſicut ei qui perdiderit ſubvenitur, ita & ei ſubveniri oportet qui deteriores propter jactum res habere cœperit. Hac ita Papirius Fronto reſpondit. *d. l. 4. in fine.*

XVI.

16. If one recovers his Goods that were thrown over-board in the firſt Danger. If in the Caſe of the foregoing Article, he whoſe Goods had been thrown over-board in the firſt Danger, happens to recover them, he will not be bound to contribute towards making up the Loſs of what periſhed in the ſecond Danger. For it is not by the means of this Loſs that he recovers what he loſt in the firſt Danger[x].

[x] Eorum verò qui ità ſervaverunt, invicem rationem haberi non debere, ab eo qui in navigatione jactum fecit, ſi quædam ex his mercibus per urinatores extractæ ſunt. Eorum enim merces non poſſunt videri ſervandæ navis cauſa jactæ eſſe, quæ periit. *l.* 4. §. 1. *in fine ff. de leg. Rhod.* See the following Article.

XVII.

17. When the Things thrown over board are recovered, the Contribution for them ceaſes. If the Things that have been thrown over-board chance to be recovered, or a part of them, the Contribution for the Loſs of them will ceaſe in proportion. And if the Contribution has been already paid, thoſe who have received it muſt reſtore it to the others[y].

[y] Si res quæ jactæ ſunt apparuerint, exoneratur collatio. Quòd ſi jam contributio facta ſit, tunc hi qui ſolverint, agent, &c. *l.* 4. §. 7. *ff. de leg. Rhod.*

XVIII.

18. If by the throwing of ſome Goods over-board, others which remain in the Ship, are damaged. If in a Danger which hath made it neceſſary to throw Goods into the Sea, it happens that other Goods, being uncovered by the throwing of the uppermoſt Goods into the Sea, have by that means received ſome Damage; as if the Waves of the Sea have got into them, and ſpoiled them, that Loſs will be made good by Contribution, as being a Sequel of the Loſs of the Goods thrown over-board[z]. And the Owner of thoſe damaged Goods will contribute on his part for the Loſs of the Goods that were thrown over-board, but only upon the foot of the Value of his Goods after they have been damaged; for it is only that Value which he ſaves[a].

[z] Cùm autem jactus de nave factus eſt, & alicujus res quæ in navi remanſerunt deteriores factæ ſunt, videndum an conferre cogendus ſit: quia non debet duplici damno onerari, & collationis, & quod res deteriores factæ ſunt Sed defendendum eſt, hunc conferre debere pretio præſente rerum. *l.* 4. §. 2. *ff. de lege Rhod.*

TITLE X.

Of that which is done to defraud CREDITORS.

The Subject Matter of this Title. Altho' the Frauds done in prejudice of Creditors be commonly tranſacted by Agreements between the Debtors and thoſe who are in the Secret with them, yet the Engagements which ariſe from the ſaid Frauds, and which lay thoſe who are acceſſory to the Fraud under an Obligation to the Creditors, are nevertheleſs of the Number of thoſe Engagements which are formed without a Covenant, for there is no manner of Covenant that paſſes between the Acceſſories to the Fraud and the Creditor.

The Frauds committed by Debtors and their Accomplices, to make Creditors loſe what is due to them, are of ſeveral Sorts, and form the Engagements which ſhall be the Subject Matter of this Title.

As to this Matter of Frauds done to the prejudice of Creditors, it is to be obſerved, that the Frauds which Debtors may do by making Aſſignments of their Immoveables, are much leſs frequent with us, than they were under the *Roman* Law: For the *Romans* contracted often without Writing[a]: and even a Mortgage could be acquired by an unwritten Covenant, and by a bare Paction[b]; which rendered all Frauds eaſy. But according to our Uſage, all Contracts which exceed the Value of One Hundred Livres, ought to be in Writing[c]; and a Mortgage is not acquired except by a Deed executed in the preſence of publick Notaries, or by the Authority of the Judge. Thus Creditors have their Security on the Immoveables, or Real Eſtate of their Debtors, by a Mortgage, which they cannot be defeated of unleſs by forged Deeds, which it is not an eaſy matter to accompliſh, becauſe even the forged Deed muſt be made by Notaries Publick,

lick, or by Perſons who counterfeit their Hand and Seal.

[a] *Toto tit. ff. de verb. obl. inſt. eod.*

[b] *L. 4. ff. de pign.*

[c] *See the twelfth Article of the firſt Section of Covenants.*

We have not put down in this Title the Rule of the *Roman* Law, which leaves the Debtor at liberty to renounce the Succeſſions that may fall to him either by Teſtament, or without Teſtament, altho' his Creditors receive thereby prejudice [d]. Which was founded upon this, that every body may abſtain from augmenting his Eſtate [e]. So that they did not look upon any thing as a Fraud done to the prejudice of Creditors, except what was a Diminution of the Eſtate which the Debtor had already acquired. Neither did the *Romans* reckon that among the Frauds done to the prejudice of Creditors, when an Heir, or Executor, paid the Total of Legacies, and Bequeſts in Truſt, without retaining thoſe Portions, which are called the *Falcidian* and *Trebellianick* Portions, of which we ſhall treat in the Second Part of this Work; becauſe it was thought that the Heir, or Executor had the liberty to deprive himſelf of that which the Law gave him Right to retain out of Legacies and Bequeſts in Truſt, and that he might thus fully perform the Will of the dead. And the Reaſon which induced us not to put down theſe Rules here, is becauſe there are ſome Cuſtoms which direct, that if a Debtor renounces a Succeſſion that is fallen to him, his Creditors may demand to be ſubſtituted to his Right, that they may accept the Succeſſion, if they hope to find their account in it. And this does no harm to the Debtor; for if the Succeſſion be profitable, it is but juſt that his Creditors ſhould reap the benefit of it: and if on the contrary it be burdenſome, they do not any way engage him, and oblige only themſelves to the Charges of the Succeſſion. And as to the Portions allowed to be detained by the *Falcidian* and *Trebellianick* Laws, if the Legacies and Bequeſts in Truſt, not being as yet paid by the Heir, or Executor, his Creditors put a ſtop to the payment of them, that the *Falcidian* and *Trebellianick* Portions may be deducted, it ſeems to be reaſonable that they ſhould be allowed to uſe the Right of their Debtor. For it is Natural, and agreeable to our Uſage, as alſo to the Rules of the *Roman* Law, that Creditors may exerciſe all the Rights and Actions of their Debtors, as it is expreſly ſaid in the firſt Law, *Cod. de præt. pign.* of which theſe are the words. *Si prætorium pignus quicumque judices dandum alicui perſpexerint: non ſolum ſuper mobilibus rebus, & immobilibus, & ſe moventibus, ſed etiam ſuper actionibus quæ debitori competunt, præcipimus hoc eis licere decernere.* To which we may add, that it may be that the Creditor had reaſon to reckon among the Securities which he took on the Eſtate of his Debtor, that of the Succeſſions which were like to fall to him.

[d] *L. 6. §. 2. ff. quæ in fraud. cred.*

[e] *L. 6. ff. quæ in fraud. cred. v. l. 28. ff. de verb. ſign. l. 119. ff. de reg. jur. l. 134. eod.*

SECT. I.

Of the ſeveral ſorts of Frauds which are done to the prejudice of Creditors.

The CONTENTS.

1. *Whatever Debtors do to defraud their Creditors, is revoked.*
2. *Fraudulent Bounties.*
3. *Alienations to fair Purchaſers.*
4. *Alienations made to Purchaſers who are conſcious of the Fraud.*
5. *To make a Purchaſer conſcious of the Fraud, he muſt know of the deſign to defraud.*
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7. *Divers ways of defrauding.*
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11. *A Dowry ſettled to defraud Creditors.*
12. *He who receives what is due to him, commits no Fraud.*
13. *Exception to the foregoing Article.*

I.

1. Whatever Debtors do to defraud their Creditors, is revoked.

WHatever Debtors do to defeat their Creditors, by Alienations, and other Diſpoſitions of what nature ſoever, is revoked, according as the circumſtances of the Fact, and the Rules which follow may give occaſion to it [a].

[a] Neceſſariò Prætor hoc edictum propoſuit: quo edicto conſulit creditoribus, revocando ea quæcumque in fraudem eorum alienata ſunt. *l. 1. §. 1. ff. quæ in fr. cred. §. 6. inſt. de act.* Omnem omninò fraudem factam, vel alienationem, vel quemcumque contractum, &c. *d. l. §. 1.* See the ſeventh Article.

II.

2. Fraudulent Bounties.

All the Diſpoſitions which Debtors make on the Score of Liberality, to the prejudice of their Creditors, may be revoked, whether he who receives the Liberality knew of the prejudice done thereby to the Creditors, or whether he was ignorant of it. For his Honeſty and Integrity does not hinder the thing from being unjuſt, that he ſhould profit by their Loſs. But if the Donee received the Bounty with an innocent Intention, knowing nothing of the prejudice the Creditors would ſuffer thereby, and if the Thing that was given be no more in being, and that he reaped no manner of Profit from it, he would not be bound to reſtore a Benefit from which there accrued to him no manner of Advantage[b].

[b] Simili modo dicimus, & ſi cui donatum eſt, non eſſe quærendum an ſciente eo cui donatum, geſtum ſit, ſed hoc tantùm, an fraudentur creditores: nec videtur injuriâ affici is qui ignoravit, cùm lucrum extorqueatur, non damnum infligatur. In hos tamen qui ignorantes ab eo, qui ſolvendo non ſit, liberalitatem acceperunt, hactenùs actio erit danda, quatenùs locupletiores facti ſunt, ultrà non. *l.* 6. §. 11. *ff. quæ in fraud. cred. l.* 5. C. *de revoc. his quæ in fr. cred.*

III.

3. Alienations to fair Purchaſers.

The Alienations of Moveables and Immoveables which Debtors make upon another Score than that of Liberality, to Perſons who purchaſe with an honeſt Intention, and for a valuable Conſideration, knowing nothing of the prejudice done thereby to Creditors, cannot be revoked, whatever Intention of defrauding the Debtor may have had. For the Debtor's knaviſh Intention ought not to cauſe a Loſs to thoſe who deal with him in a lawful Commerce, and who have no ſhare in his Fraud[c].

[c] Ait Prætor, *quæ fraudationis cauſa geſta erunt, cum eo qui fraudem non ignoraverit——— actionem dabo.* l. 1. ff. quæ in fraud. cred. l. 10. eod. Hoc Edictum eum coercet, qui ſciens eum in fraudem creditorum hoc facere, ſuſcepit quod in fraudem creditorum fiebat. Quare ſi quidem in fraudem creditorum facit, ſi tamen is qui cœpit ignoravit, ceſſare videntur verba Edicti. *l.* 6. §. 8. *eod.*

It is to be remarked on this Article, that it does not extend to the Caſe where the Creditors have a Privilege, or a Mortgage upon the Thing alienated.

IV.

4. Alienations made to Purchaſers who are conſcious of the Fraud.

Altho' the fraudulent Alienation be made for a valuable Conſideration, ſuch as a Sale, yet if it be proved that the Purchaſer has been a partaker in the Fraud, that he might profit by it, getting the Thing upon that account at a cheaper Rate, the Alienation will be revoked, without any Reſtitution of the Price to the Purchaſer who is an Accomplice in the Fraud[d], unleſs the Moneys which he paid for it be ſtill in being, in the hands of the Debtor who ſold the Thing to him[e].

[d] Si debitor in fraudem creditorum minore pretio fundum ſcienti emptori vendiderit: deinde hi, quibus de revocando eo actio datur, eum petant, quæſitum eſt, an pretium reſtituere debent? Proculus exiſtimat, omnimodò reſtituendum, eſſe fundum, etiamſi pretium non ſolvatur. Et reſcriptum eſt ſecundùm Proculi ſententiam. *l.* 7. *ff. quæ in fr. cred.*

[e] Ex his colligi poteſt, ne quidem portionem emptori reddendam ex pretio. Poſſe tamen dici, eam rem apud arbitrum ex cauſa animadvertendam, ut ſi nummi ſoluti in bonis extent, jubeat eos reddi: quia ea ratione nemo fraudetur. *l.* 8. *eod.*

V.

5. To make a Purchaſer conſcious of the Fraud, he muſt know of the deſign to defraud.

To oblige him who purchaſes a thing of a Debtor, to make Reſtitution of it, it is not enough that the Purchaſer knew that the ſaid Debtor had Creditors; but he muſt have been privy to the deſign of defrauding them. For many of thoſe who have Creditors are not inſolvent, and one does not become an Accomplice in the Fraud, except by taking part in it[f].

[f] Quod ait Prætor, *ſcienter*, ſic accipimus, te conſcio, & fraudem participante; non enim ſi ſimpliciter ſcio illum creditores habere, hoc ſufficit ad contendendum, teneri eum in factum actione; ſed ſi particeps fraudis eſt. *l.* 10. §. 2. *ff. quæ in fraud. cred.* Aliàs autem qui ſcit aliquem creditores habere, ſi cum eo contrahat ſimpliciter, ſine fraudis conſcientia, non videtur hac actione teneri. *d. l.* 10. §. 4.

VI.

6. The Intention to defraud muſt be followed with the Effect, otherwiſe the Alienation cannot be revoked.

If the Intention to defraud is not attended with the Effect, and the Creditors ſuffer no real Loſs by it; as if, for Example, when the Creditors are ſuing at Law for their Debt, or are preparing to bring their Action, the Debtor ſatisfies them by the Sale of his Goods, or otherwiſe, the Alienation which had been made to their prejudice will have its effect. And if afterwards the Debtor borrows Money, the new Creditors cannot revoke the firſt Alienation, which was not made to their prejudice[g]; but if the new Creditors had lent their Money to pay off the old ones, and if their Money was actually imployed to that uſe, they may revoke the Alienation, altho' it was made before they lent their Money. For in this caſe, they would exerciſe the Rights of the firſt Creditors,

tors, in whoſe place they ſucceeded, by reaſon that their Money was imployed to pay them off, according to the Rules which ſhall be explained in their proper place[h].

VII.

7. Divers ways of defrauding.

All the ways by which Debtor's diminiſh fraudulently their Stock of Goods, to defraud their Creditors, are unlawful: And whatever is done to their prejudice by ſuch ways, will be revoked. Thus, Donations, Sales at an under Price, or for a counterfeit Price, for which the Debtor gives an Acquittance, Aſſignments made to third Perſons, fraudulent Diſcharges, and in general, all Contracts, and other Deeds and Diſpoſitions made to defraud Creditors, will be annulled[i].

VIII.

8. Other ſorts of Frauds.

If to defraud Creditors a Debtor colluding with his own Debtor, gives up a Mortgage, or Pawn, which he had for the Security of his Debt[l]: if to extinguiſh a Debt he furniſhes his Debtor with Exceptions which he had no juſt title to, or if he refers to the Debtor's Oath a Debt which he had ſufficient Evidence to prove[m]: if he compounds the matter by Tranſaction, with an unfair and diſhoneſt Intention, or if he gives an Acquittance without Payment[n]: if he lets himſelf be Non-ſuited in a juſt Demand, by Colluſion with his Debtor, or if he ſuffers a Creditor to obtain Judgment againſt him in a Suit where he had juſt and legal Defences[o]: if he drops an Action commenced[p]: if he ſuffers a Debt to preſcribe by Colluſion with his Debtor[q]: And if he does, or omits to do any other thing, by which he cauſes a Loſs, or a voluntary Diminution of his Goods, to the prejudice of his Creditors[r]; whatever ſhall have been done by ſuch Colluſion will be revoked, and the Creditors will be ſubſtituted to the firſt Rights of their Debtor[ſ].

IX.

9. Another kind of Fraud.

If a Debtor who had a Term fixed for the Payment of what he owed to one of his Creditors, or who owed the Debt only upon a certain Condition which was not as yet come to paſs, colluding with this Creditor, in order to favour him preferably to the others, pays him beforehand; the other Creditors may demand from him who has received the ſaid Payment, the Intereſt, from the day of Payment to the time that the Debt became really due[t], and even the Principal Sum, if it was a Debt that was only due upon a Condition not yet come to paſs. And in this caſe, care would be taken to provide for the Security of thoſe to whom the Money ought to return; whether it be the Creditor, if the Condition is fulfilled; or thoſe who ought to receive the Money, if the Condition is not fulfilled.

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[g] Ita demùm revocatur, quod fraudandorum creditorum cauſa factum eſt, ſi eventum fraus habuit, ſcilicet, ſi hi creditores, quorum fraudandorum cauſa fecit, bona ipſius vendiderunt. Cæterùm, ſi illos dimiſit, quorum fraudandorum cauſa fecit, & alios ſortitus eſt, ſi quidem ſimpliciter dimiſſis prioribus, quos fraudare voluit, alios poſteà ſortitus eſt, ceſſat revocatio. Si autem horum pecunia quos fraudare noluit, priores dimiſit, quos fraudare voluit, Marcellus dicit, revocationi locum fore. Secundùm hanc diſtinctionem & ab Imperatore Severo, & Antonino reſcriptum eſt. Eóque jure utimur. *l.* 10. §. 1. *ff. quæ in fraud. cred.* *l.* 15. *l.* 6. *eod.* Utrumque in eorumdem perſonam exigimus, & conſilium & eventum. *l.* 15. *eod.* Conſilium fraudis, & eventus damni. *l.* 1. *C. qui man. n. poſſ.*

[h] *See the ſeventh Section of Pawns and Mortgages.*

[i] Ait ergo Prætor, *quæ fraudationis cauſa geſta erunt.* Hæc verba generalia ſunt, & continent in ſe omnem omninò fraudem factam, vel alienationem, vel quemcumque contractum. Quodcumque igitur fraudis cauſa factum eſt, videtur his verbis revocari, qualecunque fuerit; nam latè verba iſta patent, ſive ergò rem alienavit, ſive acceptilatione, vel pacto aliquem liberavit, idem erit probandum. *l.* 1. §. 2. *& l.* 2. *ff. quæ in fraud. cred.* *l.* 7. *eod.*

[l] Et ſi pignora liberet. *l.* 2. *ff. quæ in fr. cred.*

[m] Vel ei præbuit exceptionem. *l.* 3. *eod.* Si quis in fraudem creditorum jusjurandum detulerit debitori, adverſus exceptionem jurisjurandi replicatio fraudis creditoribus debet dari. *l.* 9. §. 5. *ff. de jurejur.*

[n] Omnes debitores qui in fraudem creditorum liberantur, per hanc actionem revocantur in priſtinam obligationem. *l.* 17. *eod.* Si (libertus) tranſegit in fraudem patroni, poterit patronus Faviana uti. *l.* 1. §. 9. *ff. ſi quid. in fr. patr.*

[o] Verùm etiam ſi fortè data opera ad judicium non adfuit. *d. l.* 3. §. 1. *ff. quæ in fr. cred.*

[p] Vel litem mori patiatur. *d.* §. 1.

[q] Vel à debitore non petit, ut tempore liberetur. *d.* §. 1.

[r] Et qui aliquid fecit ut deſinat habere quod habet ad hoc edictum pertinet. In fraudem facere etiam eum, qui non facit quod debet facere, intelligendum eſt: id eſt, ſi non utatur ſervitutibus. *d. l.* 3. §. *ult. & l.* 4. *eod.*

[ſ] Quodcumque igitur fraudis cauſa factum eſt, videtur his verbis revocari, *qualecunque fuerit.* l. 1. §. ult. eod.

[t] Si cùm in diem mihi deberetur, fraudator præſens ſolverit, dicendum erit, quòd in eo quod ſenſi commodum in repræſentatione, in factum actioni locum fore. Nam prætor fraudem intelligit etiam in tempore fieri. *l.* 10. §. 12. *ff. quæ in fr. cred.* *l.* 17. *in f. eod.*

X.

10. *Other Frauds.* If a Debtor obliges himſelf, to the prejudice of his Creditors, for things which he does not owe; if he gives Money, or any other Thing, to Perſons to whom he owed nothing, or if he commits other Frauds of the like Nature, the whole will be revoked by his Creditors[u].

[u] Sive ſe obligaverit fraudandorum debitorum cauſa, ſive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum, palam eſt edictum locum habere. *l.* 3. *ff. quæ in fraud. cred.*

XI.

11. *A Dowry ſettled to defraud Creditors.* We muſt not reckon in the number of fraudulent Liberalities which may be revoked, that which is given on the ſcore of Dowry, or Marriage Portion, whether it be by the Father of the Woman, or by other Perſons, when the Huſband is ignorant of the Fraud. For altho' the Dowry may be given fraudulently by thoſe who endow the Wife, yet the Huſband who receives the Dowry on a valuable conſideration, and who without the ſaid Dowry would not have engaged in the State of Matrimony, ought not to loſe it[x]. But if the Huſband was a partaker in the Fraud, he may be made accountable for what concerns his own Fact, according to the Circumſtances[y].

[x] In maritum qui ignoraverit, non dandam actionem, non magis quàm in creditorem qui a fraudatore quod ei deberetur acceperit. Cùm is indotatam uxorem ducturus non fuerit. *l.* 25. §. 1. *in fine ff. quæ in fraud. cred.*

[y] Si a ſocero fraudatore ſciens gener accipit dotem, tenebitur hac actione. *d.* §. 1. Ergò & ſi fraudator pro filia ſua dotem dediſſet ſcienti fraudari creditores, filia tenetur, ut cedat actione de dote adverſus maritum. *l.* 14. *in fine eod.*

Si cùm mulier fraudandorum creditorum conſilium miſſet, marito ſuo eidemque debitori in fraudem creditorum acceptum debitum fecerit, dotis conſtituendæ cauſa, locum habet hæc actio. Et per hanc omnis pecunia quam maritus debuerat, exigitur; nec mulier de dote habet actionem: neque enim dos in fraudem creditorum conſtituenda eſt. Et hoc certo certius eſt, & ſæpiſſimè conſtitutum. *l.* 10. §. 14. *eod. l.* 2. C. *de revoc. his quæ in fraud. cred. alien. ſunt.*

By the Ordinances of Francis I. *of the* 8th *of* June, 1532, *and of* Charles IX. *in* January, 1563, *the Settlements of Dowries, or Marriage Portions, could not exceed Ten Thouſand Livres. Which, among other Motives, might have that of preventing Frauds in Marriage Settlements. But theſe Ordinances are of no manner of uſe.*

We muſt obſerve on this Article, the difference between the Condition of a Huſband to whom a Portion is given in Marriage with his Wife, without his being concerned in any Fraud whatſoever, and who receives what has been promiſed him for a Dowry, from the Perſon who made the Settlement, altho' the ſaid Perſon may have done it with Intention to defraud his Creditors, and the Condition of a Huſband who has been partaker in the Fraud that was done to the Creditors, by giving him with his Wife an exceſſive Dowry. For this Huſband being an Accomplice in the Fraud, might be made anſwerable for it according to the circumſtances. But the other Huſband, in the firſt caſe mentioned, would have a Right to receive the Dowry which had been promiſed him, in the ſame manner as every Creditor may receive what is due to him, altho' there ſhould not remain enough to ſatisfy the other Creditors.

We muſt likewiſe diſtinguiſh upon this Article, between the Dowry which a Woman ſettles her ſelf on her Marriage, and that which her Father, or other Perſons, may ſettle upon her. In the firſt caſe, that which a Woman her ſelf ſettles on her Marriage out of her own Eſtate can be of no prejudice to her Creditors; for they will have their Action againſt the Huſband for what he ſhall have received on the ſcore of Dowry, he being in ſo much a Debtor to his Wife. But in the ſecond caſe, the Creditors of thoſe who have ſettled the Dowry have no Action againſt the Huſband, who has received nothing but what was due to him on account of his Wife's Portion.

XII.

12. *He who receives what is due to him, commits no Fraud.* The Creditor who receives from his Debtor that which is due to him, commits no Fraud; but does himſelf Juſtice, by taking care of his own Intereſt, as it is lawful for him to do. And altho' his Debtor be found Inſolvent, and that becauſe of the ſaid Payment there does not remain enough to ſatisfy the other Creditors, or that even there remains nothing at all for them, he is not bound to reſtore what he has received for his own Payment; but the other Creditors ought to blame themſelves for not having been as watchful of their Intereſt, as he has been of his who has got Payment[z].

[z] Apud Labeonem ſcriptum eſt, eum qui ſuum recipiat, nullam videri fraudem facere. Hoc eſt, eum qui quod ſibi debetur, receperat. *l.* 6. §. 6. *ff. quæ in fr. cred.* Sciendum, Julianum ſcribere, eoque jure nos uti, ut qui debitam pecuniam recepit, antequam bona debitoris poſſideantur, quamvis ſciens prudenſque ſolvendo non eſſe, recipiat, non timere hoc edictum. Sibi enim vigilavit. *d. l.* 6. §. 7. *l.* 24. *eod.* Alii creditores ſuæ negligentiæ expenſum ferre debent. *d. l.* 24. Vigilavi, meliorem meam conditionem feci. Jus civile vigilantibus ſcriptum eſt. Ideóque non revocatur id quod percepit. *d. l.* 24. *in fine.* Licet creditori vigilare ad ſuum conſequendum. *l.* 21. *ff. de pecul.* See the following Article.

XIII.

13. *Exception to the foregoing Article.* If after a Seizure of the Goods of a Debtor, or after a Debtor has aſſigned over his Goods for the Satisfaction of his Creditors, one of them receives Payment of his Debt, either out of the Stock of the Goods that have been ſeized, or out of what has been made over to the Creditors; he ſhall be obliged to ſhare with the other Creditors what he has received; becauſe in that caſe he

takes to himſelf that which belongs in common to all the Creditors[a]. But this is not to be underſtood of what one who has ſeized on the Moveables of his Debtor may have received by the means of his diligence, before the other Creditors have entred their Actions[b].

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[a] Qui verò poſt bona poſſeſſa debitum ſuum recepit, hunc in portionem vocandum, exæquandumque cæteris creditoribus. Neque enim debuit præripere cæteris, poſt bona poſſeſſa, cùm jam par conditio omnium creditorum facta eſſet. *l. 6. §. 7. ff. quæ in fraud. cred.*

[b] Aliter atque ſi creditor eſt, cui permiſſum eſt poſſidere, poſteà recepit debitum ſuum. Cæteri enim poterunt peragere, bonorum venditionem. *l. 12. ff. de reb. auth. jud. poſſ.* Si debitorem meum, & complurium creditorum conſecutus eſſem fugientem, ſecum ferentem pecuniam, & abſtuliſſem ei id quod mihi debeatur: Placet Juliani ſententia dicentis, multum intereſſe, antequàm in poſſeſſionem bonorum ejus creditores mittantur, hoc factum ſit: an poſteà. Si ante, ceſſare in factum actionem: ſi poſteà, huic locum fore. *l. 10. §. 16. ff. quæ in fraud. cred.*

SECT. II.

Of the Engagements of thoſe who commit theſe Frauds, or who partake in them.

The CONTENTS.

1. *Engagements which follow from Frauds done to Creditors.*
2. *Accomplices of the Frauds.*
3. *Puniſhment of the Debtor who defrauds his Creditors.*
4. *When a Tutor, or Guardian, partakes in a Fraud done to Creditors.*

I.

1. Engagements which follow from Frauds done to Creditors.

HE who ſhall have partaken in a Fraud done to Creditors, ſhall be bound to reſtore whatever he has received by ſuch means, together with the Fruits, or other Profits, and the Intereſt, if it is Money, to be reckoned from the day on which he received it. And all things ſhall be reſtored to the ſame condition in which they were before the Fraud[a].

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[a] Per hanc actionem res reſtitui debet cum ſua ſcilicet cauſa, & fructus non tantùm qui percepti ſunt, verùm etiam hi qui percipi potuerunt à fraudatore, veniunt. *l. 10. §. 19. & 20. ff. quæ in fraud. cred.* Præthereà generaliter ſciendum eſt, ex hac actione reſtitutionem fieri oportere in priſtinum ſtatum, ſive res fuerunt, ſive obligationes: ut perinde omnia revocentur, ac ſi liberatio facta non eſſet. Propter quod etiam medii temporis commodum, quod quis conſequeretur liberatione non facta, præſtandum erit. *d. l. 10. §. 22.* in Faviana quoque actione, & Pauliana, per quam, quæ in fraudem creditorum alienata ſunt, revocantur, fructus quoque reſtituuntur. Nam prætor id agit, ut perinde ſint omnia, atque ſi nihil alienatum eſſet. Quod non eſt iniquum. Nam & verbum *reſtituas*, quod in hac re prætor dixit, plenam habet ſignificationem, ut fructus quoque reſtituantur. *l. 38. §. 4. ff. de uſur.*

II.

2. Accomplices of the Frauds.

All thoſe who contribute to Frauds done by Debtors to their Creditors, whether they reap Profit by them, or whether they lend barely their Names, are bound to repair the Wrong they have done. Thus, thoſe who accept of fraudulent Aſſignments to what is due to the Debtor, are bound to deliver up to the Creditors the Titles of the ſaid Credits, together with their Aſſignments, or that which they have received of the Debt themſelves, or cauſed the Debtor to receive, who borrowed their Name[b].

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[b] Hac in factum actione non ſolùm dominia revocantur, verùm etiam actiones reſtaurantur. Ea propter competit hæc actio & adverſus eos qui res non poſſident, ut reſtituant: & adverſus eos quibus actio competit, ut actione cedant. Proinde ſi interpoſuerit quis perſonam Titii, ut ei fraudator res tradat, actione mandati cedere debet. *l. 14. ff. quæ in fr. cred.* See the following Article.

III.

3. Puniſhment of the Debtor who defrauds his Creditors.

The Debtor who has defrauded his Creditors, is not only bound to repair, as much as can be done out of his Eſtate, the Effect of the Fraud; but he ought likewiſe to be condemned to ſuch Penalties as his unfair dealing may deſerve, according to the Circumſtances[c].

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[c] Hæc actio in ipſum fraudatorem datur, licet Mela non putabat in fraudatorem eam dandam. Quia nulla actio in eum ex ante geſto, poſt bonorum venditionem daretur: & iniquum eſſet actionem dari in eum, cui bona ablata eſſent. Si verò quædam diſperdidiſſet, ſi nulla reſtitutione recuperari poſſent, nihilominùs actio in eum dabitur. Et prætor non tantum emolumentum actionis intueri videtur in eo qui exutus eſt bonis, quam pœnam. *l. ult. §. ult. ff. quæ in fr. cred.* Actionem dabo, idque etiam adverſus ipſum qui fraudem fecit, ſervabo. *l. 1. eod. See the Ordinance of* Orleans, *Art. 143. that of* Blois, *Art. 205. and others, which inflict Penalties on thoſe who are guilty of fraudulent Bankrupcies.*

[*By the Law of* England, *as it now ſtands, Fraudulent Bankrupcies are made Capital. For if any Perſon becoming Bankrupt, and againſt whom a Commiſſion of Bankrupcy hath been awarded and iſſued out, ſhall not, within thirty Days after Notice in Writing, and in the* London Gazette, *ſurrender himſelf to the Commiſſioners, and ſubmit to be examined upon Oath, (except Quakers,) and truly diſcloſe and diſcover how he hath diſpoſed, aſſigned or transferred his Effects, or Eſtate, and all Books and Papers relating thereto; and alſo deliver up to the Commiſſioners all ſuch his Effects, or E-*

ſtate, and all Books and Writings relating thereunto, as at the time of his Examination ſhall be in his Cuſtody, or Power; or if he removes, or conceals his Effects, to the Value of Twenty Pounds, then he ſhall be adjudged, upon Conviction by Indictment, or Information, a Felon, without Clergy, or the benefit of any Statute made in relation to Felons. Stat. 5 Georgii.]

IV.

4. When a Tutor, or Guardian, partakes in a Fraud done to Creditors.

If a Tutor, or Guardian, becomes partaker in any Fraud which a Debtor commits againſt his Creditors, by favouring in that Quality the unfair dealing of the ſaid Debtor, by any deed which relates to the Perſon whom the ſaid Tutor or Guardian has under his Charge; he ſhall be bound perſonally for the Loſs which his Fraud may have cauſed. And the Minor, whoſe Eſtate the Tutor or Guardian had the Adminiſtration of, ſhall likewiſe be bound to repair the Fraud, altho' he knew nothing of it, but he will be liable only for ſo much as he ſhall have profited thereby[d].

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[d] Ait prætor, *ſciente*, id eſt, eo qui convenietur hac actione. Quid ergò ſi fortè tutor pupilli ſcit, ipſe pupillus ignoravit, videamus, an actioni locus ſit, ut ſcientia tutoris noceat: idem & in curatore furioſi, & adoleſcentis? & putem hactenùs illis nocere conſcientiam tutorum, ſive curatorum, quatenùs quid ad eos pervenit. *l.* 10. §. 5. *ff. quæ in fr. cred. d. l.* §. 11.

Altho' theſe Laws make no mention of what the Tutor may be obliged to bear in his own Name, for his own proper Fact, yet he is moſt certainly liable for the Loſs which his Deceit ſhall have occaſioned; as are all thoſe who do harm by their fraudulent Dealings. Quæ dolo malo facta eſſe dicuntur, ſi de his rebus alia actio non erit, & juſta cauſa eſſe videbitur, judicium dabo. *l.* 1. §. 1. *ff. de dolo.*

THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK III.

Of the Conſequences which add to Engagements, or which ſtrengthen and corroborate them.

HAVING explained the ſeveral Sorts of Engagements which are the Subject Matter of the Civil Law, and which are formed either by Covenant, of which we have treated in the Firſt Book, or without Covenant, ſuch as thoſe which have been explained in the Second Book; it remains now, in order to finiſh the Firſt Part of this Work, purſuant to the Plan laid down in the laſt Chapter of the Treatiſe of Laws, that we explain the Conſequences of Engagements. And in this Third Book we ſhall treat of the Conſequences which add to Engagements, or which ſtrengthen and corroborate them; and in the Fourth we ſhall examine the Conſequences which annul Engagements, or which diminiſh them.

TITLE I.

Of PAWNS and MORTGAGES, and of the Privileges of CREDITORS.

The Mortgage, or Pawn, is a Conſequence of Engagements.

THE firſt and moſt frequent of all the Conſequences of Engagements, whether they ariſe from Covenants, or whether they are formed without Covenant, is that of a

Pawn, or Mortgage; that is to ſay, the Appropriation of the Eſtate, or Goods of any Perſon, for a Security of their performance of the Engagement they are under. The meaning and Uſe of theſe two Words ſhall be more fully explained in the firſt Article of the firſt Section.

Origine of Mortgages.

Pawns, or Mortgages, derive their Origine, and that very Naturally, from Engagements which cannot be executed, unleſs the Perſon who is engaged be ſeiſed, or poſſeſſed of ſome Eſtate. For the greateſt Force of Obligations, and the moſt perfect Integrity in thoſe who are bound, would be all to no purpoſe, if they had no Eſtate: and the Security even from thoſe who have Eſtates would not be entire, if the Mortgage did not appropriate their Eſtates for the Payment of their Creditors: becauſe the Debtors diveſting themſelves of their Eſtates, either by Donations, or by Sales, or other Titles; and the Eſtate when alienated being no longer the Debtor's Eſtate, the Creditors would be without Remedy, if they had not the Right to claim the Eſtate which has been alienated, into whoſe hands ſoever it may have paſſed. And it is by the Uſe of a Mortgage that this Right hath been eſtabliſhed.

We ſhall ſay nothing here of the Privileges of Creditors; for that ſhall be the Subject Matter of the fifth Section; neither ſhall we make here any other Remarks on the Nature of Mortgages, their Kinds, the Things which are ſubject to them, the Ways by which they are acquired, and what elſe relates to this Matter. For the Order and Place of every one of theſe Things will ſufficiently appear by the Diſtinction of the Sections of this Title.

SECT. I.

Of the Nature of a Pawn, and Mortgage, and of the Things which are capable of being thus engaged, or not.

Difference between our Uſage and the Roman *Law as to Moveables, in what relates to a Mortgage.*

SEeing the Nature of a Mortgage is to appropriate Eſtates for the Security of Engagements; and that, for Example, the Creditor of a Sum of Money, ſecures his Payment by the Right of claiming the Thing which is mortgaged to him, into whoſe hands ſoever it paſſes, it is neceſſary to obſerve one important difference between our Uſage and the *Roman* Law, in what relates to the Security on the Moveables and Perſonal Eſtate of Debtors.

By the *Roman* Law, the Mortgage had the ſame Effect on Moveables, as Immoveables, with that Right of claiming them, into whoſe hands ſoever they went. But the Inconveniencies of ſubjecting to this Right of Proſecution, Moveables which are ſo liable to change Maſters, have induced our Lawgivers to ſettle the Law in relation to this matter otherwiſe in this Kingdom. And the Rule with us is, that the Mortgage, or Pawn, upon a Moveable Thing, laſts no longer than whilſt the Thing is in the Cuſtody of the Perſon who is bound, or that he who has it for his Security, is in poſſeſſion of it. But if the Debtor makes it to paſs into other hands, either by alienating it, or pawning it, the Creditor cannot any longer lay claim to it. And this Rule is expreſſed in theſe words, That *Moveables have no Sequel by a Mortgage.*

The Uſage then in *France*, as to Moveables is, that Creditors exerciſe their Right to them two ways. One is, when the Moveable is in the Cuſtody of the Creditor, who has it in his Poſſeſſion, and holds it in Pawn. And the other is, when the Moveable is in the Cuſtody of the Debtor, or of other Perſons who keep it in his Name; ſuch as a Depoſitary, or one who has borrowed it, or another Creditor who has a Thing in Pawn, the Value of which exceeds that of his Debt. In the firſt Caſe the Creditor may cauſe the Thing to be ſold, if the Debtor conſents to it; or upon his Refuſal, the Creditor may have an Order from the Judge for ſelling it; in order to pay himſelf out of the Price which it yields, and that preferably to all other Creditors, even altho' they be prior in time, but not to the prejudice of a Creditor who has a Privilege on the ſame Pawn[a]. In the ſecond Caſe, the Creditor may ſeize on, and expoſe to Sale, a Moveable Thing belonging to his Debtor, if he has a Mortgage upon his Eſtate, or Leave from the Judge to attach his Goods. And if other Creditors concur with him by other Attachments, or Actions, he ſhall be preferred to them, if he has made the firſt Seizure; unleſs it be that all the Goods of the Debtor are not ſufficient to ſatiſfy all his Creditors. For in this Caſe of Inſolvency, the firſt who ſeizes, or attaches the Goods, is not preferred, and there is no Preference belongs to any of the Creditors, except ſuch as have ſome Privilege, and all the other Creditors ſhare in proportion to their Claims, as ſhall be explained in the fifth Title of the fourth Book. Whereas in Immoveables the Creditors are preferred the one to the other, according to the Priority of their Mortgages; which proceeds from the Difference which our Uſage puts between Immoveables, which are capable of a Mortgage, and Moveables, in which the Mortgage has no Sequel. And when the Moveable Thing is neither in the Cuſtody of the Creditor, nor of the Debtor, nor of any other in his Name, the Debtor having alienated it; the Creditor then has no longer any Right to it, except in the Caſe which ſhall be obſerved on the fourth Article of the fifth Section.

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[a] *See the remark on the fourth Article of the fifth Section.*

[*As to the Mortgage of Moveables, the Law of* England *agrees with the Law in* France, *in oppoſition to the Civil Law. For in* England *a Mortgage on Moveables has no Sequel; ſo that if the Thing that is mortgaged be ſold, or otherwiſe alienated by the Debtor; the Creditor, who had it mortgaged to him as a Security for his Debt, can lay no claim to it.*]

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33. *Approbation of the Perſon whoſe Thing is mortgaged by another.*

I.

1. *Signification of the words* Pawn *and* Mortgage.

THE word *Mortgage* ſignifies commonly the ſame thing as the word *Pawn*; that is, the Appropriation of the Thing given for the Security of an Engagement: and theſe two Words are uſed indifferently in the ſame Senſe. But the word *Pawn* is more properly applied to Moveable Things, which are put into the Hands and Keeping of the Creditor; and the word *Mortgage* ſignifies properly the Right acquired by the Creditor upon the Immoveables which are appropriated to him by his Debtor, altho' he be not put into Poſſeſſion of them [a].

[a] Inter pignus autem & hypothecam, quantùm ad actionem hypothecariam attinet, nihil intereſt. Nam de qua re inter creditorem & debitorem convenerit, ut ſit pro debito obligata, utraque hac appellatione continetur. Sed in aliis differentia eſt. Nam pignoris appellatione eam propriè rem contineri dicimus, quæ ſimul etiam traditur creditori, maximè ſi mobilis ſit. At eam, quæ ſine traditione, nuda conventione tenetur, propriè hypothecæ appellatione contineri, dicimus. §. 7. *inſt. de act.* Inter pignus autem & hypothecam tantùm nominis ſonus differt. *l. 5. §. 1. ff. de pign. & hypot.* Pignus appellatum à pugno, quia res quæ pignori dantur, manu traduntur. Unde etiam videri poteſt, verum eſſe quod quidam putant, pignus proprie rei mobilis conſtitui. *l. 238. §. 2. ff. de verb. ſignif.* Propriè pignus dicimus, quod ad creditorem tranſit, Hypothecam cùm non tranſit, nec poſſeſſio ad creditorem. *l. 9. §. 2. ff. de pign. act.* Et ſi non traditum eſt. *l. 1. eod.*

II.

2. Mortgages are for the Security of Obligations. The Mortgage being eſtabliſhed for the Security of the ſeveral ſorts of Obligations and Engagements, there is no Engagement in which one may not give a Mortgage for the Security of the Creditor. Thus, thoſe who borrow, who ſell, or buy, who let or take to Hire, or who enter into other Engagements, may add thereto the Mortgage of their Eſtate, for the greater Security of the Perſon to whom they oblige themſelves[b].

[b] Res hppothecæ dari poſſe ſciendum eſt, pro quacumque obligatione, ſive mutua pecunia datur, ſive dos, ſive emptio vel venditio contrahatur, vel etiam locatio & conductio, vel mandatum. *l. 5. ff. de pign. & hyp.* Vel pro civili obligatione, vel honoraria, vel tantùm naturali. *d. l.* non tantùm autem ob pecuniam, ſed & ob aliam cauſam pignus dari poteſt: veluti ſi quis pignus alicui dederit ut pro ſe fidejubeat. *l. 9. §. 1. ff. de pign. act.*

III.

3. Mortgage for a Conditional Debt. One may mortgage his Eſtate not only for Engagements which have an immediate and certain Effect, ſuch as an Obligation for Money lent, a Sale, the Contract of Letting and Hiring, and others of the like Nature, where the Engagement is formed immediately, altho' there be a Term fixed for the Payment; but alſo for Engagements the Effect of which depends on a Condition, or other Event, which may not come to paſs. Thus, the Engagements formed by a Contract of Marriage, imply always the Condition, if the Marriage is accompliſhed; but the Mortgage is acquired from the day of the Contract; both to the Huſband on the Eſtate of thoſe who contract for the Wife's Portion, and to the Wife on the Eſtate of the Huſband, that ſhe may recover her Dowry when there ſhall be occaſion for it. And as a Mortgage may be given for a conditional Debt, ſo likewiſe a Mortgage may be given upon Condition, for a Debt which is pure and ſimple, ſo as that the Mortgage may not have its Effect till the Condition is fulfilled[c].

[c] Et ſive pura eſt obligatio, vel in diem, vel ſub conditione, & ſive in præſenti contractu, ſive etiam præcedat, ſed & futuræ obligationis nomine (res hypothecæ, dari poſſunt. *l. 5. ff. de pign. & hyp.* In conditionali obligatione non alias (res) obligantur, niſi conditio extiterit. *d. l.* Cùm enim ſemel conditio extitit, perinde habetur, ac ſi illo tempore, quo ſtipulatio interpoſita eſt ſine conditione facta eſſet. *l. 11. §. 1. ff. qui pot.* Qui dotem pro muliere promiſit, pignus ſive hypothecam de reſtituenda ſibi dote accepit: ſubſecuta deinde pro parte numeratione, maritus eamdem rem pignori alii dedit; mox reſiduæ quantitatis numeratio impleta eſt. Quærebatur de pignore? Cùm ex cauſa promiſſionis ad univerſæ quantitatis exolutionem qui dotem promiſit compellitur, non utique ſolutionum obſervanda ſunt tempora, ſed dies contractæ obligationis. Nec probè dici, in poteſtate ejus eſſe, ne pecuniam reſiduam redderet, ut minus dotata mulier eſſe videatur. Alia cauſa eſt ejus, qui pignus accepit ad eam ſummam quam intra diem certum numeraſſet: ac fortè priuſquam numeraret, alii res pignori data eſt. *l. 1. ff. qui pot. d. l. §. 1.*

See concerning the Conditional Mortgage, the twentieth Article of this Section, and the ſeventeenth Article of the third Section. Si præſens ſit debitum, hypotheca verò ſub conditione. *l. 13. §. 5. ff. de pignor.* See the following Article.

IV.

4. A Mortgage for a Loan that is to be contracted, has no effect. If a Perſon foreſeeing that in a ſhort time he may have occaſion to borrow Money, obliges himſelf beforehand for the Sum which he ſhall afterwards borrow, and mortgages his Eſtate for this Loan that is to be contracted; the Mortgage ſtipulated on ſuch account will be without effect. For a Mortgage is only an Acceſſory to an Engagement that is already formed; and till it be formed there is no Loan, for the Perſon may perhaps not borrow Money at all. And beſides, if a Mortgage could be acquired in this manner, it would be eaſy by an Obligation of this Nature, made to a Perſon whoſe Name is borrowed for that purpoſe, to defraud the Creditors from whom one ſhould afterwards borrow[d].

[d] Titius, cùm mutuam pecuniam accipere vellet à Mævio, cavit ei, & quaſdam res hypothecæ nomine dare deſtinavit: deinde poſtquàm quaſdam ex his rebus vendidiſſet, accepit pecuniam. Quæſitum eſt, an & prius res venditæ creditori tenerentur? Reſpondit, cùm in poteſtate fuerit debitoris, poſt cautionem interpoſitam, pecuniam non accipere, eo tempore pignoris obligationem contractam videri, quo pecunia numerata eſt. Et ideò inſpiciendum, quæ res in bonis debitor numeratæ pecuniæ tempore habuerit. *l. 4. ff. quæ res pign. vel hyp. l. 11. ff. qui potior.* Re contrahitur obligatio mutui datione. *inſt. quib. mod. re contr. obl.* See the latter part of the Text cited on the foregoing Article, taken out of the firſt Law, *ff. qui potior.*

If the Obligation was made for a Loan already contracted, it would carry in it the Proof of the Delivery of the Money, altho' the Creditor had not delivered it till ſome time after the Date of the Obligation, and yet the Mortgage would nevertheleſs have its effect. Every day Obligations are given for Sums of Money that are not to be delivered till ſome time after, and in another place; but the Engagement is already formed, and the Delivery of the Money may be retarded by ſome Obſtacle, without any unfair dealing.

V.

5. Mortgage on an Eſtate to come.

Thoſe who bind themſelves by any Engagement whatſoever, may, for the Security of their performance of the Engagement on their part, appropriate and mortgage not only the Eſtate they are Maſters of at the time of contracting, but likewiſe all the Eſtate which they ſhall be afterwards ſeiſed or poſſeſſed of. And this Mortgage extends to all the Things which they ſhall afterwards acquire, that are capable of being mortgaged, by what Title ſoever it be that they acquire them, and even to thoſe which are not in being when the Obligation is contracted; ſo that the Fruits which ſhall grow upon the Lands will be comprehended in the Mortgage of an Eſtate to come [e].

[e] Conventio generalis in pignore dando bonorum, vel poſtea quæſitorum recepta eſt. *l. 1. ff. de pign. & hyp.*

Et quæ nondum ſunt, futura tamen ſunt, hypothecæ dari poſſunt: ut fructus pendentes, partus ancillarum, fœtus pecorum, & ea quæ naſcuntur ſint hypothecæ obligata. *l. 15. eod.*

As to the Things which are not ſuſceptible of a Mortgage, ſee the twenty fourth and following Articles.

VI.

6. How a Mortgage extends to the whole Eſtate, or is reſtrained to part of the Eſtate.

Altho' the Obligation of the Mortgage does not make expreſs mention of the Eſtate to come, or that the Perſon contracting mortgages only his Eſtate, without the addition of the word *all*; yet the Obligation will take in both the Eſtate in Poſſeſſion, and alſo that in Reverſion. But if the Mortgage be only particular, and reſtrained to certain Lands and Tenements, it will have no effect upon the others [f].

[f] Quod dicitur, creditorem probare debere, *cùm conveniebat rem in bonis debitoriis fuiſſe*, ad eam conventionem pertinet, quæ ſpecialiter facta eſt; non ad illam quæ quotidie inſeri ſolet cautionibus, *ut ſpecialiter de rebus hypotheca nomine datis, cætera etiam bona teneantur debitoris, quæ poſtea acquiſierit, perinde atque ſi ſpecialiter hæ res fuiſſent obligatæ.* l. 15. §. 1. ff. de pign. & hyp. Si quis in cujuſcunque contractus inſtrumento ea verba poſuerit, *fide & periculo rerum ad me pertinentium*, vel *per earum exactionem ſatisfieri tibi promitto*: ſufficere ea verba ad rerum tam earum quas in præſenti debitor habet, quam futurarum hypothecam ſancimus. *l. ult. C. quæ res pign. obl.* Sancimus, ſi res ſuas ſupponere debitor dixerit, non adjecto, *tam præſentes quàm futuras*, jus tamen generalis hypothecæ, etiam ad res futuras producatur. *d. l. ult. in f.*

When a Debtor who has mortgaged all his Eſtate, happens to make a new Purchaſe, the Mortgage which his Creditors have on the Thing newly purchaſed, commences only from the day that the Purchaſe was made, and not from the day of their Mortgage on the reſt of the Eſtate. For otherwiſe, there would be Wrong done to the Creditors of the Perſon of whom the Debtor purchaſed the ſaid Land, or Tenement; the Alienation of which could not be of any prejudice to their Mortgage. But among the Creditors of this Purchaſer, the moſt ancient will be preferred before the others, on the Land or Tenement that is acquired after their Mortgages.

VII.

7. Acceſſories of the Mortgage.

Altho' the Mortgage be reſtrained to certain Things, yet it will nevertheleſs extend to all that ſhall ariſe, or proceed from that Thing which is mortgaged, or that ſhall augment it, and make part of it. Thus, the Fruits which grow on the Lands that are mortgaged, are ſubject to the Mortgage while they continue unſeparated from the Ground [g]. Thus, when a Stud of Horſes, a Herd of Cattle, or a Flock of Sheep is put in Pawn into the Creditor's hands, the Foals, the Lambs, and other Beaſts which they bring forth, and which augment their Number, are likewiſe engaged for the Creditor's Security: And if the whole Herd, or Flock, be entirely changed, the Heads which have renewed it are engaged in the ſame manner as the old Stock [h]. Thus, when the Bounds of a Piece of Ground that is mortgaged happen to be enlarged by that which the Courſe of a River may add to it, the Mortgage extends to that which has augmented the Ground [i]. Thus, a Houſe that is built on a Ground which is mortgaged, is ſubject likewiſe to the Mortgage. And if on the contrary, a Houſe be mortgaged, and it periſhes by Fire, or falls thro' decay, the Mortgage will ſubſiſt on the Ground where the Houſe ſtood [l]. Thus, when a Debtor mortgages a Piece of Ground of which he had only the bare Property, another enjoying the Uſufruct of it, when the ſaid Right to the Uſufruct comes to be extinct, the Mortgage will comprehend the Ground together with the Fruits [m].

[g] *See the fourth Article of this Section.*

[h] Grege pignori obligato, quæ poſtea naſcuntur, tenentur. Sed etſi prioribus capitibus decedentibus totus grex fuerit renovatus, pignori tenebitur. *l. 13. ff. de pign. l. 29. §. 1. eod.*

[i] Si fundus hypothecæ datus ſit, deinde alluvione major factus eſt, totus obligabitur. *l. 16. eod. l. 18. §. 1. ff. de pign. act.*

[l] Domo pignori datâ, & area ejus tenebitur: eſt enim pars ejus. Et contra, jus ſoli ſequetur ædificium. *l. 21. ff. de pign. act. V. l. 29. §. 2. ff. de pign. & hyp.*

[m] Si nuda proprietas pignori data ſit, uſusfructus qui poſtea accreverit, pignori erit. *l. 18. §. 1. ff. de pign. act.*

Altho' Living Creatures be of the Number of Moveable Effects, which, by our Uſage, are not capable of being mortgaged, yet they may be put in Pawn into the Hands of a Creditor, to be as a Security to him for a Legacy, for a Rent, or other Debt. And it would be the ſame thing if a Herd of Cattle had been bought with the Money of a Creditor, to whom it would be appropriated as a Security for his Money. For that Creditor would retain his preference on the ſaid Herd of Cattle, as long as it continued in the Poſſeſſion of the Proprietor his Debtor. See the Remark on the fifth Article of the fifth Section, and that which has been ſaid in the Preamble of this Section; and the Remark on the fourth Article of the fifth Section.

VIII.

8. *The Proceed of the Thing mortgaged, and which is ſeparated from it, is not ſubject to the Mortgage.*

All that has been ſaid in the preceding Article, is to be underſtood only of the Augmentations, or Acceſſories, which are a part of the Thing that is mortgaged, and does not extend to that which is the Proceed of it, but is ſeparated from it, and changes its Nature. For, as for Example, if one takes Timber out of a Foreſt that is mortgaged, to imploy it in a Building, or in making a Ship, the Mortgage which one has on the Foreſt, will not extend to this Timber that has been taken out of it[n].

[n] Si quis caverit, ut ſilva ſibi pignori eſſet, navem ex materia factam non eſſe pignoris, Caſſius ait: Quia aliud ſit materia, aliud navis. Et ideò nominatim in dando pignore adjiciendum eſſe ait, quæque ex ſilva facta, natave ſint. *l.* 18. §. 3. *ff. de pign. act.*

Our Uſage, according to which Moveables have no Sequel by a Mortgage, furniſhes us with another Reaſon why theſe Kinds of Changes make the Mortgage to ceaſe on that which becomes Moveable, and which is no longer in the Poſſeſſion of the Debtor, or Creditor. Thus, the Timber that is ſeparated from the Foreſt, and the Materials of a Houſe that is gone to Ruine, being alienated by the Debtor, the Purchaſer poſſeſſes them free from the Mortgage which a Creditor had on the ſaid Foreſt, or on the ſaid Houſe.

IX.

9. *Of a Building raiſed on a Ground that is mortgaged.*

If a third Poſſeſſor of a Ground that is ſubject to a Mortgage builds upon it, the Mortgage that is upon the Ground will extend likewiſe to the Building. For the Building is an Acceſſory which follows the Nature of the Ground: and which belongs likewiſe to the Proprietor of the Ground. But the Creditor who exerciſes his Right of Mortgage on the Ground that is built upon, cannot have it adjudged to him, but with the Charge of reimburſing the ſaid Poſſeſſor who has raiſed the Building, of the Expences he has laid out upon it, provided that the Expences do not exceed the Value of the Building; for if they do exceed it, it would not be juſt that the Creditor ſhould be obliged to refund them[o]. But whether the Building be worth more than what it coſt, or worth as much, or leſs, it will be free for the ſaid Poſſeſſor to retain the Ground and the Building, if he pays the Debt.

[o] Domus pignori data exuſta eſt, eamque aream emit Lucius Titius, & extruxit: Quæſitum eſt de jure pignoris? Paulus reſpondit, pignoris perſecutionem perſeverare: & ideò jus ſoli ſuperficiem ſecutam videri, id eſt, cum jure pignoris. Sed bonâ fide poſſeſſores non aliter cogendos creditoribus ædificium reſtituere, quàm ſumptus in extructione erogatos, quatenùs pretioſior res facta eſt, reciperent. *l.* 29. §. 2. *ff. de pign. & hyp.*

Si quis in alieno ſolo ſua materia ædificaverit, illius fit ædificium cujus & ſolum eſt. *l.* 7. §. 12. *ff. de acquir. rer. dom.* §. 30. *inſt. de rer. div.* Certè ſi dominus ſoli petat ædificium, nec ſolvat pretium materiæ, & mercedes fabrorum, poterit per exceptionem doli mali repelli. *d. l.* 7. §. 12. *inſt. & d.* §. 30.

X.

10. *When a Houſe that is mortgaged, is burnt down, and rebuilt by the Debtor.*

If a Houſe that is mortgaged, happens to be burnt down, and is rebuilt by the Debtor, the Creditor will have the ſame Mortgage both upon the Ground, and the new Houſe, and that with much more reaſon than in the caſe of the foregoing Article[p].

[p] Si inſula quam tibi ex pacto convento, licuit vendere, combuſta eſt, deinde à debitore tuo reſtituta, idem in nova inſula juris habes. *l. ult. ff. de pign. & hyp.*

XI.

11. *Of the Change of the Face of the Land or Tenement that is mortgaged.*

The other Changes which may be made by any Poſſeſſor of a Ground that is ſubject to a Mortgage, do not extinguiſh it; but the Mortgage ſubſiſts upon the Ground, whether it be made worſe, or better, and in the Condition that it happens to be. Thus, for Example, if a Houſe is turned into a Garden, a Field into a Vineyard, a Wood into Meadow Ground, the Mortgage continues upon the new Face that is given to the Land, or Tenement[q].

[q] Si res hypothecæ data, poſteà mutata fuerit, æquè hypothecaria actio competit. Veluti de domo data hypothecæ, & horto facta: item ſi de loco convenit, & domus facta ſit: item de loco dato, deinde vineis in eo depoſitis. *l.* 16. §. 2. *ff. de pign. & hyp.*

XII.

12. *Of that which is purchaſed with the Money that ariſes from the Land or Tenement that is mortgaged.*

If a Debtor who had not mortgaged all his Eſtate, but only one Piece of Land, lays out the Money ariſing from the Fruits of the ſaid Land that is mortgaged on the Purchaſe of a new Eſtate; this new Purchaſe, altho' proceeding from the Fruits which were ſubject to the Mortgage, will not be ſubject to it; no more than an Eſtate that is purchaſed with the Money, or other Thing, which the Creditor had in Pawn[r]. For the Mortgage may very well extend to the Acceſſories of the Thing that is mortgaged, according to the Rule explained in the ſeventh Article; but it does not paſs from one Thing to another, which was not included in the Deed of Mortgage.

[r] Quamvis fructus pignori datorum prædiorum, & ſi id apertè non ſit expreſſum, & ipſi pignori credantur tacita pactione ineſſe: prædia tamen quæ emuntur ex fructuum pretio, ad eamdem cauſam veniſſe, nulli prudentium placuit. *l.* 3. *C. in quib. cauſ. pign.* Res ex nummis pignoratis empta, non eſt pignorata ob hoc ſolùm, quia pecunia pignorata erat. *l.* 7. *in fine ff. qui pot.*

If a Debtor acquires by an Exchange another Land, or Tenement, in lieu of that which he had mortgaged, would this Exchange of the ſaid Land, or Tenement, make the Mortgage to paſs to the Land, or Tenement, which the Debtor has got in Exchange? If the Mortgage was limited by a Covenant to the Land, or Tenement, given away in Exchange by the Debtor, it would ſeem that the Mortgage ought not to change, no more than it ought to extend to both the Lands, or Tenements. For beſides that it is the Nature of the Mortgage to affect only the Land or Tenement that is engaged, and to follow it; the Change which ſhould diſcharge from the Mortgage the Land or Tenement given away in Exchange by the Debtor, and which ſhould charge with it the Land or Tenement which he receives in Exchange, would be attended with Inconveniencies, which would cauſe Injuſtice to the Creditors of the Perſons who make the Exchange, not only by the Inequality which might happen in the Value of the two Lands, or Tenements, but becauſe of other Conſequences, of which it is eaſy to judge without farther Explication. But if this Debtor had mortgaged all his Eſtate, preſent and to come, the Mortgage would extend to both the Lands or Tenements.

XIII.

13. *Of an Eſtate that is mortgaged at the ſame time to two Creditors.*

If one and the ſame Eſtate be mortgaged to two Creditors for different cauſes at the ſame time, without diſtinguiſhing one Portion for one of the Creditors, and another for the other; each of them ſhall have his Mortgage upon the whole Eſtate for his whole Debt. And if the whole Eſtate be not ſufficient for both the Creditors together, their Right will be divided, not by Moieties, but in proportion to the difference of the Debts owing to them. For each Creditor having his Mortgage upon the whole Eſtate for his whole Debt, their Concurrence divides their Rights upon the ſame foot. And if, for Example, there be Ten Thouſand Livres due to one of the Creditors, and Five Thouſand to the other, and the Eſtate which is mortgaged to them be not worth Fifteen Thouſand Livres, the one Creditor will have two Thirds for his Mortgage, and the other one Third[s].

[s] Si duo pariter de hypotheca paciſcantur, in quantum quiſque obligatam hypothecam habeat, utrùm pro quantitate debiti, an pro partibus dimidiis quæritur? & magis eſt, ut pro quantitate debiti pignus habeant obligatum. Sed uterque ſi cum poſſeſſore agat, quemadmodùm? Utrùm de parte quiſque, an de toto, quaſi utrique in ſolidum res obligata ſit? Quod erit dicendum, ſi eodem die pignus utrique datum eſt ſeparatim: ſed ſi ſimul illi & illi, ſi hoc actum eſt, uterque rectè in ſolidum aget: ſi minùs, unuſquiſque pro parte. *l.* 16. §. 8. *ff. de pign. & hyp. l.* 10. *eod.* ſi pluribus res ſimul pignori detur æqualis omnium cauſa eſt. *l.* 20. §. 1. *ff. de pign. act.* See the three following Articles.

XIV.

14. *In an Equality of Mortgage, the Poſſeſſor is preferred.*

If in the caſe of two Creditors, to whom the ſame Thing is mortgaged for the Whole at the ſame time, one of them is put into Poſſeſſion, he ſhall be preferred. For the Poſſeſſion diſtinguiſhes their Right in favour of him who beſides the Equality of the Title, has the advantage of being in Poſſeſſion[t]. But if one part of the Thing is mortgaged to one Creditor, and the reſt to another, each ſhall have his ſeparate Right on his own Portion[u].

[t] In pari cauſâ poſſeſſor potior haberi debet. *l.* 128. *ff. de reg. jur.*

Si debitor res ſuas duobus ſimul pignori obligaverit, ita ut utrique in ſolidum obligatæ eſſent, ſinguli in ſolidum adverſus extraneos Serviana utentur: inter ipſos autem ſi quæſtio moveatur, poſſidentis meliorem eſſe conditionem. *l.* 10. *ff. de pign. & hyp. l.* 1. §. 1. *ff. de ſalv. interd.* See the thirteenth Article of the ſecond Section of the Contract of Sale, and the third Article of the third Section of this Title.

[u] Si autem id actum fuerit, ut pro partibus res obligarentur, utilem actionem competere, & inter ipſos, & adverſus extraneos, per quam dimidiam partis poſſeſſionem adprehendant ſinguli. *dd. ll.* See the foregoing Article.

XV.

15. *Of a Mortgage upon the undivided Portion of one of the Co-Heirs to an Eſtate.*

If an Eſtate belonging in Common, without any Diviſion, or Partition, to two or more Perſons, ſuch as Co-Partners, Co-Heirs, or others, one of them has mortgaged to his Creditor either all his Eſtate, or the Right which he had to that Eſtate; this Creditor will have his Mortgage upon the undivided Portion of his Debtor, as long as the Eſtate ſhall remain in common. But after the Partition, the Right of this Debtor being limited to the Portion that has fallen to his Lot, the Mortgage of his Creditor will be alſo limited to the ſame. For altho' before the Partition the whole Eſtate was ſubject to the Mortgage for the undivided Portion of this Debtor, and that a Right which is acquired cannot be diminiſhed; yet ſeeing the Debtor had not a ſimple and immutable Right of enjoying his Share of the Eſtate always undivided, but that his Right implied the Condition of a Liberty to all the Proprietors to come to a Partition in order to aſſign to every one a Portion that might be wholly and entirely their own; the Mortgage, which was only an Acceſſory to the Debtor's Right, implied likewiſe the ſame Condition, and affected only that which ſhould fall to the Debtor's Share, the Portions of the others remaining free to them. But if in the Partition there was any Fraud committed, the Creditor might procure a Redreſs of what has been done to his prejudice.

[x] Si fundus communis nobis ſit, ſed pignori datus à me, venit quidem in communi dividundo: ſed jus pignoris creditori manebit, etiamſi adjudicatus fuerit. Nam, & ſi pars ſocio tradita fuiſſet, integrum maneret. Arbitrum autem communi dividundo hoc minoris partem æſtimare debere, quod ex pacto eam rem vendere creditor poteſt, Julianus ait. *l.* 6. §. 8. *ff. comm. divid.* Illud tenendum eſt ſi quis communis rei partem pro indiviſo dederit hypothecæ, diviſione facta cum ſocio, non utique eam partem creditori obligatam eſſe quæ ei obtingit, qui pignori dedit: ſed utriuſque pars pro indiviſo, pro parte dimidia manebit obligata. *l.* 7. §. *ult. ff. quib. mod. pign. vel hyp. ſolv. l.* 3. §. *ult. ff. qui potior.*

We have added to the Rule that is taken from the Texts cited upon this Article, that after the Partition, the Mortgage is reſtrained to the Portion that falls to the Share of the Debtor. For this is the Uſage with us; and it is what Equity demands, as appears from the Reaſons explained in the Article. So that we do not follow the Diſpoſition of theſe Texts, no more than another Deciſion of the like Nature in the thirty firſt Law, ff. de uſu & uſufr. & red. *which determines, that the Uſufructuary of an undivided Share retains his Right after the Partition among the Proprietors, and that he has his Uſufruct intire upon the Portions of all the Proprietors. Theſe Laws are founded upon this Nicety, that the Uſufructuary, or the Mortgagee, having their Right entire and undivided upon the whole Eſtate, the Partition ought not to take away their Right. But this Right of theirs is in effect no other than what has been explained in the Article. And likewiſe this Nicety would be attended with an infinite number of Inconveniencies; if Perſons intereſted in a Partition, whether they be Co-Partners, or others, after they have made a Partition without Fraud, might be diſturbed by the Creditors of one of their Number, and that all their Portions might be ſeized and ſold for the Debt of one Perſon alone. To which may be applied the laſt words of the only Law,* Cod. ſi commun. res pign. data ſit. Unde intelligis contractum ejus nullum præjudicium dominio veſtro facere potuiſſe.

The difficulty would ſtill be much greater in the Caſe of a Partition of a Succeſſion conſiſting of Moveable Effects, and of one only Land or Tenement, which it would be either impoſſible, or very inconvenient to divide into Shares, or even altho' there were more Lands, or Tenements, than one in the Succeſſion, which the Heirs, or Executors would be obliged for their Conveniency to divide, ſo that ſome of them ſhould have only for their Shares Moveable Effects, and but little, or perhaps nothing at all, in the Lands and Tenements. For in this caſe, the Creditors of the Co-Heir, or Co-Executor, who ſhould chance to have in his Lot, either little, or nothing at all, of the Lands and Tenements, would find themſelves diſappointed in their hopes they may have entertained of having a Mortgage upon the Lands, or Tenements, that made part of the Succeſſion. But theſe Creditors ought to have a watchful Eye before the Partition, both over the Moveables and Immoveables, that nothing be done to their prejudice. For if the Partition were made without Fraud, they might be told, that their Security was only upon what might fall to the Share of their Debtor: and if, for Example, that Debtor had waſted and diſſipated the Moveable Effects which fell to his Lot, it would not be juſt that the Shares of the others ſhould go to the Payment of his Debts.

XVI.

16. *The Creditor's Mortgage on the Lands of a perſon deceaſed, extends to all the Portions of the ſaid Lands, even after they are divided among the Co-Heirs.*

The Partitions which Co-Heirs make among themſelves of the Lands or Tenements of a Succeſſion, make no Change in the Mortgage which the Creditors of the deceaſed had on the ſaid Lands, or Tenements; and each Land, or Tenement, remains engaged for the whole Debt. Thus, the Co-Heir who poſſeſſes one Land, or Tenement, of the Succeſſion, having paid his Share of the Debt, cannot hinder his Land, or Tenement, from being ſeiſed on for the Portions of the other Co-Heirs, no more than if that Portion of the Debt had been paid by the deceaſed himſelf. For the Mortgage affects every particular Land, or Tenement, of the Succeſſion, and every part of the ſaid Land, or Tenement, for the whole Debt[y]. And this Heir will only have his Recourſe againſt his Co-Heirs for their Portions.

[y] Si unus ex hæredibus portionem ſuam ſolverit, tamen tota res pignori data venire poterit: quemadmodum ſi ipſe debitor portionem ſolviſſet. *l.* 8. §. 2. *ff. de pign. act.* Actio quidem perſonalis inter hæredes pro ſingulis portionibus quæſitis ſcinditur, pignoris autem jure multis obligatis rebus, quas diverſi poſſident, cùm ejus vindicatio non perſonam obliget, ſed rem ſequatur, qui poſſident tenentes, non pro modo ſingularum rerum ſubſtantiæ conveniuntur, ſed in ſolidum: ut vel totum debitum reddant, vel eo quod detinent cedant. *l.* 2. *C. ſi unus ex plur. hæred. credit. l.* 16. *C. de diſtr. pign. l.* 1. *C. de luit. pign.*

It is upon this Rule that this common Maxim is founded, That the Heirs are bound by vertue of the Mortgage for the whole Debt, *altho' they are bound perſonally only every one for the Portion of the Inheritance that falls to their Share. For the Perſonal Action is divided among the Perſons of the Heirs, or Executors, as ſhall be explained in its proper place. But the Mortgage ſubſiſts undivided, and binds equally all the Lands and Tenements that are ſubject to it, and all the parts of each Land, or Tenement.*

XVII.

17. *All the Co-Heirs, or Co-Executors of a Creditor deceaſed, have their Security on what was mortgaged to the ſaid Creditor.*

If one of ſeveral Co-Heirs, or Co-Executors of a Creditor, receives his Portion of the Debt from the Debtor, the Mortgage neverthleſs remains intire to the other Co-Heirs, or Co-Executors, for the Security of their Portions, upon all that the ſaid Debtor had mortgaged to the ſaid deceaſed Creditor[z].

[z] Si creditori plures hæredes extiterint, & uni ex his pars ejus ſolvatur, non debent cæteri hæredes creditoris injuriâ affici: ſed poſſunt totum fundum vendere. *l.* 11. §. 4. *ff. de pign. act.*

XVIII.

18. *The Mortgage is undivided.* The Mortgage makes an undivided Appropriation of all that is mortgaged, for the Security of all that is due; and in ſuch a manner, that, for Example, if two Lands or Tenements be mortgaged for one and the ſame Sum, the Mortgage hath not this effect, that each Land or Tenement be bound only for a part of the Debt; but, of what value ſoever they be, they are, both the one and the other, bound for the whole Sum; and if one of the ſaid Lands or Tenements happens to periſh, the Mortgage remains intire for the whole Debt, upon the Land or Tenement which is ſtill in being[a] And likewiſe, altho' the Debtor pay a Half, or other Share, of the Debt, the two Lands or Tenements continue to be bound for what remains unpaid. For it is the Nature of a Mortgage, that all that is mortgaged ſerves as a Security for the whole Debt, and even all the parts of each Land or Tenement that is mortgaged, are all of them bound for all that is due[b].

[a] Qui pignori plures res accipit, non cogitur unam liberare, niſi accepto univerſo quantum debetur. *l.* 19. *ff. de pign.*

[b] Quamdiù non eſt integrè pecunia creditori numerata etiamſi pro parte majore eam conſecutus ſit, diſtrahendi rem obligatam non amittit facultatem. *l.* 6. *C. de diſtr. pign. l.* 1. *C. de luit. pign.* Propter indiviſam pignoris cauſam. *l.* 65. *ff. de evict.*

XIX.

19. *What may not be ſold, cannot be mortgaged.* We can only pawn and mortgage ſuch Things as may be ſold; and what may not be ſold, cannot likewiſe be mortgaged. For the uſe and benefit of the Mortgage conſiſts only in the Alienation that may be made of the Thing mortgaged, for the Payment of what is due upon that Security[c].

[c] Quod emptionem venditionemque recipit, etiam pignorationem recipere poteſt. *l.* 9. §. 1. *ff. de pign. & hypoth.* Eam rem quam quis emere non poteſt, quia commercium ejus non eſt, jure pignoris accipere non poteſt. *l.* 1. §. 2. *ff. quæ res pign. vel hyp. dat. obl. non poſſunt. V. l. ult. C. de reb. al. non alien.*

We have ſeen in the eighth Section of the Contract of Sale, what are the Things which may not be ſold. But there are other Things which one cannot mortgage, altho' they may be ſold. See hereafter the twenty fourth and following Articles of this Section.

XX.

20. *A Mortgage given by a Debtor, on a Land or Tenement that is not his own.* As one may ſell a Thing which belongs to another perſon[d], ſo likewiſe may he mortgage it; whether it be that the Owner conſents to the Mortgage, or that he ratifies it[e]; or that the Mortgage be conditional, to have its Effect when he who engages a Thing that is not his own, ſhall become Maſter of it[f]. But if the Debtor pawns or mortgages a Thing as his own, which he knows does not belong to him, he is guilty of Cozenage, which Knaviſh Practice the *Romans* diſtinguiſhed by the Name of *Stellionatus*, and diſcouraged by ſevere Penalties[g]. However, if afterwards he becomes Maſter of the Thing, the Mortgage will then have its Effect[h]; but without prejudice to the Mortgages of the Creditors of the Perſon to whom the Thing belonged.

[d] *See the thirteenth Article of the fourth Section of the Contract of Sale.*

[e] Aliena res pignori dari voluntate domini poteſt. Sed etſi ignorante eo data ſit, & ratum habuerit, pignus valebit. *l.* 20. *ff. de pign. act.*

[f] Aliena res utiliter poteſt obligari ſub conditione, *ſi debitoris facta fuerit.* l. 16. §. 7. ff. de pign. & hyp.

[g] Si quis rem alienam mihi pignori dederit ſciens prudénſque—— crimine (ſtellionatus) plectetur. *l.* 36. §. 1. *ff. de pign. act.*

[h] Rem alienam pignori dediſti, deinde dominus rei ejus eſſe cœpiſti, datur utilis actio pignoratitia creditori. *l.* 41. *eod.* Cùm res quæ necdum in bonis debitoris eſt, pignori data ab eo, poſteà in bonis ejus eſſe incipiat, ordinariam quidem actionem ſuper pignore non competere manifeſtum eſt: ſed tamen æquitatem facere, ut facilè utilis perſecutio, exemplo pignoratitiæ, detur. *l.* 5. *C. ſi alien. res pig. dat. ſit.* See the twenty firſt Article of the third Section.

XXI.

21. *Cozenage, or Stellionate, in mortgaging.* He who having mortgaged a certain Land or Tenement, ſpecified and particularly named, to one Creditor, engages it afterwards to another, without giving him notice of the firſt Mortgage, commits an Infidelity which is called by the Name of *Stellionate*. And if this ſecond Creditor be a Loſer thereby, the Debtor not having wherewithal to ſatisfy all his Creditors, he ought to be puniſhed for this his knaviſh dealing, according as the Fact may deſerve: and eſpecially if he had declared to the ſecond Creditor, that the Land or Tenement which he mortgaged to him was not engaged to others; for in this caſe the Knavery would be the greater. And even altho' the Debtor ſhould have Goods enough beſides for the ſatiſfaction of his Creditors, yet he would be anſwerable for the Conſequences. And if, for Example, that Land or Tenement had been given to the ſecond Creditor, for aſſigning a Rent, the Debtor might be conſtrained, by reaſon of that Fraud, to redeem the Rent, or he might be otherways puniſhed according to the circumſtances. But the Crime of Stellionate is not imputed to him, who having

ing once mortgaged his whole Eſtate, does afterwards mortgage again either all his Eſtate in general, or ſome part of it in particular; neither is that Crime imputed to him who mortgages the ſame Land or Tenement to ſeveral Creditors, whoſe Credits, when they are all put together, do not exceed the Value of the Land or Tenement that is mortgaged[l].

[l] Si quis alii obligatam (rem) mihi obligavit, nec me de hoc certioraverit, crimine (ſtellionatus) plectetur, *l. 36. §. 1. ff. pign. act.* Improbum quidem & criminoſum fateris, eaſdem res pluribus pignoraſſe, diſſimulando in poſteriore obligatione, quod eædem aliis pignori tenentur. Verùm ſecuritati tuæ conſules, ſi oblato omnibus debito, criminis inſtituendi cauſam peremeris. *l. 1. C. de crim. ſtell.* Planè ſi ea res ampla eſt, & ad modicum æris fuerit pignorata: dici debebit, ceſſare non ſolum ſtellionatus crimen, ſed etiam pignoratitiam, & de dolo actionem: quaſi in nullo captus ſit, qui pignori ſecundo loco accepit. *l. 36. in f. ff. de pign. act.*

[*By the Law of* England, *if the Debtor does not give notice in writing of the firſt Mortgage, to the ſecond Mortgagee, or Creditor, he ſhall have no Relief or Equity of Redemption, againſt the ſecond Mortgagee.* Stat. 4 & 5 *W.* and *M.* chap. 16.]

XXII.

22. *How a Tutor, Guardian, or Factor, may mortgage the Eſtates of Perſons committed to their Care.*

Tutors, Guardians, Factors, or Agents appointed by Letter of Attorney, and others who have power, either by their Offices, or by virtue of ſome Order, to borrow, and to pawn or mortgage the Eſtates of thoſe whoſe Affairs are committed to their Care, may mortgage the ſaid Eſtates, according to the Power which they have by virtue of their Offices, or of the Orders which they have from the Perſons for whom they act. But if they are the Eſtates of Minors, or of ſome Community, the Engagement, and the Mortgage, which is a Conſequence of it, have not their Effect, unleſs the Obligation has turned to their Advantage, and unleſs the Formalities preſcribed in ſuch Contracts have been obſerved[l].

[l] Curator adulti, vel Tutor pupilli, propriam rem mobilem ejus cujus negotia tuetur, pignoris jure non obligare poteſt, niſi in rem ejus pecuniam mutuam accipiat. *l. 3. C. ſi alien. res pign. d. ſ.* Procurator citra domini voluntatem domum pignori fruſtrà dedit: ſi tamen pecuniam creditoris in rem domini verſam conſtabit, non inutilis erit exceptio, dumtaxat quod numeratum eſt exolvi deſideranti. *l. 1. eod.* Si is qui bona Reipublicæ jure adminiſtrat, mutuam pecuniam pro ea accipiat, poteſt rem ejus obligare. *l. 11. ff. de pign. V. l. 27. ff. de reb. cred.*

XXIII.

23. *Mortgage of Things Incorporeal.*

One may pawn and mortgage not only Corporeal Things, that is, ſuch Things as may be felt and touched, but alſo Things Incorporeal, ſuch as Debts, Actions, and other Rights: and the Effects of this ſort are comprehended in the general Mortgage, altho' they be not particularly mentioned: Thus, the Creditor may exerciſe the Right which he acquires by the Mortgage of all his Debtor's Eſtate, as much upon theſe ſorts of Rights, as upon the other Effects, and may ſeize or attach, in the hands of the Perſons that are indebted to his Debtor, what they owe him, to the Value of what is owing by the Debtor to this Creditor who has the Mortgage[m].

[m] Nomen quoque debitoris pignorari & generaliter & ſpecialiter poſſe, jam pridem placuit. Quare ſi debitor is ſatis non fecerit, cui tu crediſti, ille cujus nomen tibi pignori datum eſt, niſi ei cui debuit ſolvit, nondùm certior à te de obligatione tua factus, utilibus actionibus ſatis tibi facere, uſque ad id quod tibi deberi à creditore ejus probaveris, compelletur: quatenus tamen ipſe debet. *l. 4. C. quæ res pign. obl. poſſ.* Etiam nomen debitoris, in cauſâ judicati, capi poſſe, ignotum non eſt. *l. 5. C. de exec. rei jud. l. 1. C. de præt. pign.* Si convenerit, ut *nomen debitoris mei tibi pignori ſit*, tuenda eſt à prætore hæc conventio. *l. 18. ff. de pign. act.*

It is to be obſerved on this Article, that there are Rights which are of the Nature of Immoveables, ſuch as Rents; and that there are others of the Nature of Moveables, as an Obligation for Money lent; and other Perſonal Debts. Rents are ſo far capable of being mortgaged, that the Creditor retains his Right on them, altho' they ſhould paſs into other hands. But Obligations, and other Perſonal Debts are of the Nature of Moveables, and cannot be ſeized by the Creditor when they are out of the Debtor's Poſſeſſion. For altho' the Creditor might cauſe them to be ſeized whilſt they belong to the Debtor, yet he cannot proſecute them after the Debtor has aſſigned them over to another Perſon, and that the ſaid Aſſignment has been intimated to the Perſon who is indebted to this Debtor, or that he has accepted of the Aſſignment. Offices are reckoned to be in the number of Immoveables, and are capable of being mortgaged. See the Edict of February, 1683. *See, concerning the Seizure of Moveable Effects, the end of the Preamble of this Section. See, as to Things Corporeal and Incorporeal, the third Article of the ſecond Section of the Title of Things.*

[*In* England, *it is only by the ſpecial Cuſtom of ſome places, ſuch as the City of* London, *that a Creditor may attach the Goods or Moneys belonging to his Debtor, in the hands of a third perſon. And this is called* a Foreign Attachment. *See Termes de la Ley. verb. Attachment. Privilegia Londini, pag.* 189.]

XXIV.

24. *Things which cannot be mortgaged.*

The general Mortgage, in what terms ſoever it be conceived, does not extend to Things which Humanity forbids us to ſtrip our Debtors of, and which conſequently ought not to be comprehended in the Mortgage. Thus, a Creditor cannot ſeize, nor take in pawn, the neceſſary wearing Apparel of his Debtor, his Bed, nor his other Moveables and Utenſils that are of the like neceſſity to him. Neither can the Debtors give in Pledge ſuch Things ſpecially and by Name. For the Creditor could not ſtipulate ſuch an Engagement, without tranſgreſſing the Rules of Equity and Good Manners[n].

[n] Obligatione generali rerum *quas quis habuit habiturusve ſit*, ea non continebuntur quæ veriſimile eſt quemquam ſpecialiter obligaturum non fuiſſe: ut puta ſuppellex. Item veſtis relinquenda eſt debitori, & ex mancipiis quæ in eo uſu habebit, ut certum ſit eum pignori daturum non fuiſſe. Proinde de miniſteriis ejus perquàm ei neceſſariis, vel quæ ad affectionem ejus pertineant, vel quæ in uſum quotidianum habentur, Serviana non competit. *l. 6. & l. 7. ff. de pign. & hypot.* Res quas neminem credibile eſt pignori ſpecialiter daturum fuiſſe, generali pacti conventione, quæ de bonis tuis facta eſt, in cauſa pignoris non fuiſſe, rationis eſt. *l. 1. C. quæ res pign. obl. poſſ. vel non.* See *Exod.* xxii. 26. *Deut.* xxiv. 6, 17. *Job* xxiv. 3.

See upon this and the following Articles, the fourteenth, fifteenth, and ſixteenth Articles of the thirty third Title of the Ordinance of the Month of April, 1667, *and that of* Orleans, *Art.* 28. *that of* Blois, *Art.* 57. *the Edict of the ſixteenth of* March, 1595, *and other Regulations.*

XXV.

25. *Things neceſſary for the Tillage of the Ground, cannot be put in Pawn.* Beaſts belonging to the Plough, Ploughs, and other things neceſſary for tilling and cultivating the Ground, are not capable of being mortgaged, or pawned, and cannot be ſeized on by the Creditor; not only becauſe of the preſumption that it was not the Intention of the Debtor and Creditor to ſtrip the Debtor of Things deſtined to ſo neceſſary an Uſe, but likewiſe becauſe of the prejudice which the Publick might ſuffer from ſuch an Interruption of the Agriculture[o].

[o] Executores à quocumque judice dati ad exigenda debita ea quæ civiliter poſcuntur, ſervos aratores, aut boves aratorios, aut inſtrumentum aratorium, pignoris cauſà de poſſeſſionibus non abſtrahant. *l. 7. C. quæ res pign. obl. poſſ. v. n.* Pignorum gratia aliquid quod ad culturam agri pertinet, auferri non convenit. *l. 8. eod.*

[*This is agreeable to the ancient Common Law of* England, *which does not allow Beaſts belonging to the Plough to be diſtrained, nor any Man to be diſtrained by the Utenſils or Inſtruments of his Trade, or Profeſſion, as the Axe of a Carpenter, or the Books of a Scholar; becauſe of the Damage which may accrue to the Commonwealth, by the interruption of Trade and Commerce.* Coke 1 Inſt. fol. 47. a.]

XXVI.

26. *Things which are not in Commerce, cannot be pawned, or mortgaged.* Things which do not enter into Commerce, and which cannot be ſold; ſuch as Things belonging to the Publick, Things ſacred, cannot likewiſe be pawned or mortgaged, while they remain deſtinated to the ſaid Uſes[p].

[p] Eam rem quam quis emere non poteſt, quia commercium ejus non eſt, jure pignoris accipere non poteſt. *l. 1. §. 2. ff. quæ res pign.* Sancimus nemini licere ſacratiſſima atque arcana vaſa, vel veſtes cæteraque donaria quæ ad divinam religionem neceſſaria ſunt (cùm etiam veteres leges ea quæ juris divini ſunt, humanis nexibus non illigari ſanxerint;) vel ad venditionem, vel pignus trahere. *l. 21. C. de ſacr. Eccleſ.*

XXVII.

27. *The Benevolence of the Prince, and the Pay of Officers and Soldiers.* The Benevolence of the Prince, the Subſiſtence and Pay of Officers and Soldiers, are of the number of thoſe Things which cannot be diſtrained. For it is for the Publick Good, that ſuch Money ſhould not be diverted from the Uſe to which it was appropriated, for the neceſſary Service of the Prince, and of the Country[q].

[q] Stipendia retineri propterea quod condemnatus es non patietur præſes provinciæ, cùm rem judicatam poſſit aliis rationibus exequi. *l. 4. C. de re judic.* Spem eorum præmiorum quæ pro coronis Athletis penſitanda ſunt, privata pactione pignorari minimè admittendum eſt. Et ideò, nec ſi generale pactum de omnibus bonis pignori obligandis intervenerit. *l. 5. C. quæ res pign. obl. p. v. n. l. ult. C. de pign. Nov. 53. c. 5.*

XXVIII.

28. *The Mortgage called* Antichreſis. The Mortgage may be ſettled two different ways. One is, when the Debtor mortgages Houſes, or Lands, for the Security of what he owes, but ſtill keeps Poſſeſſion of them himſelf. The other is, when the Debtor puts his Creditor into Poſſeſſion of the Houſes, or Lands, which he mortgages to him, allowing the Creditor to reap the Fruits and Profits of them, as a Compenſation for the Legal Intereſt which the Debtor is obliged to pay. And this laſt ſort of Mortgage is called in the *Roman* Law, *Antichreſis*. Thus, for Example, if a Father in Law, who owes his Son in Law the Portion which he promiſed with his Daughter, gives him Houſes, or Lands, to enjoy, that he may reap the Profits and Fruits of them, in lieu of the Intereſt of the Marriage Portion; this is ſuch a Mortgage as the *Romans* called *Antichreſis*. And this Contract gives the Creditor, over and above his Right of Mortgage, a Right alſo to enjoy the Fruits and Profits[r].

[r] Si ἀντίχρησις, id eſt, mutuus pignoris uſus pro credito facta ſit, & in fundum aut in ædes aliquis inducatur, eouſque retinet poſſeſſionem pignoris loco, donec illi pecunia ſolvatur. Cùm in uſuras fructus percipiat, aut locando, aut ipſe percipiendo, habitandoque. *l. 11. §. 1. ff. de pign. & hyp.* See the fourth Article of the fourth Section.

We give here for an Example of that ſort of Mortgage called Antichreſis, *the Mortgage of Lands, or Houſes, for a Marriage Portion, becauſe the Intereſt of the Marriage Portion being due to the Husband, this Covenant hath nothing unlawful in its nature. But the* Antichreſis *for the Intereſt of Money lent, which was allowed by the* Roman *Law, as likewiſe was Uſury, is unlawful, according to our Uſage, which puniſhes Uſury, and the Contracts which palliate it under the colour of other Covenants. See the fourth Article* *of the fourth Section. As to Uſury, ſee the Preamble to the Title of Loan, and the end of the Preamble to the Title of the Vices of Covenants.*

[*This ſort of Mortgage called* Antichreſis, *in the* Roman *Law, is the ſame with that which is termed* Vivum Vadium, *in the* Engliſh *Law. Which is, when a Man borrows a Sum of Money of another, and maketh over an Eſtate of Lands unto him until he hath received the ſaid Sum of the Iſſues and Profits of the Lands, ſo as in this caſe neither Money nor Land dieth, or is loſt. And therefore it is called* Vivum Vadium, *to diſtinguiſh it from the other ſort of Mortgage called.* Mortuum Vadium. *Coke* 1. *Inſtit. fol.* 205. *a.*

XXIX.

29. *The Creditor who has a Right to the Iſſues and Profits, may farm them out.*

The Creditor who has a Right to the Iſſues and Profits of the Lands which are mortgaged to him, may farm them out[s].

[s] Creditor prædia ſibi obligata ex cauſa pignoris locare rectè poterit. *l.* 23. *ff. de pign. l.* 11. §. 1. *eod.*

XXX.

30. *When the Debtor borrows his own Goods that he has laid in Pawn.*

When the Creditor is put into Poſſeſſion of the Thing, Moveable or Immoveable, that is given him in Pledge, he has a Right to keep it till he is paid what is owing to him: and the Debtor cannot turn the Creditor out of Poſſeſſion, nor make uſe of his own Thing, without the conſent of his Creditor. And if, for Example, the Thing given in Pawn be a Moveable Thing, which the Creditor is willing to let his Debtor have the uſe of for a time, it will be a kind of Loan, which will give the Creditor a Right to take poſſeſſion of it again, the Debtor's Poſſeſſion, during the time that he uſes his own Thing, being only precarious[t].

[t] Pignus, manente proprietate debitoris, ſolam poſſeſſionem transfert ad creditorem. Poteſt tamen & precario, & pro conducto re ſua uti. *l.* 35. §. 1. *ff. de pign. act.*

XXXI.

31. *If the Pawn be not ſufficient to pay the Debt, the Debtor will ſtill be accountable for the Surplus.*

If it happens that the Pawn which a Creditor has taken for his Security, be not ſufficient for his Payment, and that the Creditor cannot be charged with any fault whereby he may have diminiſhed the Value of the Pawn, he will recover the Surplus of his Debt, out of the other Goods of his Debtor[u].

[u] Creditor qui non idoneum pignus accepit, non amittit exactionem ejus debiti quantitatis, in quam pignus non ſufficit. *l.* 28. *ff. de reb. cred.* Siquidem minus in pignore, plus in debito inveniatur, in hoc quod noſcitur abundare, ſit creditori omnis ratio integra. *l. ult.* §. 4. *C. de jure dom. imp.* Quæſitum eſt, ſi creditor ab emptore pignoris pretium ſervare non potuiſſet, an debitor liberatus eſſet? putavi ſi nulla culpa imputari creditori poſſit, manere debitorem obligatum. *l.* 9. *ff. de diſtr. pign.* Adverſus debitorem electis pignoribus, perſonalis actio non tollitur: ſed eo quod de pretio ſervari potuit in debitum computato, de reſiduo manet integra. *l.* 10. *C. de obl. & act.*

XXXII.

32. *One may mortgage his Eſtate for the Debt of another perſon.*

One may mortgage his Eſtate, not only for his own proper Debts, but likewiſe for the Debts of others; in the ſame manner as one may become Surety for other perſons[x].

[x] Dare autem quis hypothecam poteſt, ſive pro ſua obligatione, ſive pro aliena. *l.* 5. §. *ult. ff. de pign. & hyp.*

XXXIII.

33. *Approbation of the Perſon, whoſe Thing is mortgaged by another.*

If a Debtor mortgages that which belongs to another Perſon, and the ſaid Perſon conſents to the Mortgage, or by ſome act ſignifies his Approbation of it; as if he ſigns the Contract as a Witneſs, or writes it with his own hand, the Mortgage will have its effect. For otherwiſe he would partake with Impunity in the Fraud done to the Creditor. And it would be the ſame thing, altho' it were a Father who had mortgaged the Houſes, or Lands, belonging to his Son[y].

[y] Pater Seio emancipato filio facilè perſuaſit, ut quia mutuam quantitatem acciperet à Septicio creditore, chirographum perſcriberet ſua manu filius ejus, quod ipſe impeditus eſſet ſcribere, ſub commemoratione domus ad filium pertinentis pignori dandæ. Quærebatur, an Seius intèr cætera bona etiam hanc domum jure optimo poſſidere poſſit, cum patris ſe hæreditate abſtinuerit, nec metuiri ex hoc ſolo quod mandante patre manu ſua perſcripſit inſtrumentum chirographi: cum neque conſenſum ſuum accommodaverat patri, aut ſigno ſuo, aut alia ſcriptura? Modeſtinus reſpondit, cùm ſua manu pignori domum ſuam futuram Seius ſcripſerat, conſenſum ei obligationi dediſſe manifeſtum eſt. *l.* 26. §. 1. *ff. de pign. & hyp.* See the twelfth and fifteenth Articles of the ſeventh Section, and the Remark on the fifteenth Article.

SECT. II.

Of the ſeveral ſorts of Mortgages, and of the manner how a Mortgage is acquired.

Two ſorts of Mortgage, Conventional and Legal.

SEeing the Mortgage is an Acceſſory to Engagements, and that there are ſome Engagements into which the Parties enter by Covenant, and others which are formed without a Covenant; the Mortgage may likewiſe be acquired either by Covenant, and then it is a Conventional Mortgage; or without a Covenant, by the bare effect of the Law, which may be called a Legal Mortgage. Thus, when a Seller engages his Eſtate for the Warranty of that which he ſells, and the Buyer his Eſtate for the payment of the Price, theſe are Conventional Mortgages, being made by Covenant, or Agreement: Thus, when a Tutor, or Guardian, is called to that Office, his Eſtate is mortgaged for all that he ſhall owe on the ſcore of his Adminiſtration; and this Mortgage which the Minor acquires by Law, without a Covenant, may be called a Legal Mortgage [a]. Thus the Eſtates of Officers that are Accountable, and of ſuch perſons as are called to Municipal Offices, and imployed in collecting the Publick Revenue, are mortgaged for what they ſhall appear to be indebted to the Publick [b]. Thus, the Sentences of Condemnation in a Court of Juſtice, give a Mortgage on the Eſtate of the Party condemned [c]. And it is by the Authority of the Law, that all theſe ſorts of Mortgages have been eſtabliſhed without the intervention of any Covenant.

[a] *See the thirty ſixth Article of the third Section of Tutors.*

[b] *See hereafter the nineteenth and twentieth Articles of the fifth Section.*

[c] *See the fourth Article of this Section, with the Remark upon it.*

The Conventional Mortgage was acquired under the *Roman* Law, by the bare effect of a Covenant, or Agreement, if the Mortgage was thereby ſtipulated, and even without any Indenture in Writing [d], and without the preſence or aſſiſtance of any Publick Officer whatſoever; in which the Emperor *Leo* made ſome change, by requiring the preſence of three Witneſſes of probity and integrity [e]. But by our Uſage in *France*, Covenants do not eſtabliſh a Right of Mortgage, although it ſhould be therein expreſly mentioned, unleſs the ſaid Covenants are made in the Preſence of Publick Notaries. For unleſs this Formality were obſerved, it would be an eaſy matter for Debtors who ſhould have a mind to defraud their Creditors, to give to their latter Creditors ancient Mortgages, by antedating the ſame. Thus, when we ſhall hereafter make mention of a Conventional Mortgage, it is always to be underſtood of Covenants made in the preſence of Notaries Publick.

[d] *L. 4. ff. de pign.*

[e] *L. 11. Cod. qui potior.*

[*According to the Uſage in* England, *the preſence of a Publick Notary is not neceſſary for the eſtabliſhing a Mortgage. But to prevent any fraudulent Conveyances of this kind, the Law requires that all Covenants, by which any Intereſt in Lands paſſes, ſhould be duly executed in writing, in the preſence of Witneſſes.* Stat. 29 Car. II. cap. 3.]

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2. *The Special Mortgage is of two ſorts.*
3. *The Mortgage is either ſimple, or privileged.*
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6. *A Mortgage is either Conventional, or Legal.*
7. *The Creditor cannot by force, take the Pawn from his Debtor.*

I.

1. *The Mortgage is either general or ſpecial.*

ONE may mortgage either all his Eſtate in general, or only ſome part of it, which he particularly ſpecifies. And this makes two firſt Kinds of Mortgage, the one General, and the other Special; and one may alſo join both the one and the other together, engaging at the ſame time, both all his Eſtate in general, and likewiſe ſome part of it in particular, which he expreſly mentions [a].

[a] Quod dicitur, creditorem probare debere, *cùm conveniebat rem in bonis debitoris fuiſſe*, ad eam conventionem pertinet, quæ ſpecialiter facta eſt, non ad illam, quæ quotidiè inſeri ſolet cautionibus, *ut ſpecialiter rebus hypothecæ nomine datis, cætera etiam bona teneantur debitoris, quæ nunc habet, & quæ poſteà acquiſiverit, perinde atque ſi ſpecialiter hæ res fuiſſent obligatæ.* l. 15. §. 1. ff. de pign. & hyp. Per generalem aut ſpecialem nominatim hypothecam. *Novel.* 112. c. 1.

II.

2. *The ſpecial Mortgage is of two ſorts.*

The Special Mortgage is of two ſorts. One, where the Creditor is put into Poſſeſſion; and the other, where the Thing that is engaged remains in the Debtor's Cuſtody. Thus, in the Mortgage called *Antichreſis*, the Creditor is in poſſeſſion of the Thing engaged to him; and in the bare Special Mortgage, the Debtor remains in poſſeſſion of the Thing that is mortgaged. Thus, one may give his Moveables for Security, whether he delivers them to his Creditor, or whether he keeps them in his own hands. But the Appropriation of a Moveable for the Security of a Debt, is not, properly ſpeaking, Special, but whilſt the Thing is in the Cuſtody of the Creditor, or that he has a Preference upon it before other Creditors [b].

[b] Pignus contrahitur non ſolâ traditione, ſed etiam nudâ conventione, & ſi non traditum eſt. *l. 1. ff. de pign. act.* Si ἀντίχρησις, id eſt, *mutuus pignoris*

uſus

III.

3. The Mortgage is either ſimple, or privileged. The Mortgage, under another View, may be divided into two other Kinds: One is that of the ſimple Mortgage; and the other is that which gives a Preference, or a Privilege. The ſimple Mortgage is that which is barely an Appropriation of the Thing mortgaged, without any other difference among many Creditors to whom the ſame Thing has been engaged at different times, than that he who is firſt in time, will be preferr'd to the others who have no Privilege: and the Mortgage which is privileged, is that which gives a Preference without reſpect to time. Thus, the Creditor whoſe Money has been laid out in repairing, or rebuilding, a Houſe, is preferred before the Creditors who had a prior Mortgage upon the ſaid Houſe[c].

IV.

4. Three ways of acquiring a Mortgage. The Mortgage is acquired three manner of ways; either with the conſent of the Debtor by Agreement, if he engages his Eſtate[d]; or, without the Debtor's conſent, by the Quality and bare Effect of the Engagement; the Nature of which is ſuch, that the Law has annexed to it the Security of a Mortgage, as in the caſes mentioned in the following Article[e]: or laſtly, the Mortgage is acquired by the Authority of Juſtice[f], altho' the Law had given no Mortgage: which happens when the Creditor who had no Mortgage, obtains a Sentence of Condemnation in his favour; for the Sentence, or Decree which condemns the Debtor, gives a Mortgage to the Creditor, altho' no mention be made of it in the Sentence.

V.

All Mortgages are either expreſs, or tacit. *5. A Mortgage is either expreſs, or tacit.* We call that an expreſs Mortgage, which is acquired by a Title, or Deed, wherein the Mortgage is expreſſed, ſuch as a Bond, or a Contract[g]. And that is called a tacit Mortgage, which is acquired by Right[h], altho' it be not particularly mentioned; ſuch as that which Minors, Prodigals, and Ideots, or Mad-men, have, on the Eſtates of their Tutors, or Guardians[i]; ſuch as the King has on the Eſtates of the Farmers and Receivers of his Revenue[l]: and ſome others, which ſhall be explained in the fifth Section.

VI.

The diſtinction explained in the foregoing Article, of an expreſs Mortgage, *6. A Mortgage is either Conventional, or Legal.* and of a tacit Mortgage, may be applied to that of a Conventional Mortgage, and of a Legal Mortgage; of which mention has been made in the Preamble of this Section; for the Conventional Mortgage is expreſſly ſtipulated by the Agreement; and the Legal Mortgage is underſtood, whether it be expreſſed or not[m].

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uſus pro credito, facta ſit, & in fundum aut in ædes aliquis inducatur: euſque retinet poſſeſſionem pignoris loco, donec illi pecunia ſolvatur. *l.* 11. §. 1. *ff. de pign. & hyp.* See the fifth Section, concerning the Preference of Creditors.

[c] Cum de pignore utraque pars contendit, prævalet jure, qui prævenit tempore. *l.* 2. *in fine C. qui pot. in pign. hab.*

Sicut prior es tempore, ita potior es jure. *l.* 4. *eod.*

Interdùm poſterior potior eſt priori, ut puta, ſi in rem iſtam conſervandam impenſum eſt, quod ſequens credidit. *l.* 5. *ff. eod.*

[d] De pignore jure honorario naſcitur pacto actio. *l.* 17. §. 2. *ff. de pact.* Contrahitur hypotheca per pactum conventum. *l.* 4. *ff. de pign. & hyp.*

[e] Eo jure utimur, ut quæ in prædia urbana inducta, illata ſunt, pignori eſſe credantur, quaſi id tacitè convenerit. *l.* 4. *ff. in quib. cauſ. pign. vel hyp. tac. contr.* Fiſcus ſemper habet jus pignoris. *l.* 46. §. 3. *ff. de jur. fiſci.*

[f] (Pignus) quod à judicibus datur, & prætorium nuncupatur. *l. ult. C. de præt. pign.* Non eſt mirum, ſi ex quacumque cauſa magiſtratus in poſſeſſionem aliquem miſerit, pignus conſtitui. *l.* 26. *ff. de pign. act.*

By the fifty third Article of the Ordinance of Moulins, *and the Declaration of the tenth of* July, 1566, *upon this Article, Condemnations in a Court of Juſtice give a Mortgage from the day of the Sentence, if it is confirmed by the Decree of a Superior Court, or if there be no Appeal from the Sentence. And by the ninety ſecond and ninety third Articles of the Ordinance of* 1539, *Promiſſory Notes in Writing give a Right of Mortgage upon one ſingle Default, after a Demand of Payment; and if the Demand be conteſted, and afterwards proved, the Mortgage will take place from the day of the Denial, or Conteſtation of Suit.*

[g] Contrahitur hypotheca per pactum conventum. *l.* 4. *ff. de pign. & hyp.*

[h] Quaſi id tacitè convenit. *l.* 4. *ff. in quib. cauſ. pign. vel hyp. tac. contr.*

[i] Pro officio adminiſtrationis tutoris, vel curatoris bona, ſi debitores exiſtant, tamquam pignoris titulo obligata, minores ſibi vindicare minimè prohibentur. *l.* 20. *C. de adm. tut. Nov.* 118. *c.* 5. *in f.* Æquiſſimum erit cæteros quoque quibus curatores quaſi debilibus, vel prodigis dantur, vel ſurdo, vel muto, vel fatuo, idem privilegium competere. *l.* 19. §. 1. *l.* 20. *l.* 21. *l.* 22. *ff. de reb. auct. jud. poſſ. l.* 1. §. 1. *C. de rei ux. act.* See the thirty ſixth Article of the third Section of Tutors.

[l] Certum eſt ejus qui cum fiſco contrahit, bona veluti pignoris titulo obligari, quamvis ſpecialiter id non exprimatur. *l.* 2. *C. in quib. cauſ. p. v. hyp. tac.* See the nineteenth Article of the fifth Section.

[m] Duplum genus hypothecarum, unum quidem quod ex conventionibus & pactis hominum naſcitur: aliud quod à judicibus datur, & prætorium nuncupatur. *l.* 2. *C. de præt. pign.* See the fifth Art.

VII. A

VII.

7. The Creditor cannot by force take the Pawn from his Debtor. A Mortgage cannot be acquired, but by one of the ways explained in the fourth Article; and the Creditor cannot of himſelf, either take Poſſeſſion of an Immoveable Thing, or ſeize upon a Moveable Thing belonging to his Debtor, unleſs he conſents to it, or that it be by the Authority of Juſtice, if the Debtor does not conſent. Thus, much leſs may the Creditor enter the Houſe of his Debtor, to take Pledges out of it[n]. And if a Moveable Thing taken away in this manner, without the conſent of the Debtor, ſhould chance to periſh, altho' by a mere Accident, the Loſs of it would fall upon this Creditor[o].

[n] Nec creditor, circa conventionem, vel præſidialem juſſionem, debiti cauſa, res debitoris arbitrio ſuo auferre poteſt, *l.* 11. *C. de pign. act.*

Autoritate præſidis poſſeſſionem adipiſci debent. *l.* 3. *C. de pign. & hyp.*

When thou doſt lend thy brother any thing, thou ſhalt not go into his houſe to fetch his pledge. Thou ſhalt ſtand abroad, and the man to whom thou doſt lend, ſhall bring out the pledge abroad unto thee. *Deut.* xxiv. 10, 11.

[o] Qui ratiario crediderat, cùm ad diem pecunia non ſolveretur, ratem in flumine ſua autoritate detinuit: poſteà flumen crevit, & ratem abſtulit. Si invito ratiario retinuiſſet, ejus periculo ratem fuiſſe, reſpondit. *l.* 30. *ff. de pign. act.*

SECT. III.

Of the Effects of the Mortgage, and of the Engagements which it forms on the Debtor's part.

The CONTENTS.

1. *The firſt effect of the Mortgage, is the Right to get the Thing that is mortgaged, or pawned, expoſed to Sale.*
2. *Second effect, a Right to follow the Thing mortgaged.*
3. *The third effect, Preference of the firſt Creditor.*
4. *A fourth effect, Security for all the conſequences of the Debt.*
5. *Theſe Effects take place, whether the Mortgage be General, or Special.*
6. *Diſcuſſion in favour of a third Poſſeſſor.*
7. *In what manner a ſubſequent Creditor may ſecure his Mortgage againſt prior Creditors.*
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16. *Effect of the Mortgage before the Term of Payment.*
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20. *Improvements of the Pledge made by the Creditor.*
21. *The Creditor does not loſe his Debt, if his Pledge is evicted from him.*
22. *When the Debtor gives in Pawn one Thing inſtead of another.*
23. *How the Creditor is to be put in poſſeſſion of his Pledge.*
24. *The Debtor cannot take back the Pawn, without the Creditor's conſent.*
25. *The Mortgage is limited to the Right which the Debtor had.*
26. *The Effect of the Mortgage depends on the Effect of the Obligation.*

I.

1. The firſt effect of the Mortgage, is the Right to get the Thing that is mortgaged, or pawned, expoſed to Sale. THE Uſe of the Mortgage being to ſecure to the Creditor his Payment, the firſt Effect of the Mortgage is, the Right to ſell the Pledge, or Thing mortgaged, whether the Creditor has been put into poſſeſſion of it, or whether it has remained in the hands of the Debtor[a].

[a] Si in hoc quod jure tibi debetur, ſatisfactum non fuerit, debitoribus res obligatas tenentibus, aditus præſes provinciæ, tibi diſtrahendi facultatem jubebit fieri. *l.* 14. *C. de diſtract. pign. l.* 9. *eod.*

Sed etſi non convenerit de diſtrahendo pignore, hoc tamen jure utimur, ut liceat diſtrahere. *l.* 4. *ff. de pign. act.*

By our Uſage the Pawn cannot be ſold, but with the conſent of the Debtor, or by the Authority of Juſtice. See the ninth Article, with the Remark on it, and the tenth Article.

II.

2. Second effect, a The ſecond effect of the Mortgage is, that into whatſoever hands the Thing mort-

Right to follow the Thing mortgaged. mortgaged paſſes, whether it be that the Debtor engages it to a ſecond Creditor, giving him power to ſell it, which he had not given to the firſt; or that he puts the ſecond Creditor into Poſſeſſion; or that he ſells the Thing, or gives it away, or diſpoſes of it otherwiſe, or that he is ſtript of it without his own act and deed; the Creditor to whom he had before mortgaged it has a Right to follow the Thing, and to evict it from the Poſſeſſors[b].

[b] Si fundus pignoratus venierit, manere cauſam pignoris, quia cum ſua cauſa fundus tranſeat. *l.* 18. §. 2. *de pign. act.* *V. Nov.* 112. *c.* 1.

Si priori hypotheca obligata ſit, nihil verò de venditione convenerit, poſterior verò de hypotheca vendenda convenerit: verius eſt priorem potiorem eſſe. Nam & in pignore placet, ſi prior convenerit de pignore, licet poſteriori res tradatur, adhuc potiorem eſſe priorem. *l.* 12. §. *ult. ff. qui pot. in pign.*

III.

3. The third effect, Preference of the firſt Creditor. The third effect of the Mortgage, which is a conſequence of the two firſt, is, that among many Creditors to whom the ſame Debtor mortgages the ſame Land, or Tenement, the firſt in date is preferred; and has a Right to follow the Land, or Tenement, even when it is in the hands of the other Creditors, and to recover it from him who is in poſſeſſion of it[c].

[c] Cùm de pignore utraque pars contendit, prævalet jure, qui prævenit tempore. *l.* 2. *in fine. l.* 4. *C. qui pot. l.* 11. *ff. eod.* In pignore placet, ſi prior convenerit de pignore, licet poſteriori res tradatur, adhuc potiorem eſſe priorem. *l.* 12. *in f. ff. qui pot.* See the ſecond Article.

IV.

4. A fourth effect, Security for all the conſequences of the Debt. This is likewiſe a fourth effect of the Mortgage, that it ſerves as a Security not only for what is due at the time that the Mortgage is contracted; but alſo for all the Conſequences that ſhall ariſe from the ſaid Debt, and which ſhall augment it; ſuch as the Intereſt of the Principal Sum, Coſts and Damages, Expences laid out in preſerving the Pledge, and others of the like nature[d]. And the Creditor ſhall have his Mortgage for all theſe Conſequences, from the day that he has it for the Principal Debt[e].

[d] Cùm pignus ex pactione venire poteſt, non ſolùm ob ſortem, ſed ob cætera quoque veluti uſuras, & quæ in id impenſa ſunt. *l.* 8. §. *ult. ff. de pign. act.*

[e] Lucius Titius pecuniam mutuam dedit ſub uſuris, acceptis pignoribus: eidemque debitori Mævius, ſub iiſdem pignoribus, pecuniam dedit. Quæro, an Titius non tantùm ſortis, & earum uſurarum nomine quæ acceſſerunt, potior eſſet? reſpondit, Lucium Titium in omne quod ei debetur potiorem eſſe. *l.* 18. *ff. qui pot. in pign.* *V. l.* 8. *ff. de pign. act.*

V.

5. Theſe Effects take place, whether the Mortgage be General, or Special. All theſe Effects of the Mortgage take equally place on the Land, or Tenement that is mortgaged, whether the firſt Creditor had a General Mortgage on all the Debtor's Eſtate, or a Special Mortgage on ſome particular Land, or Tenement: and whether likewiſe the Mortgage which the other Creditors have be General or Special. Thus, he who has the firſt a General Mortgage, is preferred before him who has the ſecond Mortgage, altho' it be Special. Thus likewiſe the firſt Mortgagee who has a Special Mortgage, is preferred before the ſecond who has a General Mortgage.

[f] Qui generaliter bona debitoris pignori accepit, eo potior eſt, cui poſtea prædium ex his bonis datur. *l.* 3. *ff. qui pot. in pig.* Si generaliter bona ſint obligata, & poſtea res alii ſpecialiter pignori dentur: quoniam ex generali obligatione potior habetur creditor qui antea contraxit, ſi ab illo priore tempore tu comparaſti, non oportet te ab eo, qui poſtea credidit, inquietari. *l.* 6. *C. eod.* See the following Article.

VI.

6. Diſcuſſion in favour of a third Poſſeſſor. Altho' the Creditor who has a Mortgage, whether General, or Special, may exerciſe his Right on all the Lands and Tenements that are ſubject to the Mortgage, and even on thoſe which are in the Poſſeſſion of third Perſons; yet it ſeems agreeable to Equity, that if he can hope to recover payment of his Debt out of the other Effects which remain with his Debtor, he ſhould not begin with troubling the third Poſſeſſor, even altho' his Mortgage were Special; but that before he moleſts the third Poſſeſſor, and gives occaſion to the conſequences of having a Recourſe againſt the Debtor, he ought to diſcuſs the other Effects remaining in the Debtor's Poſſeſſion[g].

[g] Quamvis conſtet ſpecialiter quædam, & univerſa bona generaliter adverſarium tuum pignori accepiſſe, & æquale jus in omnibus habere, juriſdictio tamen temperanda eſt: ideóque ſi certum eſt poſſe eum ex his, quæ nominatim ei pignori obligata ſunt, univerſum redigere debitum, ea quæ poſtea ex eiſdem bonis pignori accepiſti, interim tibi non auferri præſes provinciæ jubebit. *l.* 2. *C. de pign. & hyp.*

Quæ ſpecialiter vobis obligata ſunt, debitoribus detrectantibus ſolutionem, bona fide debetis & ſolemniter vendere. Ita enim apparebit, an ex pretio pignoris debito ſatisfieri poſſit Quod ſi quid deerit, non prohibemini cætera etiam bona, jure conventionis conſequi. *l.* 9. *C. de diſtr. pign.* Moſchis quædam fiſci debitrix ex conductione vectigalis, hæredes habuerat, à quibus poſt aditam hæreditatem Faria Senilla, & alii prædia emerant: cum convenirentur propter Moſchidis reliqua, & dicebant hæredes Moſchidis idoneos eſſe, & multos alios ex iiſdem bonis emiſſe, æquum putavit Imperator, prius hæredes conveniri debere: in reliquum, poſſeſſorem omnem: & ita pronuntiavit. *l.* 47. *ff. de jur.*

jur. fiſc. l. 1. *C. de conv. fiſc. deb.* Sed neque ad res debitorum, quæ ab aliiis detinentur veniat prius, antequam tranſeat viam ſuper perſonalibus, &c. *Nov.* 4. *c.* 2.

We have ſet down here this Rule about Diſcuſſion, becauſe it is of the Roman *Law, and is obſerved in ſome Provinces. But in others the Creditor is not obliged to diſcuſs the Goods of the Debtor, before he comes againſt the third Poſſeſſor, and he may ſeize at the ſame time, and without diſcuſſion, all the Eſtate that is ſubject to his Mortgage, whether it be General, or Special, altho' the ſame be in the Poſſeſſion of third Perſons. See the fourth Article of the ſecond Section of Sureties.*

It is to be obſerved on this Subject of a General and Special Mortgage, that altho' it ſeem that the Special Mortgage denotes a more particular Security on the Houſes and Lands that are ſpecified, than the bare General Mortgage, which does not ſpecify any one in particular; yet notwithſtanding it is certain, that as to the Right of Mortgage, and its Effects, it is equal to the Creditor, whether his Mortgage be only in general on all his Debtor's Eſtate, or that there be added to it a Special Mortgage on ſome particular Land, or Tenement, that is expreſly mentioned. For the Effects of the Mortgage are always the ſame on the Eſtate that is ſubject to it, as has been remarked in the fifth Article. And the General Mortgage gives the ſame Right to the Creditor on every one of the Lands and Tenements which it comprehends, as he could have from a Special Mortgage, which ſhould name every one of them in particular. Thus, as to what concerns the Effect and Uſe of the Mortgage between the Creditor and the Debtor, there ſeems to be no other difference between the Special and General Mortgage, than that the Special Mortgage points out to the Creditor certain Houſes, or Lands, upon which he may exerciſe his Right; and that the General Mortgage ſpecifying none in particular, the Creditor, who is ignorant what Houſes and Lands belong to his Debtor, is obliged to inform himſelf thereof.

But if we conſider the Uſe of the Mortgage between the Creditors of one and the ſame Debtor, or between a Creditor, and a third Poſſeſſor of an Eſtate mortgaged to the ſaid Creditor; it would ſeem by the two firſt Texts cited on this Article, that when the Creditor who has a Special Mortgage on ſome particular Land, or Tenement, and a General Mortgage on the whole Eſtate of his Debtor, exerciſes his Right of Mortgage on other parts of the Eſtate beſides thoſe which are ſpecially engaged to him, and that his Action intereſts either other Creditors, or third Poſſeſſors, whom he calls upon for the Eſtate which they have in their hands; theſe other Creditors, and third Poſſeſſors, might oblige him to begin with the diſcuſſion of the Lands and Tenements that are ſpecially mortgaged to him, before he comes to the others. But by this effect of the Special Mortgage, the precaution which the Creditor had taken by ſtipulating this Special Security would turn to his prejudice. And in all appearance, it is this which has given occaſion to thoſe who beſides the General Mortgage on the whole Eſtate of their Debtor, procured ſome Houſes and Lands to be mortgaged to them in particular, to add this Clauſe, that the Special Mortgage ſhould not derogate from the General, nor the General from the Special. And ſeeing the uſe of this Clauſe is ordinary, in all Deeds of Special Mortgages, and that it is highly equitable, that ſeeing the Special Mortgage was not added to the General to derogate from it, and to make the Condition of the Creditor worſe; it ſeems that by an effect of this Equity, and by the Uſage of inſerting this Clauſe, it is now come to be always underſtood altho' it be not expreſly mentioned, and that the Uſage has reſtored the Creditors to their Natural Right of exerciſing their Mortgage indifferently upon the whole Eſtate that is ſubject to it, without being obliged to diſcuſs previouſly that part of it on which they have their Special Mortgage, even altho' that Clauſe had not been expreſſed. So that it ſeems that it is not any more in uſe to diſcuſs the Lands and Tenements which are ſpecially mortgaged, before they put in their claim to the others.

But there is another ſort of Diſcuſſion, which is that which has been explained in this Article, eſtabliſhed in favour of a third Poſſeſſor, who is in Poſſeſſion of Houſes, or Lands, mortgaged to a Creditor. And this Diſcuſſion has nothing in common with that of a Special Mortgage before a General one. For on the contrary, altho' the Mortgage which a Creditor has on a Houſe, or Lands, which are in the hands of a third Poſſeſſor, be a Special Mortgage, yet he cannot exerciſe it againſt this third Poſſeſſor, until he has firſt diſcuſſed the remaining part of the Eſtate that is ſubject to his Mortgage. And this is founded on a Principle of Equity, which ſeems to require that this third Poſſeſſor ſhould not be diſturbed in his Poſſeſſion without a neceſſity, and that he be not forced to have his Recourſe againſt the Debtor, and that the Debtor be not expoſed to the conſequences of a Warranty: but that this third Poſſeſſor ſhould remain unmoleſted in his Poſſeſſion, till it ſhall appear by the Diſcuſſion of the other Effects, whether the Creditor may be paid without moleſting the third Poſſeſſor. It is becauſe of theſe Reaſons, and on the Foundation of the laſt Text cited on this Article, that the Diſcuſſion in favour of a third Poſſeſſor is received in ſome Cuſtoms; altho' in others the Creditor may bring his Action immediately againſt the third Poſſeſſor of the Thing on which he has his Mortgage, and that upon another View of Equity, becauſe of the Inconveniencies which may enſue, if the other Effects are not ſufficient to ſatisfy the Mortgagee. For in that caſe the Diſcuſſion proves altogether fruitleſs, and is of no other uſe but to multiply Law-Suits and Coſts, which are chargeable both to the Creditor, the Debtor, and even to the third Poſſeſſor, ſeeing the Houſes, or Lands, which he is in poſſeſſion of, will prove thereby to be engaged for a greater Sum, than they were beſore the Diſcuſſion; whereas the condition of the Poſſeſſor might have been better, if he had diſcharged at firſt the Debt in order to keep the Eſtate he was in poſſeſſion of. So that it might perhaps be more advantageous both to the Creditor, the Debtor, and alſo to the third Poſſeſſor, if there were no Diſcuſſion at all. For the Poſſeſſor ought to take his meaſures aright, and to make his choice, either not to demand the Diſcuſſion, or to be contented to bear the charges of it, in caſe the Diſcuſſion prove fruitleſs by the event.

It will be needleſs to explain here ſome other differences which were in the Roman *Law between the Special and General Mortgage, ſeeing they are not in uſe with us.* V. l. 12. Cod. de don inter vir. & uxor. l. 3. Cod. de ſervo pign. dato man. Nov. 7. c. 6.

VII.

The effect of the Mortgage is uſeleſs to the Creditor, whilſt other prior Creditors have their Mortgage on the ſame Eſtate for all that it is worth. But he may ſecure his Mortgage by paying off that which is due to the Creditors who have a prior Mortgage to his, or by depoſiting the Money, in caſe the Creditors refuſe to take it[h].

7. In what manner a ſubſequent Creditor may ſecure his Mortgage againſt prior Creditors.

[h] Prior quidem creditor compelli non poteſt tibi, qui poſteriore loco pignus accepiſti, debitum offerre: ſed ſi tu illi id omne quod debetur ſolveris, pignoris tui cauſa firmabitur. *l.* 5. *C. qui potior.* Qui pignus ſecundo loco accipit, ita jus ſuum confirmare poteſt, ſi priori creditori pecuniam ſolverit: aut cùm obtuliſſet, iſque accipere noluiſſet, eam obſignavit, & depoſuit, nec in uſus ſuos convertit. *l.* 1. *eod.*

This Depoſiting of the Money ought to be made according to the formalities preſcribed by our Uſage, that is, with the permiſſion of the Judge, and after calling the adverſe Party to ſee the Money depoſited.

It is to be remarked on this Article, that we do not ſpeak here of the Subſtitution to the ancient Creditor. See concerning the ſaid Subſtitution the ſixth Article of the ſixth Section.

VIII.

8. *The ſame.* The Payment which a Creditor makes to another prior Creditor, ſecures him his Pledge only with regard to the Creditors who are poſterior to him whom he pays off. But it is uſeleſs to him with reſpect to all other Creditors who are prior to his own Mortgage, and to that which he has paid off[l].

[l] *This is a Conſequence of the preceding Articles.* Si quoniam non reſtituebat rem pignoratam poſſeſſor condemnatus ex præfatis modis, litis æſtimationem exſolverit: an perinde ſecundo creditori teneatur, ac ſi ſoluta ſit pecunia priori, quæritur. Et rectè puto hoc admittendum eſſe. *l. 12. §. 1. ff. qui pot.*

IX.

9. *Of the Sale of the Thing that is pawned, or mortgaged.* Whether it has been agreed that the Creditor might ſell the Pledge, or whether no mention at all has been made of it, yet nevertheleſs it may be ſold. For it is the Natural Effect of a Pawn, or Mortgage, that if the Debtor does not pay his Debt ſome other Way, the Creditor may take his Payment out of the Price of the Thing which is pawned or mortgaged. Thus, the Creditor who has ſtipulated that he may ſell the Pledge, has no preference before him who has made no ſuch Stipulation[l].

[l] Si convenerit de diſtrahendo pignore, ſive ab initio, ſive poſteà, non tantùm venditio valet, verùm incipit emptor dominium rei habere. Sed & ſi non convenerit de diſtrahendo pignore, hoc tamen jure utimur, ut liceat diſtrahere. *l. 4. ff. de pign. act.* Si priori hypotheca obligata ſit, nihil verò de venditione convenerit, poſterior verò de hypotheca vendenda convenerit, veriùs priorem potiorem eſſe. *l. 12. ff. qui potior.*

We do not ſay in this Article, that the Creditor may ſell the Pledge, but only that the Pledge may be ſold. For by our Uſage, the Creditor cannot of his own Authority ſell the Thing he has in Pawn, or Mortgage, as he might have done by the Roman *Law. But the Thing muſt be ſold either with the Debtor's conſent, or by Authority of Juſtice. Thus, as to Immoveables, the Land, or Tenement that is mortgaged, may be ſold by the Debtor, by mutual conſent, either to the Creditor himſelf, for a reaſonable Price, or to a third Perſon, upon condition that he diſcharge the Debt. But if the Debtor refuſes to ſell the ſaid Land, or Tenement, or is not able to ſell it, either becauſe his Warranty is not ſufficient enough, or for other Reaſons, the Creditor may in that caſe ſeize on the Land, or Tenement, and cauſe it to be ſold by Cant, or Auction; obſerving the neceſſary Publications, and other Formalities. And this manner of Seizure and Sale, with all its Formalities, has been eſtabliſhed in favour of the Creditors, that they might procure payment of their Debt; in favour of the Debtors, that they might find Inhancers of the Price, or that they might have time for paying; and alſo in favour of the Buyers, that they may aſcertain their Purchaſe, by diſcharging the Lands, or Tenements purchaſed in this manner from all Mortgages, by the effect of a Sentence of Adjudication, preceded by all theſe Formalities. For the Creditors are obliged to make their Right known, by oppoſing the Seizure and Sale of the Eſtates of their Debtors, for the Security of their Mortgages and other Rights, excepting only ſome Rights which are preſerved without putting in any Oppoſition; ſuch as Quit-Rents, Services, Feudal Duties. And if the Creditor does not put in his Claim, in order to ſave his Right of Mortgage, he will have loſt his Right on the Lands or Tenements which are ſold in this manner.* Si eo tempore quo prædium diſtrahebatur, programmate admoniti creditores, cùm præſentes eſſent, jus ſuum executi non ſunt, poſſunt videri obligationem pignoris amiſiſſe. l. 6. Cod. de remiſſ. pign. V. Tit. Cod. de jur. dom. impetr. *Altho' this Law has relation to an Uſage different from ours, yet it may be applied to it.*

As to Moveables, if the Creditor is in poſſeſſion of a Pawn, he may, with the Debtor's conſent, either buy it himſelf at a reaſonable Price, or ſuffer it to be ſold to a third Perſon, and the Price to be paid to him; or if the Debtor will not conſent to the Sale, the Creditor may procure leave from the Judge to have the Thing ſold. And as for the Moveables which remain in the hands of the Debtor, the Creditor who has a Mortgage, or an Order for ſeizing and diſtraining, may cauſe them to be ſeized and ſold, he obſerving the Formalities preſcribed in theſe ſorts of Sales.

X.

10. *Agreement about the Sale of the Pawn.* If it had been agreed between the Debtor and Creditor, that the Pledge ſhould not be ſold till after a certain time, or ſimply, that it ſhould not be ſold at all; the Sale in the firſt caſe could not be made till after the time limited: and in the ſecond caſe, the Creditor might ſummon the Debtor to pay, and in default of Payment, might procure an Order for the Sale, after a delay to be regulated by the Judge. For the effect of that Agreement is not to render the Pawn always uſeleſs[m].

[m] Ubi vero convenit ne diſtraheretur, creditor, ſi diſtraxerit, furti obligatur: niſi ei ter fuerit denuntiatum ut ſolvat, & ceſſaverit. *l. 4. ff. de pign. act.*

Theſe three Summons, or Notices, are not in uſe with us, For, as has been remarked on the ninth Article, the Pledge cannot be ſold but by an Order of the Judge, if the Debtor does not conſent to the Sale. So that we have conceived this tenth Article in a manner conformable to our Uſage.

XI.

11. *Stipulation, that the Pledge ſhall belong to the Creditor in default of payment.* Altho' the Thing pawned, or mortgaged, be given that it may be ſold in default of Payment, yet the Creditor cannot ſtipulate, that if he is not payed at the term agreed on, the Pledge ſhall from thenceforth be his in lieu of his Payment. For ſuch a Covenant would be contrary to Humanity and Good Manners; ſeeing the Pledge may chance to be of greater Value, or eſteemed by the Debtor to be worth more than the Debt: and becauſe it is given to the Creditor only for his Security, and not that he may take advantage of the Poverty of his Debtor[n]. But the Debtor and Creditor may agree, that if the

Debtor does not pay within a certain time, the Thing engaged ſhall remain as ſold to the Creditor for the Price which they ſhall then regulate between themſelves, when the Sale is to take effect. And this is a conditional Sale, which has nothing unlawful in it[o], provided that the Thing be eſtimated at a reaſonable Price, either by a Court of Juſtice, or by the mutual Conſent of Debtor and Creditor, and with a liberty to the Debtor either to part with the Pledge to the Creditor at that Price, paying the Overplus, if the Pledge be not enough to acquit the Debt; or to have it ſold by Cant, or Auction; or to take it back himſelf, he paying the Debt. And if the Debtor makes choice of this laſt Expedient, the Judge may fix a time for his paying the Debt, and taking up his Pledge.

[n] Quoniam inter alias captiones præcipuæ commiſſoriæ pignorum legis creſcit aſperitas, placet infirmari eam, & in poſterum omnem ejus memoriam aboleri. Si quis igitur tali contractu laborat, hac ſanctione reſpiret, quæ cum præteritis præſentia quoque repellit, & futura prohibet. Creditores enim re amiſsâ jubemus recuperare quod dederunt. *l. ult. C. de pact. pign.* See the eighth Article of the third Section, and the eleventh and twelfth Articles of the twelfth Section of the Contract of Sale.

[o] Poteſt ita fieri pignoris datio, hypothecæve, ut, *ſi intra certum tempus non ſit ſoluta pecunia, jure emptoris poſſideat rem, juſto pretio tunc æſtimandam.* Hoc enim caſu videtur quodam modo conditionalis eſſe venditio. Et ita divi Severus & Antoninus reſcripſerunt. *l. 16. §. ult. ff. de pign. & hyp.* See the fourth Article of the fifth Section of the Contract of Sale, and the ſeventeenth Article of the ſecond Section of Covenants.

Æſtimationem autem pignoris, donec apud creditorem eumdemque dominum permaneat, ſive amplioris, ſive minoris, quantùm ad debitum, quantitatis eſt, judicialis eſſe volumus definitionis. Ut quod judex ſuper hoc ſtatuerit, hoc in æſtimatione pignoris obtineat. *l. ult. C. de jure dom. impetr.*

XII.

12. *When ſeveral Things are pawned, or mortgaged, for the ſame Debt.*

If ſeveral Things are pawned, or mortgaged for one and the ſame Debt, whether by a Special, or General Mortgage, the Creditor has it in his choice to exerciſe his Right of Mortgage upon which of them he pleaſes[p]. Thus the Creditor to whom all the Moveables are engaged, may ſeiſe upon, and cauſe to be ſold, ſuch of the Moveables as he pleaſes: and he may likewiſe chuſe among the Immoveables. But altho' all the Moveables and Immoveables of a Debtor be mortgaged, if the Debtor be a Minor, the Creditor cannot expoſe to Sale, nor ſeize upon the Immoveables, till he has firſt diſcuſſed the Moveables[q].

[p] Creditoris arbitrio permittitur, ex pignoribus ſibi obligatis, quibus velit diſtractis, ad ſuum commodum pervenire. *l. 8. ff. de diſtr. pign.*

[q] In venditione pignorum captorum facienda, primò quidem res mobiles animales pignori capi jubent, mox diſtrahi quarum pretium ſi ſuffecerit bene eſt, ſi non ſuffecerit, etiam ſoli pignora capi jubent, & diſtrahi. *l. 15. §. 2. ff. de re jud.*

This Law touching the Diſcuſſion of the Moveables, is aboliſhed by the ſeventy fourth Article of the Ordinance of 1539, and it is obſerved in France *only with reſpect to Minors, except in ſome Cuſtoms which direct that the Moveables be firſt diſcuſſed, before they proceed to the Seiſure of the Real Eſtate.*

XIII.

13. *Whether the Debtor may releaſe one Pawn, by giving another in its ſtead, or by offering Bail.*

The Debtor who hath mortgaged a Thing, or laid it in Pawn, cannot diſengage it without the conſent of the Creditor, even altho' he ſhould offer Bail; for this Security is not equal to that of the Pawn. But if he offers another Pawn which is worth as much, or more, than that which he gave at firſt; and that, for Example, inſtead of a Bed, a Suit of Hangings, or other Moveable that is pawned, the Debtor, who has occaſion for them, offers Silver Plate of a ſufficient Value, and which is his own; it would be equitable not to indulge the Creditor in his unreaſonable capricious humour, if he ſhould refuſe to accept of it[r].

[r] Quod ſi non ſolvere, ſed aliâ ratione ſatisfacere paratus eſt, fortè ſi expromiſſorem dare vult, nihil prodeſt. *l. 10. ff. de pign. act.* Neque malitiis indulgendum eſt. *l. 38. ff. de rei vind.*

XIV.

14. *If ſeveral Things are engaged for one and the ſame Debt.*

If the Debtor hath engaged ſeveral Things for the Security of one only Debt, he cannot releaſe any one of them without his Creditor's conſent, unleſs he pays the whole Debt[ſ].

[ſ] Qui pignori plures res accepit, non cogitur unam liberare, niſi accepto univerſo, quantum debetur. *l. 19. ff. de pign. & hyp.*

The Equity of this Article is more apparent, in our Uſage, in Immoveables, than it is in Moveables. For as to Immoveables, each Creditor who knows nothing of the Mortgages which other Creditors have, may retain his own Mortgage upon the whole Eſtate of his Debtor, and there is no inconvenience in it. But as to Moveables, which have no Sequel by a Mortgage, if the Creditor takes of them in Pawn to a much greater Value than his Debt, there might be a hardſhip in ſuch a proceeding which might juſtly deſerve to be repreſſed.

XV.

15. *The Monies ariſing fr the Fruits of the Thing pawned, or mortgaged, muſt firſt be applied to the diſcharge of*

Seeing the Mortgage is given as a Security not only for the principal Debt, but alſo for the Intereſt, if any is due; and that the Intereſt is a Recompence for the Loſs which the Creditor ſuſtains by the Debtor's delaying to acquit the principal Debt; the Monies which may be raiſed from the Fruits of the Thing pawned or mortgaged, not being ſuffi-

the Intereſt, and next of the Debt. cient to acquit both the Principal and Intereſt, muſt be applied in the firſt place to the diſcharge of the Intereſt. For the Debtor muſt begin with indemnifying his Creditor for the damage he has ſuſtained by this delay[t].

[t] *See the fourth Article of this Section.*

Cùm & ſortis nomine & uſurarum aliquid debetur ab eo, qui ſub pignoribus pecuniam debet: quidquid ex venditione pignorum recipiatur, primum uſuris, quas jam tunc deberi conſtat, deinde, ſi quid ſupereſt, ſorti accepto ferendum eſt. Nec audiendus eſt debitor, ſi cùm parum idoneum ſe eſſe ſciat, eligit, quo nomine exonerari pignus ſuum malit. *l.* 35. *ff. de pignor. act.* See the fifth and ſeventh Articles of the fourth Section of Payments.

XVI.

16. Effect of the Mortgage before the Term of Payment. Altho' the Term of Payment be not yet come, yet the Creditor may exerciſe his Right of Mortgage for his Security, according to the circumſtances. Thus, he may oppoſe the Sale of his Pledge, whether it be a Moveable, or Immoveable Thing, in order to preſerve his Right[u].

[u] Quæſitum eſt ſi nondum dies penſionis venit, an & medio tempore perſequi pignora permittendum ſit? Et puto dandam pignoris perſecutionem: quia intereſt mea. *l.* 14. *ff. de pign. & hyp.* See the following Article.

XVII.

17. Mortgage for a conditional Debt. If a Mortgage hath been given for the Security of a Debt which depends on the uncertain event of a Condition, he who may become Creditor, when the Condition ſhall happen, not having as yet acquired his Right, cannot in the mean while bring his Action for the Mortgage, whether it be to get the Pledge that is engaged to him to be ſold, or that he may be put in poſſeſſion of it. But when the Condition ſhall have happened, it will have that effect, which is called Retroactive, which will give to the Obligation, and to the Mortgage, their force from the day of Contract, in the ſame manner as if there had been no Condition at all inſerted. So that this Creditor will be preferred before the intermediate Creditors; that is to ſay, thoſe who have become Creditors between the date of this conditional Contract, and the Event of the Condition. And he may in the mean while, before the Condition has happened, watch for the Preſervation of his Right, either by preventing fraudulent Alienations, or hindering Seizures of the Eſtate ſubject to his Mortgage, or interrupting the Preſcription of a third Poſſeſſor[x].

[x] Si ſub conditione debiti nomine obligata ſit hypotheca, dicendum eſt, ante conditionem non rectè agi, cum nihil interim debeatur. Sed, ſi ſub conditione debiti conditio venerit, rurſus agere poterit. *l.* 13. *§.* 5. *ff. de pign. & hyp.*

Sed & ſi hæres ob ea legata quæ ſub conditione data erant, de pignore rei ſuæ conveniſſet: & poſteà eadem ipſa pignora ob pecuniam creditam pignori dedit: ac poſt conditio legatorum extitit, hi quoque tuendum eum cui priùs pignus datum eſſet, exiſtimavit. *l.* 9. *§.* 2. *ff. qui pot.* Cùm enim ſemel conditio extitit, perinde habetur, ac ſi illo tempore quo ſtipulatio interpoſita eſt, ſine conditione facta eſſet: quod & melius eſt. *l.* 1. *§.* 1. *eod.* See the foregoing Article.

We muſt take this thirteenth Law, §. 5. ff. de pign. *in the ſenſe and meaning explained in the Article. For it would not be juſt to take away from this future Creditor the Security of his Mortgage. But under theſe ſorts of Conditional Obligations, one is entitled to oppoſe a Seizure, and ſummon a third Poſſeſſor, in order to interrupt his Preſcription. And the effect of this Diligence is, that, with regard to the third Poſſeſſor, the Eſtate will remain ſubject to the Mortgage, if the Condition happens: and with regard to Seizures, this Diligence will procure an Order from the Judge, to oblige the Creditors who are poſterior to the Mortgage of a Conditional Debt, to give Security to him to whom the Conditional Debt is owing, to reſtore to him what they ſhall have received, to the Value of what ſhall appear to be due in caſe the Condition is fulfilled. Thus, for Example, if in a Contract of Marriage one Relation or other gives a Sum of Money to the firſt Male Child who ſhall be born of that Marriage, and if the Eſtate of this Donor be ſeized before the birth of a Male Child, the Husband and Wife may oppoſe the Seizure, and deſire an Order from the Judge, to oblige the poſterior Creditors, who ſhall be duly ranked according to their Priority, to acknowledge this Conditional Debt, and to give Security that they will make Reſtitution, in caſe a Male Child ſhall be born of the ſaid Marriage.*

XVIII.

18. Effect of the Mortgage of a ſecond Creditor, upon a Thing engaged to another. If a Debtor who has already mortgaged a Land, or Tenement, to a Creditor, engages it to a ſecond, altho' this Debtor, to avoid the Crime of *Stellionate*, declares to the ſecond Creditor, that the ſaid Land, or Tenement, is already engaged to another, the Mortgage of the ſecond Creditor will have its effect not only upon ſo much of the Land, or Tenement, as remains over and above the Value of what is due to the firſt Creditor; but it affects the whole Land, or Tenement, ſo as to render all and every part of it ſubject to this ſecond Mortgage, after the firſt Creditor ſhall have been paid off. And it would be the ſame thing, altho' the Debtor had particularly expreſſed that he engaged to the ſecond Creditor, only what ſhould remain after the payment of the firſt. For after the firſt Creditor is paid off, the Remainder would comprehend the whole Land, or Tenement[y].

[y] Qui res ſuas jam obligaverint, & alii ſecundo obligant creditori, ut effugiant periculum quod ſolent pati, qui ſæpius eaſdem res obligant, prædicere ſolent, *alii nulli rem obligatam eſſe quàm fortè Lucio Titio*: ut in id quod excedit priorem obligationem, res ſit obligata: ut ſit pignori hypothecæve id quod pluris eſt, aut ſolidum cum primo debito liberata res fuerit. De quo videndum eſt utrum hoc ita ſe habeat, ſi & conveniat. An etſi ſimpliciter convenerit

nerit de eo quod excedit, ut ſit hypothecæ & ſolida res ineſſe conventioni videtur cùm à priore creditore fuerit liberata, an adhuc pars. Sed illud magis eſt, quod priùs diximus. *l.* 15. §. 2. *de pign. & hyp.* Cùm pignori rem pignoratam accipi poſſe placuerit, quatenùs utraque pecunia debetur, pignus ſecundo creditori tenetur. *l.* 13. §. 2. *eod.*

XIX.

19. *Of the Expences which the Creditor has laid out on the Pledge.*

All the Effects of the Mortgage, which have been mentioned hitherto, are as ſo many Engagements to which the Debtor is liable. And this is likewiſe another, that if the Creditor has been at any neceſſary Charges for the preſervation of the Pledge, whether he was in poſſeſſion of it, or not, the Debtor is bound to reimburſe him, altho' the Thing were no longer in being; as if a Houſe repaired by the Creditor, had been carried away by a Flood, or burnt down without his fault. And if the Pledge be ſtill in being, and in the cuſtody of the Creditor, he may detain it for Expences of this kind; for they augment the Debt, and are a part of it[z].

[z] Si neceſſarias impenſas fecerim in ſervum, aut in fundum, quem pignoris cauſa acceperim, non tantùm retentionem, ſed etiam contrariam pigneratitiam actionem habebo. Finge enim medicis, cùm egrotaret ſervus, dediſſe me pecuniam, & eum deceſſiſſe: item inſulam fulciſſe, vel refeciſſe, & poſtea deuſtam eſſe, nec habere quod poſſem retinere. *l.* 8. *ff. de pign. act.* In ſumma debiti computabitur etiam id quod propter poſſeſſiones pignori datas, ad collationem viarum muniendarum, vel quodlibet aliud neceſſarium obſequium, præſtitiſſe creditorem conſtiterit. *l.* 6. *C. de pignor.*

The Creditor has not only a Mortgage for this ſort of Expences, but he has alſo a Privilege. See the ſixth Article of the fifth Section.

XX.

20. *Improvements of the Pledge made by the Creditor.*

If the Creditor has been at any Expence which was not neceſſary for the preſervation of the Pledge, but which has augmented the Value of it; as if he has improved a Land, or Tenement, which was mortgaged to him by way of *Antichreſis*, that is, that he ſhould reap the Fruits of it in lieu of the Intereſt of his Debt, ſo that the Debtor not being in a condition to repay the Charges of the Improvements, be reduced either to ſuffer the Land or Tenement to be ſold, or to abandon it; theſe kinds of Expences will be moderated according to the circumſtances. Thus, for Example, if the Debtor himſelf had begun theſe Improvements, he will have leſs reaſon to complain of them: or if the Creditor has reaped from the ſaid Improvements Fruits to a greater Value than the Intereſt of the Money which he laid out on them amounts to, he will be entitled to a ſmaller Sum for his Reimburſement. And according to the other Circumſtances, ſuch as the Perſons, the Nature of the Land or Tenement, the Quality of the Improvements, the Value of the Fruits which the Creditor ſhall have reaped, the Time that he has enjoyed the Fruits, and other Circumſtances of the like Nature, it will be neceſſary to take ſuch a Medium as may not favour either the Severity or Hardſhip of the Creditor, or the unreaſonable Nicety of the Debtor[a].

[a] Si ſervos pigneratos artificiis inſtruxit creditor, ſi quidem jam imbutos, vel voluntate debitoris, erit actio contraria: ſi verò nihil horum interceſſit, ſi quidem artificiis neceſſariis, erit actio contraria. Non tamen ſic ut cogatur ſervis carere pro quantitate ſumptuum debitor. Sicut enim negligere creditorem dolus & culpa, quam præſtat: non patitur: ita nec talem efficere rem pignoratam, ut gravis ſit debitori ad recuperandum. Putà ſaltum grandem pignori datum ab homine, qui vix luere poteſt: nedum excolere, ut acceptum pignori excoluiſti ſic, ut magni pretii faceres. Alioquin non eſt æquum, aut quærere me alios creditores, aut cogi diſtrahere quod velim receptum, ut tibi penuria coactum derelinquere. Mediè igitur hæc à judice erunt deſpicienda: ut neque delicatus debitor, neque oneroſus creditor audiatur. *l.* 25. *ff. de pign. act. V. l.* 38. *ff. de rei vind.* See the ſeventeenth and eighteenth Articles of the tenth Section of the Contract of Sale.

XXI.

21. *The Creditor does not loſe his Debt, if his Pledge is evicted from him.*

If the Creditor is paid by the Debtor's abandoning to him the Land, or Tenement on which he had his Mortgage, and that afterwards another Creditor of this Debtor's comes and evicts the ſaid Land or Tenement from him; or if the Creditor having been paid in Money by virtue of an Order of the Judge, he having given Security to make Reſtitution in caſe the Condition of a Debt prior to his ſhould come to paſs, be obliged to return the Money he had received in Payment, as in the caſe remarked on the ſeventeenth Article, his Debt revives again. For it was extinguiſhed only on condition that the Payment which was made to him, whether in Land, or Money, ſhould have its effect[b].

[b] Eleganter apud me quæſitum eſt, ſi impetraſſet creditor à Cæſare, ut pignus poſſideret, idque evictum eſſet: an habeat contrariam pigneratitiam? Et videtur finita eſſe pignoris obligatio, & à contractu receſſum. Imò utilis ex empto accommodata eſt, quemadmodum ſi pro ſoluto ei res data fuerit, ut in quantitatem debiti ſufficiat, vel in quantum ejus interſit. *l.* 24. *ff. de pign. act.*

Suas conditiones habeat hypothecaria actio, id eſt, ſi ſoluta eſt pecunia, aut ſatisfactum eſt. *l.* 13. §. 4. *ff. de pign.*

XXII.

22. *When the Debtor gives in*

The Debtor, who gives in Pledge to his Creditor one Thing for another, as Copper gilt, for Silver gilt, is guilty of the

Pawn one Thing inſtead of another. the Crime of Stellionate, for which he may be puniſhed according to the circumſtances[c].

[c] Si quis in pignore pro auro æs ſubjeciſſet creditori, qualiter teneatur, quæſitum eſt—— ſed hic puto pigneratitium judicium locum habere. Et ita Pomponius ſcribit. Sed & extra ordinem ſtellionatûs nomine plectetur, ut eſt ſæpiſſimè reſcriptum. *l.* 36. *ff. de pign. act.* See the twentieth and twenty firſt Articles of the firſt Section.

XXIII.

23. How the Creditor is to be put in Poſſeſſion of his Pledge. If a Creditor has a mind to take poſſeſſion of his Pledge by virtue of an Agreement which entitles him ſo to do, and the Debtor oppoſes it, he cannot turn the Debtor out of Poſſeſſion by Force; but he ought to have recourſe to Juſtice, to be put into Poſſeſſion by the Authority of the Judge, who will give him Poſſeſſion, if he ſees that he has a Right to it[d].

[d] Creditores qui non redditâ ſibi pecuniâ, conventionis legem ingreſſi poſſeſſionem exercent, vim quidem facere non videntur, attamen auctoritate præſidis poſſeſſionem adipiſci debent. *l.* 3. *C. de pign.*

XXIV.

24. The Debtor cannot take back the Pawn without the Creditor's conſent. The Debtor, whoſe Pledge is in the Poſſeſſion of his Creditor, whether by Agreement, or by the Authority of Juſtice, cannot diſturb him in his Poſſeſſion. And he would be guilty even of a kind of Theſt, if, without the Creditor's conſent, he ſhould take away a Moveable which he had given him in Pawn[e].

[e] Set etſi res pignori data ſit, creditori quoque damus furti actionem, quamvis in bonis ejus res non ſit. Quin imò non ſolùm adverſus extraneum dabimus, verùm & contra ipſum quoque dominum furti actionem. *l.* 12. § 2. *ff. de furtis.*

XXV.

25. The Mortgage is limited to the Right which the Debtor had. The Creditor can pretend to no more Right in the Pledge than what the Debtor had. For it is only this Right that the Debtor has engaged[f].

[f] Non plus habere creditor poteſt, quàm habet, qui pignus dedit. *l.* 3. §. 1. *ff. de pign.* Quid in ea re, quæ pignori data eſt, debitor habuerit, conſiderandum eſt. *d.* §. *in fine.*

XXVI.

26. The Effect of the Mortgage, depends on the Effect of the Obligation. All that has been ſaid in this Section concerning the Effects of Mortgage, is to be underſtood only of the Caſes where the Obligations, of which the Mortgage is a Conſequence, may ſubſiſt and have their Effect. For the Mortgage being only an Acceſſory to the Obligation, it hath not its effect but when the Obligation, to which it is an Acceſſory, ought to have its effect. Thus, the Obligation of a Minor who has mortgaged his Eſtate, being confirmed when he is of Age, the Mortgage on his Eſtate is likewiſe confirmed. Thus, in the caſe of thoſe ſorts of Obligations which are called Natural Obligations, of which mention has been made in the ninth Article of the fifth Section of Covenants, the Effect of the Mortgage depends on that which the Obligation ſhall have[g].

[g] Ex quibus cauſis naturalis obligatio conſiſtit, pignus perſeverare conſtitit. *l.* 14. §. 1. *ff. de pign. & hyp.* Res hypothecæ dari poſſe ſciendum eſt, pro quacumque obligatione—— vel tantum naturali. *l.* 5. *eod.*

SECT. IV.

Of the Engagements of the Creditor to the Debtor, becauſe of the Pawn, or Mortgage.

The CONTENTS.

1. *The Creditor is to take care of the Pledge which is in his Poſſeſſion.*
2. *If the Pledge periſhes by an Accident.*
3. *Of the Creditor who uſes the Pawn.*
4. *If the Creditor receives from the Sale of the Pledge more than the Debt comes to.*
5. *The Engagement of the Creditor, who enjoys the Fruits of the Pledge, in lieu of the Intereſt of his Money.*
6. *If the Pledge receives any Augmentation.*
7. *The Creditor cannot acquire the Property of the Pledge by Preſcription.*

I.

1. The Creditor is to take care of the Pledge which is in his poſſeſſion. THE Creditor who is not in poſſeſſion of his Pledge, contracts no manner of Engagement towards his Debtor, but if he has the Pledge in his cuſtody, his firſt Engagement is, to take care of it. And not only will he be anſwerable for the Loſſes and Damages which he may have cauſed by his own act and deed; but he will be accountable likewiſe for what ſhall happen thro' any Negligence, or any Fault, which a careful and circumſpect Perſon would not readily be guilty of[a].

[a] Contractus quidam dolum malum dumtaxat recipiunt; quidam & dolum & culpam——Dolum & culpam mandatum, commodatum, venditum pignori acceptum. *l.* 23. *ff. de reg. jur.* Venit autem in hac actione & dolus & culpa, ut in commodato, venit & cuſtodia. *l.* 13. §. 1. *ff. de pign. act.* Ea igitur quæ diligens paterfamilias in ſuis rebus præſtare ſolet, à creditore exiguntur. *l.* 14. *eod.* §. *ult. inſt.*

inſt. quib. mod. re contr. obl. In pigneratitio judicio venit, & ſi res pignori datas malè tractavit creditor, vel ſervos debilitavit. *l. 24. §. ult. ff. de pign. act.* Si agrum deteriorem conſtituit (creditor) eo quoque nomine pigneratitia actione obligatur. *l. 3. in fine. C. de pign. act. l. 7. eod.* Exactam diligentiam adhibeat. *§. ult. inſt. quib. mod. re cont. obl.*

II.

2. If the Pledge periſhes by an Accident.

If the Pledge periſhes in the hands of the Creditor by an Accident, he does not anſwer for it, and preſerves nevertheleſs his Right on the other Goods of his Debtor[b]. But if the Accident was a conſequence of ſome Negligence, or of ſome Fault, ſuch as the Theft of a Moveable, or the Burning of a Houſe, occaſioned by the want of Care in the Perſon who enjoys the Fruits of it in lieu of the Intereſt of his Money, or who poſſeſſes it by virtue of ſome other Engagement, he would be anſwerable for it.

[b] Quia pignus utriuſque gratia datur, & debitoris quo magis pecunia ei credatur, & creditoris quo magis ei in tuto ſit creditum: placuit ſufficere ſi ad eam rem cuſtodiendam exactam diligentiam adhibeat: quam ſi præſtiterit, & aliquo fortuito caſu rem amiſerit, ſecurum eſſe, nec impediri creditum petere. *§. ult. inſt. quib. mod. re cont. obl.* Vis major non venit. *l. 13. in fine ff. de pign. act.* Culpam dumtaxat ei præſtandam, non vim majorem. *l. 30. in f. ff. eod. l. 5. l. 6. C. eod.* Sicut vim majorem pignorum creditor præſtare non habet neceſſe, ita dolum & culpam, ſed & cuſtodiam exhibere cogitur. *l. 19. C. de pign.* See the fourth and fifth Articles of the ſecond Section of Letting and Hiring.

III.

3. Of the Creditor who uſes the Pawn.

The Creditor who uſes the Pawn againſt the will of the Owner, commits a kind of Theft. For it is not given him in Pawn that he may make uſe of it, but that it may ſerve as a Security to him for his Payment; and the Thing may be the worſe for uſing[c].

[c] Si pignore creditor utetur, furti tenetur. *l. 54. ff. de furt.*

IV.

4. If the Creditor receives from the Sale of the Pledge more than the Debt comes to.

If the Creditor receives from the Sale of the Pledge more than the Debt amounts to, he will be obliged to reſtore the Overplus, together with the Intereſt from the time of his delay, altho' it have not been demanded of him, unleſs he has uſed his endeavours to pay it[d].

[d] Si creditor pluris fundum pignoratum vendiderit, ſi id fœneret, uſuram ejus pecuniæ præſtare debet ei, qui dederit pignus. Sed etſi ipſe uſus ſit ea pecunia, uſuram præſtari oportet. Quod ſi eam depoſitam habuerit, uſuras non debet. *l. 6. §. 1. ff. de pign. act.* See the eighth Article of the firſt Section of Intereſts.

V.

5. The Engagement of the Creditor, who enjoys the Fruits of the Pledge, in lieu of the Intereſt of his Money.

If the Engagement gives to the Creditor a Right to reap the Fruits of the Pledge for the Intereſt of his Money, as in the caſe of an *Antichreſis*, he ought to reſtore the Revenues which exceed the Rent, or Legal Intereſt, that may be due to him. Thus, he who enjoys the Rent of a Houſe, or a Ground-Rent, of greater Value than the Intereſt of the Money that is due to him, ought to reſtore the Overplus: in the ſame manner as he who receives more Money from the Sale of the Pledge than his Debt comes to, is obliged to reſtore the Surplus to the Owner of the Pledge. But if the Fruits, or other Revenues, of the Houſes or Lands which are mortgaged by way of *Antichreſis*, be uncertain, and that the Creditor is to content himſelf with them inſtead of the Intereſt of his Debt, whether the ſame chance to exceed or fall ſhort of the Intereſt, and that this Agreement have nothing in it contrary to Law, as in the caſe of the twenty eighth Article of the firſt Section, the Creditor will not be obliged to give back any of the Fruits, or Revenues, which he reaps from the Thing mortgaged, altho' they ſhould exceed the Intereſt of his Debt. For ſeeing he could not demand the Deficiency, in caſe the Fruits ſhould happen to be leſs than his Intereſt, ſo likewiſe he is not obliged to reſtore the Overplus. But if this Mortgage by way of *Antichreſis* ſhould appear to have any thing in it contrary to Law, or the Damage ſuſtained in the Fruits to be exceſſive and uſurious, or if the Creditor had no juſt Title to his Poſſeſſion and Enjoyment, he would be obliged to compenſate the Overplus of the Fruits with the Principal Sum that ſhould appear to be legally due to him[e].

[e] Ex pignore percepti fructus imputantur in debitum: qui ſi ſufficiant ad totum debitum, ſolvitur actio, & redditur pignus: ſi debitum excedant qui ſupererunt, redduntur. *l. 1. C. de pign. act. l. 2. & 3. eod. l. 1. C. de diſtr. pign.* Si accepit jam pecuniam ſuperfluum reddit. *l. 24. §. 2. in f. ff. de pign. act. l. ult. C. de diſtr. pign.*

Si ea lege poſſeſſionem mater tua apud creditorem ſuum obligaverit, ut fructus in vicem uſurarum conſequeretur, obtentu majoris percepti emolumenti, propter incertum fructuum proventum, reſcindi placita non poſſunt. *l. 17. C. de uſur.* See the twenty eighth Article of the firſt Section.

VI.

6. If the Pledge receives any Augmentation.

Whatever Augmentation may happen to the Thing mortgaged, whether by Accident, or otherwiſe, the Creditor having contributed nothing of his own towards it, the ſame belongs to the Debtor; and the Creditor ought to reſtore it to him, altho' the Pledge was in his Poſſeſſion when this change happened to it. For theſe Augmentations are Acceſſories to the Right of Property, which belongs to the Debtor[f].

[f] Quidquid pignori commodi, ſive incommodi fortuitò acceſſit, id ad debitorem pertinet. *l.* 21. §. 2. *ff. de pign. & hyp.*

VII.

7. The Creditor cannot acquire the Property of the Pledge by Preſcription.

This is alſo an Engagement of the Creditor, who is in poſſeſſion of a Pledge, and of his Heirs and Executors, that they remain perpetually obliged to reſtore the Pledge after payment of the Debt, and can never pretend to have acquired the Property thereof by Preſcription[g].

[g] Nec creditores, nec qui his ſucceſſerunt, adverſus debitores pignori quondam res nexas petentes, reddita jure debiti quantitate, vel his non accipientibus oblata & conſignata & depoſita, longi temporis præſcriptione muniri poſſunt. *l.* 10. *C. de pign. act. l. ult. eod.* See the eleventh Article of the fifth Section of Poſſeſſion.

SECT. V.

Of the Privileges of Creditors.

Three ſorts of Creditors.

We muſt diſtinguiſh between three ſorts of Creditors. Thoſe who have neither Mortgage nor Privilege, ſuch as he who has only a bare Promiſe for Money lent: thoſe who have a Mortgage without a Privilege, as he who has an Obligation for Money lent, paſt before Notaries Publick: and thoſe whoſe Credit has ſome Privilege that diſtinguiſhes their condition from that of other Creditors, and which gives them a Preference to thoſe whoſe Credit is prior to theirs. Thus he who has lent Money to buy a Houſe, or to repair it, is preferred, as to that Houſe, before other Creditors of the ſame Debtor, altho' they have Mortgages on it, which are prior in date.

Two ſorts of Privileges.

The Privileges of Creditors are of two Kinds. One is, of thoſe which give the Creditors a Preference on all the Goods, without any particular Aſſignment on any one Thing; as, for Example, the Privilege of the Expences of a Law-Suit, and that of Funeral Expences: And the other is of thoſe which aſſign to the Creditors their Security on certain Things, and not on the other Goods, ſuch as the Privilege of thoſe who have lent Money to buy a Piece of Ground, or to build on it; the Privilege of the Landlord of a Houſe on the Moveables of his Tenant, for the Rent of his Houſe, and other Privileges of the like nature.

We ſhall not put down among the Rules of this Section, thoſe of the *Roman* Law relating to the Privileges which the Emperor *Juſtinian* granted to married Women for their Dowries, or Marriage Portions, giving them the Preference for the ſame before Creditors who had prior Mortgages[a], and even before him whoſe Money had been laid out on the Purchaſe, or Repair, of the Lands or Tenements[b]. For theſe Privileges are not in uſe with us, except in ſome Provinces where the Wife has the Preference before Creditors who have prior Mortgages, and in ſome Places where ſhe has this Preference only as to the Moveables.

[a] *L. ult. C. qui pot.*

[b] *Nov.* 97. *C.* 3.

We do not reckon in the number of Privileges, the Preference which the Creditor hath on the Moveables that have been given him in Pawn, and which are in his Cuſtody. For this Preference is not founded on the quality of the Credit, but on the Security which the Creditor has taken by getting poſſeſſion of the Pledge. But this does not extend to Immoveables, the Poſſeſſion of which does not give any Preference to the Creditor, if he has it not otherwiſe. And as to Moveables, ſeeing they are not ſubject to Mortgage by our Uſage, the Creditor who has a Moveable in Pawn, and in his own Poſſeſſion, hath his Security on it. See the Preamble of the firſt Section of this Title, and that of the Title of the Ceſſion of Goods. *V. l.* 10. *ff. de pign.*

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I.

1. Defini- of Privilege.

THE Privilege of a Creditor is the diſtinguiſhing Right which the Nature of his Credit gives him, and which makes him to be preferred before other Creditors, even thoſe who are prior in time, and who have Mortgages[a].

II.

2. Priority of time is of no importance among privileged Creditors.

Among Creditors who are privileged, it is no matter which of them is firſt, or laſt, in order of time; for they are diſtinguiſhed only by the Nature of their Privileges. And if two Creditors have a Privilege of the ſame kind, altho' their Debts be of different times, yet they ought to be paid in the ſame order, and in the ſame proportion[b].

III.

3. Effect of the Privilege.

All the Privileges of Creditors have this in common, that the leaſt of them gives the Preference before Creditors who are ſuch only by Bond, by Mortgage, and others who have no manner of Privilege. And among thoſe who are privileged, there are ſome who have the Preference before others, according to the different qualities of their Privileges[c].

IV.

4. Privilege of the Seller.

He who has ſold an Immoveable Thing for which he has not received the Price, is preferred before the Creditors of the Purchaſer, and before all others, as to the Thing that is ſold. For the Sale implied the Condition, that the Purchaſer ſhould not be Maſter of the Thing till he had paid the Price. Thus the Seller who has not received the Price, may either keep the Land, or Tenement, if the Price was to be paid before Delivery, or he may follow it, into what hands ſoever it may have paſſed; if he has delivered it before Payment[d].

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[a] Privilegia non tempore æſtimantur, ſed ex cauſa. *l. 32. ff. de reb. auct. jud. poſſ.* Interdum poſterior potior eſt priori. Ut putà, ſi in rem iſtam conſervandam impenſum eſt, quod ſequens credidit. Veluti ſi navis fuit obligata, & ad armandam eam rem, vel reficiendam ego credidero. *l. 5. ff. qui potior.*

[b] Privilegia non tempore æſtimantur, ſed ex cauſa. Et ſi ejuſdem tituli fuerunt, licet diverſitates temporis in his fuerint. *l. 32. ff. de reb. auct. jud. poſſ.*

[c] Interdum poſterior potior eſt priori. Ut putà, ſi in rem iſtam conſervandam impenſum eſt, quod ſequens credidit. *l. 5. ff. qui pot.*

[d] Quod vendidi, non aliter ſit accipientis, quàm ſi aut pretium nobis ſolutum ſit, aut ſatis eo nomine factum. *l. 19. de contr. empt. l. 53. eod.* §. 41. *inſt. de rerum diviſ.* Venditor quaſi pignus retinere poteſt, eam rem quam vendidit. *l. 13.* §. 8. *ff. de act. empt. & vend.* Hæreditatis venditæ pretium pro parte accepit, reliquum emptore non ſolvente, quæſitum eſt, an corpora hæreditaria pignoris nomine teneantur? Reſpondi, nihil proponi, cur non teneantur. *l. 22. ff. de hered. vel act. vend. l. 31.* §. 8. *ff. de ædil. edicto.*

By the third Article of the Edict of the Month of Auguſt 1669, *as to the King's Mortgages, the Seller in this caſe is preferred before the King.*

The Rule which gives this Preference to the Seller ought to be underſtood only in the caſe where it appear by the Contract of Sale that he has not been paid. For if he had given an Acquittance, and taken a Promiſe, or Bond, for his Payment, he would have loſt his Preference,

rence, the Contract appearing to be acquitted. Other*wiſe thoſe who ſhould afterwards lend to this Purchaſer might be deceived. And beſides, the Novation of the Obligation extinguiſhes the Mortgage.* See the ſecond Article of the ſeventh Section.

It is to be remarked on this Article, that by our Uſage it takes place only in Immoveables, and we have limited it to this Senſe. For as concerning Moveables, ſeeing they have no Sequel by Mortgage, and that the Seller has loſt the Property of them by delivering them to the Buyer; he may ſeize upon them while they are in the hands of the Buyer, and he will have likewiſe the preference on them for the payment of the Price: but if the Purchaſer has diſpoſed of them to others, the Seller cannot ſeize on them in the hands of third perſons for the payment of his Price; except in one caſe allowed of by ſome Cuſtoms, to wit, when the Moveable has been ſold without fixing any day or term of Payment, the Seller expecting to be paid in hand. For in this caſe, the Infidelity of the Buyer does not deprive the Seller of the effect of this Agreement, and the Seller is conſidered as remaining Maſter of the Thing ſold, till he is paid for it. Thus he ſues not as Creditor of the Price, but as Owner, who claims his own Moveable. See the third Article of the ſecond Section of the Ceſſion of Goods.

V.

5. Privilege of him who lends Money for a Purchaſe. He who lends Money to the Purchaſer to pay the Price of his Purchaſe, has the ſame Privilege as the Seller would have, if he were not paid. For it is the Lender's Money that makes the Purchaſe to become part of the Eſtate of the Purchaſer[e]. But in order to transfer the Right of the Seller to him who lends the Money for his Payment, it is neceſſary to obſerve the precautions which ſhall be explained in the ſixth Section.

[e] Qui in navem emendam credidit, privilegium habet. *l. 26. ff. de reb. auct. jud. poſſ.* Licet iiſdem pignoribus, multis creditoribus diverſis temporibus datis, priores habeantur potiores: tamen eum, cujus pecuniâ prædium comparatur, quod ei pignori eſſe ſpecialiter obligatum ſtatim convenit, omnibus anteferri juris auctoritate declaratur. *l. 7. Cod. qui pot. in pign.* Quamvis ea pecunia, quam à te mutuò frater tuus accepit, comparaverit prædium: tamen niſi ſpecialiter, vel generaliter hoc tibi obligaverit, tuæ pecuniæ numeratio in cauſam pignoris non deduxit. Sane perſonali actione debitum apud præſidem petere non prohiberis. *l. 17. Cod. de pign.*

This Creditor is preferred before the King, by the third Article of the Edict of the Month of Auguſt, 1669. *As to the Preference of this Creditor before the King. See* l. ult. §. ult. ff. qui pot. & l. 34. ff. de reb. aut jud. poſſid.

This Preference does not take place according to our Uſage, in Moveables, except whilſt they continue in the Poſſeſſion of the Debtor. For when they are alienated, and out of the hands of the Debtor, and thoſe of the Creditor, neither the Privilege, nor Mortgage, have place any longer. See the Remark on the fourth Article.

VI.

6. Privilege of him who lends to preſerve the Thing. The Creditor whoſe Money has been laid out in preſerving, or repairing, the Thing; as, for Example, to ſecure a Piece of Ground againſt the Current of a River, to prevent the fall of a Houſe, or to rebuild it after its Fall, has a Privilege. For he has preſerved the Thing in being for the common Intereſt, both of the Proprietor, and Creditors: and it is as it were his own, to the value of what he has laid out upon it[f].

[f] Creditor qui ob reſtitutionem ædificiorum crediderit, in pecuniam quam crediderit, privilegium exigendi habebit. *l. 25. ff. de reb. cred. l. 24. §. 1. ff. de reb. auct. jud. poſſ. l. 1. ff. de ceſſ. bon.* Qui in navem extruendam, vel inſtruendam credidit, privilegium habet. *l. 26. ff. de reb. auct. jud. poſſ. l. 5. ff. qui pot.* Hujus enim pecunia ſalvam fecit totius pignoris cauſam. *l. 6. eod.* See the Law quoted on the third Article.

VII.

7. Privilege for Improvements. Thoſe whoſe Money has been laid out on the Improvement of an Eſtate; ſuch as to make a Plantation, or to build upon it, or to augment the Apartments of a Houſe, or for other the like Cauſes, have a Privilege upon the ſaid Improvements, as upon a Purchaſe made with their Money[g].

[g] Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel inſtruendæ cauſâ, *vel quoquo modo*, crediderit, vel ob navem venditam petat, habet privilegium. *l. 34. ff. de reb. auct. jud. poſſ. l. 26. eod.* See the fifth Article of this Section.

Pignus inſulæ creditori datum qui pecuniam ob reſtitutionem ædificii mutuam dedit. *l. 1. ff. in quib. cauſ. pign. v. h. tac. contr.*

VIII.

8. Effect of this Privilege. This Preference in reſpect of the Improvements, is limited to what remains of them in being, and does not affect the whole Body of the Eſtate, as does the Preference on account of Repairs, which have preſerved the whole Eſtate in being. For if there remains nothing of the Improvements, the Eſtate not being any thing the better for them, and no body profiting by them, there remains no longer any cauſe for Preference. And when the Improvements do ſubſiſt, the Privilege of him who has been at the charges of them, takes place only on the Value of what remains of the Improvements[h].

[h] Quaſi pignus retinere poteſt eam rem. *l. 13. §. 8. ff. de act. empt. & vend. Theſe words which are for the Seller, may be applied to this Article. For he who has made the Improvements, is, with regard to them, in the ſtead of a Seller.* See the thirty firſt Article of this Section.

IX.

9. Privileg of Architects, and Workmen. Architects, and other Undertakers, Workmen, and Artificers, who beſtow their Labour on Buildings, or other Works, and who furniſh Materials, and in general, all thoſe who imploy their Time, their Labour, their Care, or furniſh any Materials, whether it be to make a Thing, or to repair it, or to preſerve it, have the ſame Privilege for their Salaries, and for what they furniſh, as thoſe have who have advanced Money for theſe kind of Works, and which the Seller has for the Price of the Thing ſold[i].

[i] *In the ſame manner, and with much more reaſon, as thoſe have who lend Money for theſe kinds of Things.* See the fourth, fixth, tenth, and eleventh Articles of this Section.

See concerning this Privilege, with regard to Moveables, the Remarks on the fifth Article, as alſo on the eleventh and twelfth Articles.

X.

10. *Privilege of him who lends to the Undertaker of a Work.* If a third Perſon lends to an Architect, or other Undertaker, Money, which is laid out on a Houſe, or any other Work, and the ſaid Money has been advanced by order of the Maſter for whom the ſaid Work is to be done, this third Perſon ſhall have the ſame Privilege as if he had lent the Money to the Maſter himſelf for that uſe[l]. But if the Money was lent without the Maſter's knowledge, or without his Order, and if the Maſter has paid the ſaid Undertaker; he who has lent the Money will have his Action only againſt the Perſon to whom he lent it. But if the Maſter has not paid the Undertaker, this third Perſon may uſe the Privilege, whether he has lent the Money by the Maſter's Order, or without it, provided he has taken the precautions which ſhall be explained in the ſixth Section.

[l] Divus Marcus ita edixit, creditor qui ob reſtitutionem ædificiorum crediderit, in pecunia quæ credita erit, privilegium exigendi habebit: quod ad eum quoque pertinet, qui redemptori domino mandante, pecuniam adminiſtravit. *l.* 24. §. 1. *ff. de reb. auct. jud. poſſ. l.* 1. *ff. in quib. cauſ. pign. vel hyp. t. c.*

XI.

11. *Privilege of Carriers, and others.* Carriers have a Privilege on the Goods which they have carried, for the Carriage of them, and for the Duties of Toll, Cuſtoms, or others, which they ſhall have paid on account of the ſaid Goods. And the ſame Privilege have all thoſe whoſe Money has been laid out in Expences of the like neceſſity, ſuch as for the keeping and feeding of Cattle, and others of the like kind[m].

[m] Hujus enim pecunia ſalvam facit totius pignoris cauſam, quod poterit quis admittere, & ſi in cibaria nautarum fuerit creditum, ſine quibus navis ſalva pervenire non poterat. Item ſi quis in merces ſibi obligatas crediderit, vel ut ſalvæ fiant, vel ut naulum exolvatur, potentior erit, licet poſterior ſit. Nam & ipſum naulum potentius eſt. Tantundem dicetur, & ſi merces horreorum, vel areæ, vel vectura jumentorum debetur. Nam & hic potentior erit. *l.* 6. *d. l.* §. 1. & 2. *ff. qui pot.* See concerning this Article, the Remarks which have been made on the fifth and ninth Articles, and on the Article which follows.

XII.

12. *Privilege on the Fruits of the Ground, for the Rent of the Farm.* The Proprietor of an Eſtate that is farmed out, has the Preference on the Fruits that grow on it, for the payment of his Rent. And this Preference is acquired by Law, altho' the Leaſe make no mention of it. For theſe Fruits are not ſo much his Pledge, as they are his Property, till he has got payment of his Rent[n].

[n] In prædiis ruſticis fructus, qui ibi naſcuntur, tacitè intelliguntur pignori eſſe domino fundi locati: etiamſi nominatim id non convenerit. *l.* 7. *ff. in quib. cauſ. pign. vel hyp. tac. contr. l.* 3. *Cod. eod.*

This Preference is to be underſtood, according to our Uſage, of Fruits which either are not ſeparated from the Ground, or are ſtill in the Poſſeſſion of the Debtor. For if he has ſold, and delivered them to one who has bought them fairly and honeſtly, they cannot be ſeized on in the hands of the Purchaſer. Thus he who in a Market buys Corn of a Farmer, cannot be ſued by the Proprietor of the Ground where the Corn grew, for the payment of the Rent of his Farm, for he ought to have taken care of his Payment. This Privilege which Proprietors have, for the Rent of their Farm, belongs even to thoſe who have no Leaſe in Writing. For it is enough that it appears that the Fruits which they lay claim to, are the Produce of their Ground. See the fourteenth Article.

XIII.

13. *Privilege of a Quit-Rent, and of the Penſion due from an Emphyteutical Tenant.* He who has made a Grant of an Eſtate, on condition to have a Quit-Rent paid him out of it, or who has given an Emphyteutical Leaſe of it, for a yearly Rent, or Penſion, has a Privilege for his ſaid Quit-Rent, or Penſion, upon the Fruits growing on the Eſtate, and alſo on the Land it ſelf, into what hands ſoever it may paſs. And if the Poſſeſſor of this Eſtate ſells it, or mortgages it, or farms it out, or diſpoſes of it otherwiſe, or that it be ſeized on and ſold; the firſt Owner will be paid off his Quit-Rent, or Penſion, as well out of the Land it ſelf, or out of the Monies ariſing from the Sale of it, preferably to all the Creditors of the Poſſeſſor, as out of the Fruits of the Ground which are in being, and in the hands of the Poſſeſſor[o].

[o] Etiam ſuperficies in alieno ſolo poſita pignori dari poteſt. Ita tamen, ut prior cauſa ſit domini ſoli, ſi non ſolvatur ei ſolarium. *l.* 15. *ff. qui pot.* Lex vectigali fundo dicta erat, ut, *ſi poſt certum tempus vectigal ſolutum non eſſet, is fundus ad dominum redeat:* Poſteà is fundus à poſſeſſore pignori datus eſt. Quæſitum eſt, an rectè pignori datus eſt? Reſpondit, ſi pecunia interceſſit pignus eſſe. Item quæſiit, ſi cùm in exſolutione vectigalis tam debitor, quàm creditor ceſſaſſent, & propterea pronun-

ciatum eſſet *fundum ſecundùm legem domini eſſe*: cujus potior cauſa eſſet? Reſpondi, ſi, ut proponeretur, vectigali non ſoluto, jure ſuo dominus uſus eſſet, etiam pignoris jus evanuiſſe. *l. 31. ff. de pign. & hypoth.*

XIV.

14. *Privilege on the Moveables of the Tenant of a Houſe, for the Rent, and conſequences of the Leaſe.* The Moveables which Tenants have in the Houſes which they rent, are engaged to the Landlord of the Houſe, and preferably to other Creditors, for his Security, not only of his Rent, but of the other Conſequences of his Leaſe; ſuch as Dilapidations, if any have happened thro' the fault of the Tenant, and all Expences, Coſts, and Damages which the Tenant may be liable to, on account of his Leaſe[p].

[p] Eo jure utimur, ut quæ in prædia urbana inducta illata ſunt, pignori eſſe credantur, quaſi id tacitè convenerit. *l. 4. ff. in quib. cauſ. pign. vel hyp. tac. contr. l. ult. Cod. eod. l. 5. C. de loc.* Non ſolùm pro penſionibus, ſed & ſi deteriorem habitationem fecerit culpa ſua, inquilinus, quo nomine ex locato cum eo erit actio, invecta & illata pignori erunt obligata. *l. 2. ff. in quib. cauſ. pign.* See the eighteenth Article.

Altho' this text does not mention the Privilege; but only the tacit Mortgage, yet this Mortgage is privileged, and it is the Uſage with us.

If the Moveables belonging to the Tenant are not in the Places which are let, when the Landlord ſues for his Payment, he cannot lay claim to them when they are in the hands of third Perſons, unleſs there have been ſome fraud in alienating them to his prejudice.

This Privilege on the Moveables of Tenants, belongs alſo to thoſe Landlords who have no Leaſe in Writing. For it is enough, that theſe Moveables are found in the Houſe which is held by Leaſe, to appropriate them to the Landlord. See the twelfth Article, and the Remark on the twenty third Article.

XV.

15. *Of the Moveables of the Under-Tenants.* If there are Under-Tenants who occupy only one Apartment, or other Portion of a Houſe, their Moveables are engaged only for the Rent of what they occupy. And if they pay their Rent to the Tenant who let it to them, the Landlord who did not attach the Rent while it was in their hands, can pretend nothing, either on their Moveables, or their Rents: For they may pay their Rent to the Perſon who let the Lodgings to them; altho' if they pay it to the Landlord of the Houſe, it will be a good Payment, if the Tenant owes him his Rent[q].

[q] Unde ſi domum conduxeris, & ejus partem mihi locaveris, egoque locatori tuo penſionem ſolvero, pigneratitia adverſus te potero experiri. Nam Julianus ſcribit, ſolvi ei poſſe. Et ſi partem tibi, partem ei ſolvero, tantumdem erit dicendum. Planè in eam dumtaxat ſummam invecta mea, & illata tenebuntur, in quam cœnaculum conduxi. Non enim credibile eſt, hoc conveniſſe, ut ad univerſam penſionem inſulæ, frivola mea tenerentur. *l. 11. §. 5. ff. de pign. act.* See the ſeventeenth Article.

XVI.

16. *Exception to the two foregoing Articles.* The Preference which is ſpoken of in the two preceding Articles, is to be underſtood only of the Moveables which the Tenant has in the Houſe as Furniture to it, or which he deſigns always to keep in it: and not of ſuch Goods as he has put there with deſign to tranſport them to another place; as for Example, a Sute of Hangings which he had bought to ſend to another Houſe[r].

[r] Videndum eſt, ne non omnia illata, vel inducta, ſed ea ſola quæ, ut ibi ſint, illata fuerint, pignori ſint, quod magis eſt. *l. 7. §. 1. ff. in quib. cauſ. pign.* Reſpondit, eos dumtaxat, qui hoc animo à domino inducti eſſent, ut ibi perpetuò eſſent, non temporis cauſâ accommodarentur, obligatos. *l. 32. in f. ff. de pign. & hyp.*

XVII.

17. *Another Exception.* If a Tenant takes into the Houſe which he rents, another Perſon, giving him his Lodging *gratis*, the Moveables of the ſaid Lodger will not be engaged for the Rent of that part of the Houſe which the Tenant accommodates him with[ſ].

[ſ] Pomponius libro tertio decimo Variarum lectionum ſcribit, ſi gratuitam habitationem conductor mihi præſtiterit, invecta à me domino inſulæ pignori non eſſe. *l. 5. ff. in quib. cauſ. pign.*

XVIII.

18. *Privilege for the Rents of other Buildings beſides Dwelling-Houſes.* This Privilege of Landlords of Houſes upon the Moveables of Tenants, extends alſo to the Proprietors of Shops, Warehouſes, Granaries, and of all other Places, upon the Goods which the Tenants of the ſaid Places may have in them[t].

[t] Si horreum fuit conductum, vel diverſorium, vel area, tacitam conventionem de invectis illatis, etiam in his locum habere putat Neratius. Quod verius eſt. *l. 3. ff. in quib. cauſ. pign.*

XIX.

19. *Privilege of the King.* All the Effects of thoſe who are indebted to the Crown, whether they be Officers that are accountable either for Farms, or other Receipts and Diſburſements of the Publick Money, are mortgaged for all the Sums of this nature, which they may chance to owe; altho' there be no expreſs Obligation of them, nor Condemnation in a Court of Juſtice[u].

[u] Certum eſt ejus, qui cum fiſco contrahit, bona veluti pignoris titulo obligari, quamvis ſpecialiter id non exprimatur. *l. 2. C. in quib. cauſ. pign. vel hyp. tac. contr. l. 3. C. de privil. fiſci.* Fiſcus ſemper habet jus pignoris. *l. 46. §. 3. ff. de jur. fiſci.* See the fourth Article of the Edict of the month of *Auguſt*, 1669.

The Rule explained in this Article does not only relate

late to Officers that are accountable, and to others indebted to the Crown; but it is alſo to be applied to thoſe who receive and collect the Publick Money in the Towns, and open Country; ſuch as Conſuls, Receivers, Collectors, and others, whether they take an Oath in Judgment, or whether they officiate upon their bare Nomination. See the next following Article, and the twenty third Article, with the Remark on it.

XX.

20. The date of the Mortgage of the Crown. The Mortgage which is acquired to the Crown, on the Eſtates of Officers who are accountable, Farmers, and others who receive the Publick Money, takes its origine from the moment of the Title of their Engagement; as from the date of the Leaſe, if it be a Farm; the date of the Patent, if it be an Office; or the date of the Agreement, or Commiſſion [x].

[x] Si cùm pecuniam pro marito ſolveres, neque jus fiſci in te tranſferri impetraſti, neque pignoris cauſa domum, vel aliud quid ab eo accepiſti: habes perſonales actiones, nec potes præferri fiſci rationibus, à quo dicis ei vectigal denuò locatum eſſe: cum eo pacto, univerſa quæ habet habuitve *eo tempore quo ad conductionem acceſſit*, pignoris jure fiſco teneantur. *l. 3. C. de priv. fiſc.*.

This Mortgage of the Crown is regulated after this manner by the fourth Article of the Edict of the Month of Auguſt, 1669.

XXI.

21. In a competition of Mortgages, that of the Crown takes place only in its order. The Creditors who have a Mortgage prior to that of the King, preſerve their Right on the Immoveables of their Debtors. And the Mortgage which the King has, takes place only in its order [y].

[y] Quamvis ex cauſa dotis vir quondam tuus tibi ſit condemnatus, tamen, ſi priuſquam res ejus tibi obligarentur, cum fiſco contraxit, jus fiſci cauſam tuam prævenit. Quod ſi poſt bonorum ejus obligationem, rationibus meis cæpit eſſe obligatus, in ejus bona ceſſat privilegium fiſci. *l. 2. C. de priv. fiſc. l. 8. ff. qui pot. l. ult eod.* See the following Article.

We muſt add to this Article, that with reſpect to Offices, the King has the preference on the Monies of the Office on account of which the Debt is due, not only preferably to the Creditors by Mortgage, but even preferably to the Seller himſelf, on the Price of the Office, and the Perquiſites annexed to it, according to the ſecond Article of the Edict of the month of Auguſt, 1669. *Which is grounded on this, that the Office was originally granted by the King with this Burthen, and that it is therefore the proper Pledge of the King, engaged by Privilege for whatever the Officer may be indebted on account of the Office.*

XXII.

22. Exception to the foregoing Rule. The foregoing Rule is to be underſtood only of the Immoveables which the Debtor had acquired before his Engagement to the Crown. But as to thoſe which the Debtor acquired after the ſaid Engagement, the King is preferred before the Creditors who are prior to his Mortgage, altho' all the Debtor's Eſtate, preſent and to come, had been mortgaged to them. And in this concurrence of Mortgages, which begin to have their Effect in the moment that the new Purchaſe is made, the Mortgage of the King takes place before the others [z].

[z] Si quis mihi obligaverat, quæ habet, habituruſque eſſet cum fiſco contraxerit: ſciendum eſt, in re poſteà adquiſita fiſcum potiorem eſſe debere, Papinianum reſpondiſſe. Quod & conſtitutum eſt. Prævenit enim cauſam pignoris fiſcus. *l. 28. ff. de jure fiſc.*

Purſuant to this Text, the ſame thing hath been ordained by the third Article of this very Edict of the month of Auguſt, 1669, *but with an exception for the preference of the Seller, and of him whoſe Monies have been laid out on the Purchaſe; provided that mention be made of the Monies being ſo imployed in the Articles and Deed of Contract. We might add as a reaſon for this Preference of the King on the Eſtate that is acquired after that the Officer has been concerned in the Receipt of the Publick Money, that it is preſumed that the Monies which the ſaid Officer, or other Perſon that is accountable, owes to the King, have been laid out on theſe new Purchaſes, or that the Credit which the ſaid Imployment gave him has facilitated the ſame.*

XXIII.

23. Preference of the King, before all Creditors who have neither Mortgage, nor Privilege. With regard to Creditors who have neither Mortgage, nor Privilege, but only a bare Perſonal Action, the King is preferred before them on the Immoveables, becauſe he has always a tacit Mortgage without Covenant. And he has alſo the Preference on the Moveables, before thoſe who attach them, and before all the Creditors who have no Privilege. But the Creditor who has upon the Moveable one of the Privileges explained in this Section, is preferred before the King [a].

[a] Reſpublica creditrix omnibus chirographariis creditoribus præfertur. *l. 38. §. 1. ff. de reb. auct. jud. p.* Fiſcus ſemper habet jus pignoris. *l. 46. §. 3. de jure fiſci.*

This word Republick in the Text does not ſignify the Exchequer. V. l. 8. ff. qui pot. *The Prince is with much greater reaſon entitled to this Privilege.*

We have added in this Article the Preference of the privileged Creditor on the Moveables before the King; becauſe this Preference is ordained by the firſt Article of the Edict of 1669, *contrary to the Diſpoſition of the* Roman *Law, which gave to the Exchequer the Preference even before him who had ſold, or repaired, the Thing, as* Juſtinian *gave it likewiſe to the Wife for her Marriage Portion preferably to thoſe very Privileges.* V. l. 34. ff. de reb. auth. jud. poſſ. Nov. 97. cap. 3. *As to the Privilege of Rent on the Moveables of the Tenant, this Edict gives unto it the Preference before the Debt due to the King only for the laſt ſix Months.*

What is ſaid in this Article, that the King has always a tacit Mortgage, is to be underſtood only of Sums due to the King for Cauſes which have been mentioned in the 19th Article, and not for the Land-Tax, and other Impoſts, due from private perſons. For as to theſe Impoſts, there is no Mortgage for them on the Immoveables, unleſs it be in places where the Land Tax is a Real Burthen; but only a Preference on the Fruits. And it is for this reaſon that we have not quoted on the Privilege of the King this Text of the firſt Law; Cod. in quib. cauſ. pign.

vel hyp. tac. contr. *Univerſa bona eorum qui cenſentur vice pignorum tributis obligata ſunt.*

XXIV.

24. Privilege of Funeral Charges.

Merchants, Tradeſmen, and others to whom any thing is due for Funeral-Charges, have their Action againſt the Heirs, or Executors, and if there be no Heirs, or Executors, they have it againſt the Goods of the deceaſed, as if they had contracted with him; and they have moreover a Privilege, even altho' the Goods of the deceaſed ſhould not be ſufficient to pay his Debts; provided theſe Charges do not exceed what was reaſonable to be laid out on the Funeral, according to the Quality and Eſtate of the deceaſed. For the neceſſity of this Expence makes it neceſſary to favour with this Privilege, thoſe who furniſh it. But if the Funeral Charges exceed theſe bounds, even altho' the deceaſed himſelf had ordered them by his laſt Will and Teſtament, the Privilege will be reſtrained to what ſhall be judged reaſonable and juſt, according to the circumſtances[b].

[b] Impenſa funeris ſemper ex hæreditate deducitur: quæ etiam omne creditum ſolet præcedere, cum bona ſolvendo non ſint. *l. 45. ff. de relig. & ſumpt. fun.* Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede. *l. 1. eod. v. l. 17. ff. de reb. auct. jud. poſſ.* Sumptus funeris arbitrantur pro facultatibus & dignitate defuncti. *l. 12. §. 5. ff. de relig. & ſumpt. fun.* Æquum autem accipitur ex dignitate ejus qui funeratus eſt, ex cauſa, ex tempore, ex bona fide: ut neque plus imputetur ſumptus nomine, quam factum eſt, neque tantùm quantum factum eſt, ſi immodicè factum eſt. Deberet enim haberi ratio facultatum ejus in quem factum eſt, & ipſius rei quæ ultra modum ſine cauſa conſumitur. Quid ergo ſi ex voluntate teſtatoris impenſum eſt? Sciendum eſt nec voluntatem ſequendam ſi res egrediatur juſtam ſumptus rationem: pro modo autem facultatum ſumptum fieri. *l. 14. §. 6. ff. de relig. & ſump. fun. d. l. §. 3. & 4.*

XXV.

25. Law Charges.

The Expences of proving the Will, or taking Adminiſtration, of making Inventories, of Sales, Orders of Court, and Diſcuſſions of Moveables or Immoveables, and all other neceſſary Law Charges, are preferable to all other Debts[c]. For all the Creditors are concerned in theſe Expences, they being laid out for their common Intereſt.

[c] Planè ſumptus cauſa qui neceſſariè factus eſt, ſemper præcedit. Nam deducto eo bonorum calculus ſubduci ſolet. *l. 8. inf. ff. depoſ.* Quantitas patrimonii, deducto etiam eo quidquid explicandarum venditionum cauſa impenditur, æſtimatur. *l. 71. ff. ad leg. falc. l. ult. §. 9. C. de jure delib.* See the thirty ſecond Article.

XXVI.

26. Preference on the Goods of Publick Depoſitaries, for Things depoſited in their hands.

In a competition among the Creditors of Publick Depoſitaries, whoſe Function is to receive the Sums of Money, or other Things, that are to be depoſited by order of Court, the perſons who are to receive back what has been thus conſigned or depoſited, are preferred on the proper Goods of theſe Depoſitaries, before their private Creditors who have neither Mortgage, nor Privilege. And this Preference is founded upon the Intereſt which the Publick has in the Safety of thoſe *Depoſitums*, which people are obliged to conſign into their hands[d].

[d] In bonis menſularii vendendis, poſt privilegia, potiorem eorum cauſam eſſe placuit, qui pecunias apud menſam, fidem publicam ſecuti, depoſuerunt. *l. 24. §. 2. de reb. auct. jud. poſſ.* Quod privilegium exercetur non in ea tantum quantitate, quæ in bonis argentarii ex pecunia depoſita reperta eſt, ſed in omnibus fraudatoris facultatibus. Idque propter neceſſarium uſum argentariorum, ex utilitate publica receptum eſt. *l. 8. ff. depoſ.*

Beſides the Privilege explained in this Article, the Uſage in France *gives to Creditors who are to receive back Monies, or other Things, conſigned by Order of a Court of Juſtice, two other ſorts of Security. One is, a Mortgage on the whole Eſtate of the Depoſitary who is charged with theſe ſorts of Depoſitums; and this Mortgage is the Effect of the Authority of Juſtice, purſuant to what has been ſaid in the fourth Article of the ſecond Section. For as it is the Publick Juſtice that charges them with theſe Depoſitums, ſo it appropriates their whole Eſtate for the Security of the Things depoſited. So that the Perſons to whom the Things depoſited are to be reſtored, will be preferred before the other Creditors of the Depoſitary who have Mortgages, if the Thing was depoſited before their Mortgage was granted. The other Security is, the Appropriation of the Office whoſe Function it is to receive Depoſitums of this nature, ſuch as are in* France *the Offices of the Receivers of Monies brought into Court, and thoſe of the Commiſſaries of the Châtelet, who are Depoſitaries of Monies, or other Effects, when they proceed to ſeal up the Effects, and to make Inventaries, and on other occaſions of the like nature. For as the Function of receiving theſe Depoſitums is proper to theſe Offices, they are naturally appropriated for the Security of thoſe whom Juſtice puts under the neceſſity of depoſiting in their hands. Thus, this Appropriation of the Office for the Security of theſe Depoſitums, gives a Privilege to the Creditors who are to receive them, and makes them preferable to all the Creditors of the ſaid Officer who have Mortgages, even altho' they be prior in time. But this is to be underſtood only of Offices that are peculiarly deſtined to this Function. For if the Court had ordered the Monies to be depoſited into the hands of another Officer, whoſe Office was not intended for this Function, the Depoſitum put into his hands by the Authority of Juſtice would give indeed a Mortgage upon his Office, but it ought not to give a Preference. For his private Creditors would find themſelves deceived by this Preference, which they could not poſſibly foreſee; whereas the Creditors of the Perſon who by his Office is a Publick Depoſitary, cannot but know, that his Office is appropriated for indemnifying the Creditors of Things depoſited into his hands.* See the three following Articles.

It may be asked, concerning the Mortgage which the Creditors of Sums depoſited have on the Immoveables of the Publick Depoſitary, from what day this Mortgage will have its effect? Whether it will be from the day that the ſaid Receiver enters on his Office, as in the caſe of Minors, who have a Mortgage on the Eſtates of their Tutors from the day of their Nomination, for Sums *which they are to receive only a long time after, or if it will commence only from the day of depoſiting the Money? If the Mortgage takes place from the day of the Admiſſion of the Publick Depoſitary to his Office, the Creditors of the Monies that were laſt depoſited, will be preferred before the particular Creditors of the Publick Depoſitary who have Mortgages, unleſs their Mortgage be prior to the Admiſſion of the Officer: and if on the contrary the Mortgage takes place only from the day of making the Depoſitum, it would ſeem to follow from thence, that the Creditors of the ſeveral Orders ought to be preferred one before the other on the Immoveables, according to the dates of the Conſignments, altho' they come all in proportionably as to the Price of the Office, without any regard to the dates of their Conſignments, as ſhall be ſhewn in the twenty ninth Article.*

We do not pretend to decide theſe Queſtions here, nor to treat of them expreſly, no more than of others which might be ſtarted on this Subject; we make only this tranſitory Remark, to ſhew how much it is to be wiſhed for that this matter were fully ſettled.

XXVII.

27. *Preference as to the* Depoſitum *that is in being.*

If among the Things depoſited, of which mention has been made in the foregoing Article, there be ſome of them in being, thoſe who have depoſited them, or the perſons to whom they ought to return, will recover them preferably to all other Creditors; for it is their own proper Goods[e].

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[e] Si tamen nummi extent vendicari eos poſſe puto à depoſitariis, & futurum eum qui vindicat ante privilegia. *l.* 24. §. 2. *ff. de reb. auct. jud. poſſ.*

XXVIII.

28. *He who innovates the Debt, loſes his Privilege.*

If he who was Creditor to a publick Depoſitary, becauſe of Monies depoſited into his hands, ſuch as thoſe are who are to receive back Monies that have been conſigned by Order of Court, or for ſome other Cauſe, has innovated his Debt, and changed the Nature of the *Depoſitum*; as if he has taken a Bond as for Money lent, he will be intitled no longer to any Privilege; and it would be the ſame thing as if he had left his Money in the hands of the Depoſitary, that he might receive Intereſt for it; for he will have thereby changed the Nature of the *Depoſitum*, and converted it into a Contract of Loan[f].

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[f] Qui depoſitis nummis uſuras à menſulariis acceperunt, à cæteris creditoribus non ſeparantur. Et meritò, aliud eſt enim credere, aliud deponere. *l.* 24. §. 2. *ff. de reb. auct. jud. poſſ.*

He who takes Intereſt for a Sum of Money which he had depoſited into another's hands, becomes Creditor of it as of Money lent. For the Depoſitum produces no Intereſt, neither can the Depoſitary owe any. So that when he pays Intereſt, it is becauſe he does not keep the Money any longer as a Depoſitum, but converts it to his own proper uſe, with the conſent of the Perſon who ought to receive it. And the receiving of Intereſt, altho' it is not lawful on the part of the Creditor; yet it is always a mark of the intention of the Creditor, and of the Debtor, to change the Depoſitum into a Contract of Loan.

XXIX.

29. *Concurrence of Creditors for ſeveral* Depoſitums.

The three preceding Articles relate to the Competition between Creditors who are to receive Sums of Money, or other Things, depoſited, and the particular Creditors of the Publick Depoſitary. But as to the Creditors of Sums of Money, or other Things, depoſited, if they come in competition with one another for their reſpective *Depoſitums*, the Privilege which they had all of them on the Office of the Receiver, and their Preference before his particular Creditors, being common to them all, they loſe the effect of it among themſelves, and they come all in to ſhare equally in the Price of the Office, in proportion to their reſpective Claims[g]. So that, for Example, all the Creditors of one Order, whoſe Conſignment was prior, coming in competition with Creditors of another Order, whoſe Conſignment was made a long time after the firſt, there would be no Preference given to the firſt, on the Price of the Office that is ſubject to their Privilege; but each Order of Creditors would have a proportionable Share of the Price, according to the Value of the Effects conſigned by every one of them. For it is by virtue of their Privilege, that the Creditors of theſe Orders are intitled to receive the Price of this Office, which was made a part of the Eſtate of this Officer, only upon condition of its being equally appropriated for the Security of all the Sums of Money, or other Things, that ſhould be thereafter depoſited in the hands of the ſaid Officer.

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[g] Quæritur, utrum ordo ſpectetur eorum qui depoſuerunt, an verò ſimul omnium depoſitariorum ratio habeatur: & conſtat ſimul admittendos. *l.* 7. *§. ult. ff. depoſ.*

We are to underſtand the Concurrence explained in this Article, only with reſpect to all the Creditors of one Order, conſidered together as having one and the ſame Credit, and to all thoſe of the other Orders, conſidered in the like manner for the Sums that are due to them. But as to the Creditors of each Order among themſelves, there is no Contribution. For every one of them ought to receive in the Order in which he is placed, the Sums which ought to come to him according as he is ranked; ſo that he who is ranked in the firſt place ought to receive his whole Debt, if the Fund be ſufficient, altho' there ſhould not remain enough for the others.

We have ſet down in this Article this Concurrence between Creditors of ſeveral Orders, only as to the Monies ariſing from the Sale of the Office; for it is their common Pledge, appropriated to them by their Privilege: and we have not mentioned the ſame Concurrence on the other Goods of the Officer. Concerning which the Reader may conſult the laſt Remark made on the twenty ſixth Article.

XXX.

30. *Effect of Privileges.*

All Privileges make a particular Appropriation, which gives to the Creditor

tor who is privileged, the Thing for his Pledge, altho' there be neither Covenant, nor Condemnation, which expreſsly mentions this Preference. For it is annexed to the Title of the Credit, by the Nature of the Debt, and altho' no expreſs mention be made of it. And if the Debt were not of it ſelf privileged, it could not be made ſuch by the effect of a Covenant[h].

XXXI.

31. *Difference of Privileges, as to the Appropriation of Goods.* Among the Privileges of Creditors, there are ſome which affect only one particular Thing, and do not reach to the reſt of the Goods; and others affect all the Goods in general, without diſtinction. Thus, the Privilege which the Proprietor of a Ground has on the Fruits of it, for the Rent of his Farm; that of a Seller for the Price of the Thing ſold; that of the Perſon who has lent Money to buy Lands or Tenements, or to make Improvements on them, do not extend to all the Goods of the Debtor; but are limited to the Things appropriated for the Security of that particular Debt[i]. And theſe Creditors have againſt the Remainder of the Debtor's Eſtate, only a Perſonal Action[l], or a Mortgage, if they have ſtipulated it. But Law Charges, and the Funeral Expences have their Preference upon all the Goods without diſtinction.

XXXII.

32. *Competition and Preference among Creditors who are privileged.* Among Creditors who are privileged, ſome of them are preferred before others, according to the Nature of their Privileges, and the Diſpoſition of the Laws, or Cuſtoms[m]. Thus, he who has furniſhed Money to repair a Houſe which was in danger of falling, is preferr'd to the Seller of that Houſe, who demands the Price of the Sale: Thus, he who has let a Barn to a Farmer, will be preferr'd for the Rent of his Leaſe, before the Proprietor to whom the Farmer is indebted for the Rent of the Farm, on which the Fruits which are put into the Barn grew. Thus, the Expences at Law being the Debt of all the Parties, they are preferred to all Privileges whatſoever. Thus thoſe who have Privileges on Moveables, are preferred to the Privilege of the King[n]. Thus Funeral Charges are preferred before the Rent due to the Landlord of the Houſe, on the Moveables of the Tenants[o]. Thus in all the caſes of a concurrence of Privileges, their Preference is regulated by the Diſtinctions which the Nature of the ſaid Privileges makes.

XXXIII.

33. *A Caſe of Preference among Creditors who have the ſame Privilege.* If he who ſells a Houſe, occupied by a Tenant, reſerves to himſelf the Rent of the Houſe for a certain time, and it be agreed that the Moveables of the Tenant ſhall ſerve as a Pledge, for the Security of the Rent reſerved to the Seller, as well as for the Rent which ſhall fall afterwards due to the Buyer; the Seller ſhall be paid in the firſt place out of the Moveables, if their Agreement has not regulated it otherwiſe[p].

XXXIV.

34. *Three Orders of Creditors.* It follows from all the preceding Rules, that among Creditors, there are three Orders. The firſt is, of thoſe that are privileged, who go before all the others, and take place among themſelves, according to the diſtinctions of their Preferences. The ſecond, is of thoſe that have Mortgages, who have their Rank after the privileged Creditors, according to the dates of their Mortgages. And the third, is of Creditors by Bond, and others, who have only Perſonal Actions, who not being diſtinguiſhed either by Privilege, or Mortgage, come in therefore jointly together, and ſhare equally in proportion to their Debts[q].

◆

[h] *This is a Conſequence of all the foregoing Articles,* Toto tit. ff. & Cod. in quib. cauſ. pign. vel hyp. tac. contr.

[i] *See the foregoing Articles. This is a Conſequence of the nature of a Privilege.*

[l] Sanè perſonali actione debitum apud præſidem petere non prohiberis. *l.* 17. *C. de pign.*

[m] *This is a Conſequence of the Nature of Privileges. See all the Articles of this Section.*

[n] *See the Remark on the twenty third Article.*

[o] Si colonus vel inquilinus ſit is qui mortuus eſt, nec ſit unde funeretur, ex invectis illatis eum funerandum Pomponius ſcribit: & ſi quid ſuperfluum remanſerit, hoc pro debita penſione teneri. *l.* 14. §. 1. *ff. de rel. & ſumpt. fun.*

[p] Inſulam tibi vendidi, & dixi prioris anni penſionem mihi, ſequentium tibi acceſſuram: pignorumque ab inquilino datorum jus utrumque ſecuturum——facti quæſtio eſt. Sed veriſimile eſt id actum, ut primam quamque penſionem pignorum cauſa ſequatur. *l.* 13. *ff. qui potior.*

[q] *This is a Conſequence of all that has been ſaid in this Title.*

SECT.

SECT. VI.

Of Subſtitution to the Mortgage, or to the Privilege of the Creditor.

Explanation of the nature of Subſtitutions, and of their kinds.

ALtho' this Matter of the Subſtitution to the Rights of Creditors, being in it ſelf Simple and Natural, ought to be plain and eaſy; yet the different ways of acquiring the Subſtitution, and the Inconveniences which one may fall into, for want of obſerving in every one of them that which is eſſential to it, cauſe a multiplicity of Combinations which may perplex this Matter, and render it obſcure and difficult. For which reaſon, we have judged it would be uſeful, before we proceed to explain the Rules thereof, to give, in a few words, a general Idea of the Nature of Subſtitution, and of its Kinds, and of what every one of them may have, peculiar and eſſential to it.

Definition of Subſtitution.

The Subſtitution which we treat of here, is nothing elſe but that Change which puts another perſon in the place of the Creditor, and which makes the Right, the Mortgage, the Privilege which a Creditor has, to paſs to the Perſon that is ſubſtituted to him, that is to ſay, who enters into his Right.

The moſt ſimple manner of ſubſtituting, and which makes the Rights of the Creditor to paſs always to him who is ſubſtituted, is the Aſſignment which the Creditor makes of his Rights. Aſſignments are of ſeveral ſorts: Some are general, and of many Rights, ſuch as the Sale of an Inheritance, which tranſmits to him who buys it, all the Rights of the Heir, that he may exerciſe them in the ſame manner as the Heir himſelf might have done: Others are particular, of a certain Thing, ſuch as the Aſſignment of a Bond: Some are gratuitous, as an Aſſignment made by a Donor to a Donee, when the Donation contains Debts due to the Donor, or other Rights: And there are ſome Aſſignments which are made for a valuable conſideration; as if a Debtor aſſigns a Debt that is owing to him for the Payment of his Creditor, or if a Creditor makes over to a third Perſon, for a certain Price, a Debt that is due to him.

All theſe ſorts of Aſſignments have this effect, that the Aſſignee ſucceeds in the place of the Creditor, and that he may exerciſe the Rights which are made over to him in the ſame manner as the Creditor might have done himſelf, before the Aſſignment, and with the benefit of the Mortgage, and Privilege, which the Creditor had.

There is another manner of Subſtitution to the Rights of a Creditor, when his Debtor borrowing Money to pay what he owes him, agrees with the Perſon of whom he borrows, that the Monies ſhall be applied towards the Payment of that Creditor, and that the Perſon who lends the Money ſhall be ſubſtituted in the place of the ſaid Creditor. And this acquires to this new Creditor the Right of the firſt, provided it be mentioned in the Acquittance, that the Payment is made with his Money. For the Debtor who had power to engage himſelf to the firſt Creditor, may alſo engage himſelf, on the ſame conditions, to him who pays off the firſt Creditor: and by putting him in the place of the firſt Creditor, who receives his Monies, he does no wrong to his other Creditors, and changes nothing in their Condition.

The Subſtitution may likewiſe be acquired without the conſent of the Creditor, by an Order of the Judge, and that either with the Debtor's conſent, or ſometimes even without it. Thus, a Tutor who is willing to acquit with his own Money a Debt owing by his Pupil to a Creditor, who refuſes to ſubſtitute him in his room, may procure an Order to be made for ſubſtituting him in the place of the Creditor, upon his acquitting the Debt. And in this caſe, the Authority of Juſtice transfers the Right of the Creditor to the Perſon who pays him, provided he produce the Order of Court for his Subſtitution, and make it appear that the Creditor has been paid with his Monies. For the Judge does to him who pays for another, only the ſame Juſtice that is due to him from the Debtor, and that without prejudice to any other perſon.

There is yet another way of acquiring a Judicial Subſtitution, without the deed of the perſon to whom the Right belongs, and even againſt his will; as if the Debts owing to a Debtor are ſold by Decree of a Court of Juſtice. For the Court gives to the Purchaſer, to whom the Debts are adjudged, the ſame Right which he would have, if the Debtor had ſold it to them: and he will be ſubſtituted likewiſe to the Mortgages and Privileges.

We muſt take notice in the laſt place, of another ſort of Subſtitution, which is acquired without any Aſſignment from the Creditor, without the conſent of the Debtor, and without an Order of the Judge; but only by the bare effect of the Payment made to the Creditor. Thus, when a Creditor being deſirous to ſecure his Mortgage, and fearing leſt a prior Creditor ſhould increaſe his Debt by Charges, or leſt he ſhould ſeize upon the Lands, or Tenements, mortgaged, pays off that Creditor, he is ſubſtituted in his place, provided it appear by the Acquittance, that the Payment has been made with his Money. For the Law preſumes that he himſelf being a Creditor, he pays only for the Security of his Mortgage; and it ſubſtitutes him in the place of the Creditor whom he pays. And it is the ſame thing as to him who having purchaſed Lands, or Houſes, and fearing leſt he ſhould be troubled in his Poſſeſſion of them, by a Creditor prior to his Purchaſe, pays him off. And both in the one and the other of theſe two caſes, theſe Motives juſtify a Subſtitution which is prejudicial to no perſon whatſoever.

We ſee in all theſe ſorts of Subſtitution, that the Right of the Creditor paſſes from his Perſon to another, who enters into his place, and that this Change can happen only two ways. One, by the will of the Creditor who ſubſtitutes: The other without his will, by the Effect of the Law, which puts in the place of the Creditor, him to whom Equity tranſmits his Right.

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I.

1. The Aſſignment ſubſtitutes to the Mortgage, and to the Privilege.

He to whom a Creditor makes over a Debt, is ſubſtituted to his Right, and he acquires, together with the Credit, the Mortgages and Privileges which are annexed to it, whether the Aſſignment be made for a valuable conſideration, or *gratis*. For altho' it be true, that the Payment extinguiſhes the Debt, and that it ſeems for that reaſon, that the Creditor cannot tranſmit to another a Right which is extinguiſhed in his perſon, by the payment; yet the Aſſignment which is made at the ſame time, has the ſame effect as if the Creditor had ſold his Right to him who pays him. And as to the effect of the Aſſignment, it is the ſame thing to him who pays for the Debtor, whether it be the perſon who is bound jointly with him for the Debt, or his Surety, or a third Perſon [a].

[a] Emptori nominis etiam pignoris perſecutio præſtari debet: ejus quoque quod poſtea venditor accepit. Nam beneficium venditoris prodeſt emptori. *l. 6. ff. de hered. vel act. vend.* Si à creditore nomen comparaſti, ea pignora, quæ venditor nominis perſequi poſſet, apud præſidem provinciæ vindica. *l. 7. C. de obl. & act. l. 6. eod.* See the fourth Article.

Cùm is qui reum & fidejuſſores habens, ab uno ex fidejuſſoribus acceptâ pecuniâ, præſtat actiones, poterit quidem dici nullas jam eſſe, cùm ſuum perceperit; & perceptione omnes liberati ſunt: ſed non ita eſt; non enim in ſolutum accepit: ſed quodammodo nomen debitoris vendidit. Et ideò habet actiones, quia tenetur ad ipſum, ut præſtet actiones. *l. 36. ff. 6. de fidejuſſ.* Salvas eſſe mandatas actiones: cùm pretium magis mandatarum actionum ſolutum, quam actio quæ fuit perempta videatur. *l. 76. ff. de ſolut.*

II.

2. Subſtitution without an Aſſignment.

Thoſe who, without an Aſſignment from the Creditors, procure an Order from the Judge, appointing them, upon their paying of the Creditors, to be ſubſtituted in their place, acquire by the Payment, the Rights of thoſe Creditors, their Mortgages, and their Privileges; and even thoſe of the King, if they purchaſe the Debt that is due to him, and get themſelves to be ſubſtituted in his ſtead [b].

[b] Si in te jus fiſci, cùm reliqua ſolveres debitoris pro quo ſatisfaciebas, tibi competens judex adſcripſit, & tranſtulit: ab his creditoribus, quibus fiſcus potior habetur, res quas eo nomine tenes, non poſſunt inquietari. *l. ult. C. de privil. fiſc.*

III.

3. In what manner a third perſon may acquire the Right of a Creditor.

To acquire without the Authority of Juſtice the Right of a Creditor, and his Mortgage, it is ſufficient to have one of theſe two things; either that he who pays the Creditor take an Aſſignment from him, as has been ſaid in the firſt Article, or that he agree with the Debtor, that upon paying the Debt for him he ſhall be ſubſtituted to the Rights of the Creditor, and that in this caſe it be mentioned in the Acquittance, that the Payment was made with his Money. For then, altho' the Creditor ſhould refuſe to ſubſtitute, yet he who pays will acquire his Right, by the Effect of the Payment, and of the Agreement with the Debtor. And it would be the ſame thing, if the Monies lent being put into the hands of the Debtor, with this Agreement, that he who lends the Money ſhould be ſubſtituted to the Rights of the Creditor who is diſcharged with it, the Debtor ſhould afterwards make the Payment himſelf, declaring in the Acquittance, that it is with the Money borrowed of that perſon. But if the Payment is made only upon the bare Acquittance of the Creditor, and not accompanied either with the one or the other of theſe two ways of acquiring the Subſtitution, it will procure to him who pays only a bare Action againſt the Debtor, for recovering from him the Sum paid on his account, even altho' it ſhould be expreſſed in the Acquittance, that the Payment was made with the Monies of this third Perſon. For it might be preſumed that he had acquitted only what he owed[c].

[c] Res obligatas exterus, debito ſoluto liberando, datum petere, non earum dominium adipiſci poteſt. *l.* 21. *C. de pign. & hyp.*

Non omninò ſuccedunt in locum hypothecarii creditoris hi quorum pecunia ad creditorem tranſit. Hoc enim tunc obſervatur, cum is qui pecuniam poſteà dat, ſub hoc pacto credat, *ut idem pignus ei obligetur, & in locum ejus ſuccedat.* Quod cùm in perſona tua factum non ſit (judicatum eſt enim te pignora non accepiſſe) fruſtra putas tibi auxilio opus eſſe conſtitutionis noſtræ ad eam rem pertinentis. *l.* 1. *C. de his qui in prior. cred. loc. ſucc.* Ariſto Neratio Priſco ſcripſit, & ſi ita contractum ſit, *ut antecedens dimitteretur*, non aliter in jus pignoris ſuccedet, niſi convenerit, *ut ſibi eadem res eſſet obligata.* Neque enim in jus primi ſuccedere debet, qui ipſe nihil convenit de pignore. *l.* 3. *ff. qua res pign.*

See the Remark on the third Article, as to the caſe where the Debtor makes Payment only ſome time after he has borrowed the Monies for paying the Debt.

This manner of acquiring the Right of the Creditor, without his Subſtitution, is juſt and equitable, in order to facilitate the Payment of Debts. And it is but juſt that the Debtors themſelves ſhould have power to put in the place of their Creditors thoſe who pay for them, ſince no body receives any prejudice thereby, and ſince it is the intereſt of the Debtor that he ſhould have power to make his condition eaſier by changing his Creditor. It was upon this Equity that the Edict which was made in the year 1609, *after the Reduction of the Rents from Eight to Six* per Cent. *was founded; that whereas the Creditors not being willing to receive their Monies refuſed to ſubſtitute, and thoſe who were willing to lend Money, for redeeming the ſaid Rents, were afraid leſt they ſhould not be ſubſtituted to the Rights of the Creditors who refuſed to ſubſtitute. Proviſion was therefore made therein by the ſaid Edict, and the Subſtitution granted purſuant to this Rule.*

IV.

4. *How a third Perſon acquires the Privilege of a Creditor.*

He who pays a Creditor that is privileged, ſucceeds to his Privilege, whether it be by an Aſſignment from the Creditor, who makes over to him ſimply his Right, or by a Subſtitution made by the Judge; as has been ſaid in the ſecond Article: or by an Agreement with the Debtor, as ſhall be explained in the following Article[d].

[d] Cùm pro patre, in cujus poteſtate non eras, pecuniam fiſco intuleris, & jure privilegio ejus ſucceſſiſti, & ejus locum, cui pecunia numerata eſt, conſecutus es. *l.* 2. *C. de his qui in pr. cred. loc. ſucc.* Si cùm pecuniam pro marito ſolveres, neque jus fiſci in te transferri impetraſti, neque pignoris cauſa domum vel aliud quid ab eo accepiſti, habes perſonalem actionem. *l.* 3. *C. de priv. fiſc.* Si in te jus fiſci cum reliqua ſolveres debitoris pro quo ſatisfaciebas, tibi competens judex adſcripſit & tranſtulit, ab his creditoribus, quibus fiſcus potior habetur, res quas eo nomine tenes, non poſſunt inquietari. *l. ult. eod.*

V.

5. *How the Privilege is acquired without Subſtitution.*

One may acquire the Privilege of a Creditor, without Subſtitution, in the ſame manner as the Mortgage, by an Agreement with the Debtor, that he who ſhall pay for him ſhall have the Privilege. And it is no matter whether the Payment be made to the Creditor by him who lends the Money, or by the Debtor with whom the Money has been intruſted, provided that both in the one and the other caſe, it appear by the Acquittance, that the Payment is made with the Money of that Perſon[e], as has been ſaid in relation to the Mortgage in the third Article.

[e] Eorum ratio prior eſt creditorum, quorum pecunia ad creditores privilegiarios pervenit. Perveniſſe autem quemadmodum accipimus? Utrùm ſi ſtatim profecta eſt ab inferioribus ad privilegiarios, an verò & ſi per debitoris perſonam, hoc eſt, ſi ante ei numerata eſt: quod quidem poteſt benignè dici ſi modò non poſt aliquod intervallum id factum ſit. *l.* 24. §. 3. *ff. de reb. auct. jud. poſſ.* Add the Texts cited on the fourth Article.

Altho' the Money lent for the Payment be not delivered to the Creditor, whether by the Debtor, or by him who lends the Money, till ſome time after their Agreement; yet he who lends the Money ſhall nevertheleſs be ſubſtituted to the Rights of the Creditor. For the Debtor's Bond to him who advanced the Money, will ſerve as a proof that the occaſion of the Loan was to pay off the Creditor: and the Creditor's Acquittance will prove that the Money was put to that uſe. And as to what is ſaid in the Law cited on this Article, that there muſt be no interval of time, that is to be applied to the Uſage of the Roman *Law, according to which Covenants were often made without any Writing; and therefore the diſtance of time might have occaſioned the loſs of the Proof how the Monies had been imployed.*

VI.

6. Of a Creditor who pays off a Creditor more ancient than himſelf.

He who being already a Creditor, pays off another Creditor of the ſame Debtor, who is prior to himſelf, ſucceeds to his Mortgage, altho' he have made no ſuch Agreement, nor received any Subſtitution. For his Quality of Creditor makes it to be preſumed, that he pays him who is a more ancient Creditor, with no other view than that he may ſucceed in his place, and thereby ſecure his own Debt. Which diſtinguiſhes his Condition from him who having no ſuch Intereſt, pays for the Debtor without Subſtitution, and of whom it may be ſaid, that perhaps he was under an Obligation to the Debtor to pay for him[f].

[f] Plane cùm tertius creditor primum de ſua pecunia dimiſit, in locum ejus ſubſtituitur in ea quantitate, quam ſuperiori exſolvit. *l.* 16. *ff. qui pot. in pign.* *V. l.* 11. §. 4. *eod. l.* 12. §. 9. *eod. l.* 17. *eod.*

VII.

7. A Purchaſer ſubſtituted to the Creditors whom he pays off.

The Purchaſer of an Eſtate, imploying the Price of his Purchaſe for the Payment of the Creditors to whom the Eſtate was mortgaged, is ſubſtituted to their Right, to the Value of what he pays them. For by paying them with the Price of their Pledge, in order to ſecure it to himſelf, he preſerves it to himſelf for the Value of what he pays them, againſt other ſubſequent Creditors, altho' they be prior to his Purchaſe[g].

[g] Si potiores creditores pecunia tua dimiſſi ſunt, quibus obligata fuit poſſeſſio quam emiſſe te dicis, ita ut pretium perveniret ad eoſdem priores creditores, in jus eorum ſucceſſiſti: & contra eos, qui inferiores illis fuerunt, juſta defenſione te tueri potes. *l.* 3. *C. de his qui in prio. cred. loc. ſuc.* Eum qui à debitore ſuo prædium obligatum comparavit, eatenùs tuendum, quatenus ad priorem creditorem ex pretio pecunia pervenit. *l.* 17. *ff. qui pot.* See the preceding Article.

VIII.

8. Subſtitution by an Attachment.

The Creditor who by virtue of his Mortgage, or of an order from the Judge, attaches the Rights and Actions which his Debtor has againſt thoſe who are indebted to him, procuring what he has attached to be adjudged to him, is ſubſtituted to the Mortgages and Privileges which his Debtor had for the Debts that are attached[h].

[h] Si prætorium pignus quicunque judices dandum alicui perſpexerint: non ſolum ſuper mobilibus rebus, & immobilibus, & ſe moventibus, ſed etiam ſuper actionibus quæ debitori competunt, præcipimus hoc eis licere decernere. *l.* 1. *C. de prœt. pign.*

The Debt which is attached is adjudged to the Creditor who attaches, ſuch as it did belong to the Debtor.

IX.

9. The Subſtitution is null after Payment.

When the Subſtitution by the Creditor is neceſſary for tranſmitting his Right to the Perſon who pays for the Debtor, it ought to be made at the time of Payment, and of granting the Acquittance. For if the Payment was conſummated without any mention of the Subſtitution, it being made only after Payment, it would be uſeleſs. And the Right of the Creditor being extinguiſhed by the Payment, he could not make over to another what he had not any longer, nor ſubſtitute to a Right which was extinct[i].

[i] Modeſtinus reſpondit, ſi poſt ſolutum ſine ullo pacto omne quod ex cauſa tutelæ debeatur, actiones poſt aliquod intervallum ceſſæ ſint, nihil ea ceſſione actum, cùm nulla actio ſuperfuerit. *l.* 76. *ff. de ſolut.* See the following Article.

X.

10. The validity of the Subſtitution depends on the condition in which the Creditor's Right was at the time of making the Subſtitution.

All Subſtitutions, Aſſignments, and other ways of acquiring the Mortgage, or Privilege of a Creditor, whether by Covenant, or by an Order of the Judge, or otherwiſe, have no manner of effect, if at the time of the Subſtitution, Aſſignment, or other Act, the Right of the Creditor was no more in being, whether it be that it was extinguiſhed by Preſcription, or annulled by a Judgment, or diſcharged by a Payment, or that it had ceaſed to be thro' ſome one of the Cauſes which ſhall be explained in the following Section. Thus, in Queſtions relating to the validity of Subſtitutions, Aſſignments, and other ways of acquiring the Mortgage, or Privilege, of a Creditor, it is neceſſary to examine, if at the time of the Subſtitution, the Right, the Mortgage, or the Privilege, was ſtill ſubſiſting[l].

[l] Si dominus ſolvit pecuniam, pignus quoque perimitur. *l.* 13. §. 2. *ff. de pign.* See the following Section.

⁂

SECT. VII.

In what manner the Mortgage ends, or is extinguiſhed.

The CONTENTS.

1. *The Mortgage is extinguiſhed by Payment.*
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3. *By the Oath of the Debtor, when the Debt is referred to it, and he ſwears that he owes nothing; or by a Judgment which acquits him.*
4. *By every thing that is inſtead of Payment.*
5. *By conſigning the Debt, in caſe the Creditor refuſes to receive Payment.*
6. *If the Payment which was made does not ſubſiſt, the Mortgage revives.*
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9. *The Preſcription of the Debt extinguiſhes the Mortgage.*
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12. *The Creditor who conſents to the Alienation of his Pledge, loſes his Mortgage, if he does not expreſly reſerve it.*
13. *If the Creditor conſents that his Pledge be engaged to another.*
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15. *In what manner we are to underſtand the Creditor's conſent to the Alienation.*

I.

1. The Mortgage is extinguiſhed by Payment.

THE Mortgage being only an Acceſſory of the Debt, the Payment which annuls the Debt, extinguiſhes the Mortgage [a]. But it is neceſſary that the Payment ſhould be entire, of all that is due for Principal, Intereſt, and Charges [b].

[a] Si dominus ſolverit pecuniam, pignus quoque perimitur. *l.* 13. §. 2. *ff. de pign. & hyp.* Pignoris cauſa res obligatas, ſoluto debito reſtitui debere pigneratitiæ actionis natura declarat. *l.* 10. *C. de pigner. act.*

[b] Niſi univerſum, quod debetur, offerretur, jure pignus creditor vendere poteſt. *l.* 25. §. 14. *ff. fam. erciſc.* Nam ſi vel modicum de ſorte, vel uſuris in debito perſeveret, diſtractio rei obligatæ non poteſt impediri. *l.* 2. *in f. C. debit. vend. pign. imp. n. p. l.* 6. *C. de diſtr. pign.*

See the fourth Article of the third Section of this Title.

II.

2. By a Novation.

Novation, which extinguiſhes the firſt Obligation, changing it into a new one, extinguiſhes alſo the Mortgage, which was an Acceſſory to it, if it is not reſerved [c].

[c] Nova debiti obligatio pignus peremit, ni convenit, ut pignus repetatur. *l.* 11. §. 1. *ff. de pign. act.*

See what Novation is in the Title of Novations.

III.

3. By the Oath of the Debtor, when the Debt is referred to it, and he ſwears that he owes nothing; or by a Judgment which acquits him.

Whatever annuls the Debt, diſcharges the Mortgage. Thus, when a Debtor, to whoſe Oath the Debt is referred, ſwears that he has paid it, or when he is acquitted by a Judgment, from which there lies no Appeal, the Debt and the Mortgage are annulled. And it is the ſame thing in all the caſes where the Obligation ſubſiſts no more [d].

[d] Si deferente creditore juravit debitor ſe dare non oportere, pignus liberatur: quia perinde habetur atque ſi judicio abſolutus eſſet. Nam & ſi à judice quamvis per injuriam abſolutus ſit debitor, tamen pignus liberatur. *l.* 13. *ff. quib. mod. pign. vel hyp. ſol.* Idem dicere debemus, vel ſi qua ratione obligatio ejus finita eſt. *l.* 6. *eod.*

IV.

4. By every thing that is inſtead of Payment.

Whatever may be reckoned to be in the place of Payment, extinguiſhes the Mortgage. Thus, for Example, if the Creditor contents himſelf either with a Surety, or with another Debtor, inſtead of the former, or with another Pledge inſtead of the firſt; in all theſe caſes, and others of the like Nature, the Mortgage ceaſes, if it appears to have been the intention of the Parties to diſcharge the Mortgage, and to reſtrain the Creditor to theſe other Sureties, altho' his condition become thereby leſs advantageous [e].

[e] Item liberatur pignus ſive ſolutum eſt debitum, ſive eo nomine ſatisfactum eſt, *l.* 6. *ff. quib. mod. pign.* Satisfactum autem accipimus quemadmodum voluit creditor, licet non ſit ſolutum: ſive aliis pignoribus ſibi caveri voluit, ut ab hoc recedat: ſive fidejuſſoribus, ſive reo dato, ſive pretio aliquo, vel nuda conventione, naſcitur pigneratitia actio, & generaliter dicendum erit, quoties recedere voluit creditor à pignore, videri ſatisfactum, ſi ut ipſe voluit, ſibi cavit, licet in hoc deceptus ſit. *l.* 9. §. 3. *ff. de pign. act. l.* 3. *C. de luit. pign.*

V.

5. By conſigning the Debt, in caſe the Creditor

If it is by reaſon of the Creditor's refuſing his Payment, that he detains the Pledge, or inſiſts to have it expoſed to Sale, the Debtor may tender the Money *refuſes to receive Payment.* in Court, and conſign it, in order to his being diſcharged from the Debt, to hinder the Sale, and recover his Pledge, together with the Coſts and Damages which the Creditor may owe him becauſe of his Delay[f].

[f] Si per creditorem ſtetit, quominus ei ſolvatur, rectè agitur pigneratitia. *l.* 20. §. 2. *ff. de pign. act.* Si offerat in judicio pecuniam, debet rem pignoratam, & quod ſua intereſt conſequi. *l.* 9. §. *ult. eod.* Debitoris denuntiatio, qui creditori ſuo ne ſibi rem pignori obligatam diſtrahat, vel his qui ab eo volunt comparare, denuntiat, ita demum efficax eſt, ſi univerſum tam ſortis quam uſurarum offerat debitum creditori, eoque non accipiente, idonea fide probationis, ita ut oportet depoſitum oſtendat. *l.* 2. *C. debit. vend. pign. imp. n. p.* See as to the matter of Conſignment, the Remark on the ſeventh Article of the third Section.

VI.

6. If the Payment which was made does not ſubſiſt, the Mortgage revives. If the Payment, or that which was to be in lieu of it, had no effect, the Mortgage would revive together with the Credit; as if the Creditor had taken in Payment an Aſſignment to a Debt with Warranty, and that he could not get Payment of it, or Houſes and Lands with the ſame Warranty, which were evicted from him, or that a Minor had given an Acquittance, againſt which he was relieved. For theſe kinds of Payments imply the condition that they ſhall ſubſiſt. But if a Creditor of full Age had contented himſelf with an Aſſignment to a Debt at his own peril, and had given a Diſcharge, the Mortgage and the Credit would remain extinguiſhed, altho' the Creditor ſhould not get Payment of the Debt that was made over to him[g].

[g] Debitum cujus meminiſti, quod per pacti conventionem inutiliter factam remiſiſti, etiam nunc petere non vetaris, & uſitato more pignora vindicare. *l.* 5. *C. de rem. pign.*

VII.

7. The Mortgage is extinct, if the Pledge is put out of Commerce. If the Lands or Houſes that are mortgaged ceaſe to be in Commerce, as if they are dedicated to the Uſe of a Church, or other Publick Place, the Mortgage ſubſiſts no longer. But the Creditor hath his Action againſt the Price which his Debtor receives for them[h].

[h] *See the twenty ſixth Article of the firſt Section.*

VIII.

8. Or if it happens to periſh. As the Mortgage upon a Land or Tenement which happens to periſh by an Inundation, or other Accident, ſubſiſts no longer; ſo likewiſe the Mortgage which a Creditor has upon a Right of Uſufruct belonging to his Debtor, will have no longer effect, if the Uſufruct ceaſes, even altho' the Debtor ſhould ſurvive the loſs of his Uſufruct, as if he had it only for a certain time[i].

[i] Sicut re corporali extinctâ, ita & uſufructu extincto, pignus hypothecave perit. *l.* 8. *ff. quib. mod. pign.* See the ſecond Article of the ſixth Section of Uſufruct.

IX.

9. The Preſcription of the Debt extinguiſhes the Mortgage. If the Debt for which the Mortgage was given, be extinguiſhed by Preſcription, the Mortgage, which was only an Acceſſory of the Debt, is annulled[l].

[l] Item liberatur pignus ſive ſolutum eſt debitum. ——Sed & ſi tempore finitum pignus eſt, idem dicere debemus. *l.* 6. *ff. quib. mod. pign. l.* 12. *ff. de diverſ. temp. præſc. l.* 3. *C. de præſc.* 30. *vel.* 40. *ann.*

By the Roman *Law the Hypothecary Action was extinguiſhed only by a Preſcription of Forty Years againſt the Debtor and his Heirs, and likewiſe againſt a third Poſſeſſor, if the Debtor was ſtill alive. Thus, the Hypothecary Action was of a longer duration than the bare Perſonal Action.* See the end of the Preamble of the fourth Section of Poſſeſſion and Preſcription. *This Preſcription of Forty Years is obſerved in ſome Provinces. But we have conceived the Rule according to the common and natural Uſage, which gives no longer duration to the Hypothecary Action, than to the bare Perſonal Action, for the reaſon explained in the Article.*

X.

10. If the Debtor loſes his Right to the Pledge, the Creditor loſes his Mortgage on it. If the Debtor who had mortgaged a Land or Tenement, happens to loſe the Right he had to it, as if he is ſtript of it by an Eviction, or by a Power of Redemption, veſted in a former Owner, or in the next of Kin, or by other Cauſes, the Mortgage which he had aſſigned on the ſaid Land or Tenement, does not ſubſiſt any longer; unleſs it was by his own proper deed that he loſt his Right; as if, for Example, when he was able to defend himſelf againſt the ſaid Eviction, or Power of Redemption, he yielded to it; if he neglected to demand the Sale of an Eſtate, ſeized on in the hands of a third Perſon, and which belonged to him; if he did not defend himſelf in a good Cauſe; or if he abandoned any other way his Right. For in all theſe Caſes, the Creditor may exerciſe the Rights of his Debtor, in order to preſerve his own[m].

[m] Si res diſtracta fuerit ſic, *Niſi intra certum diem meliorem conditionem inveniſſet*, fueritque tradita, & fortè emptor, antequam melior conditio offerretur: hanc rem pignori dediſſet. Marcellus libro quinto Digeſtorum ait, finiri pignus ſi melior conditio fuerit allata, quamquam ubi ſic res diſtracta eſt, niſi emptori diſplicuiſſet, pignus finiri non putet. *l.* 3. *ff. quib. mod. pign.* Superſedente (debitore) tali auxilio uti, vel præſente vel abſente eo, creditores ejus poſſunt. *l. pen. C. de non. num. pec.*

XI. If

XI.

11. *Effect of Redhibition of the Thing mortgaged.*

If a Debtor who had bought a Houſe, or Lands, or a Moveable, and had afterwards engaged it to a Creditor, has a mind to diſſolve the Sale by Redhibition, that is, by obliging the Seller to take back the Thing ſold, becauſe of ſome defect in it, his Creditor may hinder him, unleſs the Debtor provides for his Security, either by giving him the Price which the Seller ſhall be obliged to reſtore to him, or by letting him have the Thing ſold, if he is willing to take it at the Price which they ſhall agree on[n].

[n] Si debitor cujus res pignori obligatæ erant, ſervum quem emerat redhibuerit, an deſinat Servianæ locus eſſe? Et magis eſt ne deſinat, niſi ex voluntate creditoris hoc factum eſt. *l. 4. ff. quib. mod. pign.*

See the firſt Article of the eleventh Section of the Contract of Sale.

XII.

12. *The Creditor who conſents to the Alienation of his Pledge, loſes his Mortgage, if he does not expreſly reſerve it.*

The Creditor who conſents to the Sale, Donation, or other Alienation which his Debtor makes of a Houſe, or Lands, that are engaged to him, or who ſuffers it, or ratifies it, has no longer any Mortgage upon the ſaid Houſe, or Lands, unleſs he reſerves it[o]. For he has conſented to an Alienation which could not have been made to his prejudice, if he had not approved of it: and his conſent would deceive the Purchaſer, if he might afterwards make uſe of his Right of Mortgage.

[o] Creditor qui permittit rem venire pignus dimittit. *l. 158. ff. de reg. jur.* Si conſenſit venditioni creditor, liberatur hypotheca. *l. 7. ff. quib. mod. pign.* Si in venditione pignoris conſenſerit creditor, vel ut debitor hanc rem permutet, vel donet, vel in dotem det, dicendum erit pignus liberari: niſi ſalva cauſa pignoris ſui conſenſit vel venditioni vel cæteris. *l. 4. §. 1. eod.* Si probaveris te fundum mercatum, poſſeſſionemque ejus tibi traditam, *ſciente & conſentiente* ea quæ ſibi eum à venditore obligatum dicit, exceptione eam removebis: nam obligatio pignoris conſenſu & contrahitur, & diſſolvitur. *l. 2. C. de remiſ. pign.* Sed & ſi non conceſſerat pignus venundari, ſi ratam habuit venditionem, idem erit probandum. *d. l. 4. §. 1. in fine ff. quib. mod. pign.*

Touching this conſent, ſee the fifteenth Article of this Section.

XIII.

13. *If the Creditor conſents that his Pledge be engaged to another.*

If a Creditor conſents that his Pledge be engaged to another, he reſigns to him his Right[p]. But this conſent ought to be ſuch as ſhall be explained in the fifteenth Article.

[p] Paulus reſpondit, Sempronium antiquiorem creditorem conſentientem, cùm debitor eandem rem tertio creditori obligaret, jus ſuum pignoris remiſiſſe videri. *l. 12. ff. quib. mod. pign. v. h. ſ.*

XIV.

14. *The Mortgage revives, if the Alienation does not take effect.*

If the Sale, or other Alienation, made by the Debtor, with the conſent of his Creditor, happens to be annulled, or that after the obtaining of this conſent, the Alienation is not accompliſhed; the Creditor, in that caſe, enters again to his Right. For it was only in favour of that Alienation that he renounced his Mortgage. And it would be the ſame thing, if he had conſented that his Debtor ſhould deviſe to a Legatee the Houſes, or Lands, mortgaged to him, and that the Legacy ſhould be found to be null, or the Legatee ſhould renounce it[q].

[q] Bellè quæritur, ſi fortè venditio rei ſpecialiter obligatæ non valeat, an nocere hæc res creditori debeat, quod conſenſit: ut putà, ſi qua ratio juris venditionem impediat, dicendum eſt, pignus valere. *l. 4. §. ult. ff. quib. mod. pign.* Si voluntate creditoris fundus alienatus eſt, inverecundè applicari ſibi eum creditor deſiderat, ſi tamen effectus ſit ſecutus venditionis. Nam ſi non venierit, non eſt ſatis ad repellendum creditorem, quod voluit venire. *l. 8. §. 6. eod.* Venditionis autem appellationem generaliter accipere debemus, ut & ſi legare permiſit, valeat quod conceſſit quod ita intelligemus, ut & ſi legatum repudiatum fuerit, convaleſcat pignus. *d. l. 8. §. 11.* Voluntate creditoris pignus debitor vendidit, & poſteà placuit inter eum & emptorem, ut à venditione diſcederent, jus pignoris ſalvum erit creditori: nam ſicut debitori, ità & creditori priſtinum jus reſtituitur: neque omnimodò creditor priſtinum jus remittit: ſed ita demùm, ſi emptor rem retineat, nec reddat venditori. *l. 10. eod.*

XV.

15. *In what manner we are to underſtand the Creditor's conſent to the Alienation.*

We ought not to take for a conſent of the Creditor to the Alienation of his Pledge, the knowledge which he may have of it, nor the ſilence which he keeps after he knows it; as if he knows that his Debtor is about ſelling a Houſe which is mortgaged to him, and ſays nothing of it. But in order to deprive him of his Right, it is neceſſary that it appear by ſome Act, that he knows what is doing to his prejudice, and that he conſents to it. And a Creditor does not loſe his Mortgage by his conſent, except when it appears evidently that his Intention is to reſign it, or that there be ground to charge him with diſhoneſty, for not having declared his Right, when he was under an Obligation to do it. Thus, for Example, if he who had mortgaged ſpecially a Houſe, or Lands, to a former Creditor for an Annuity, engages it in the ſame manner to a ſecond Creditor, for another Annuity, declaring to him that the ſaid Houſe, or Lands, were not mortgaged to any body elſe, and that the firſt Creditor ſigned the Contract either as a Party, or as a Witneſs; he will have thereby rendred himſelf an Accomplice to this falſe Declaration, and cannot exerciſe his Mortgage on the ſaid Houſe, or Lands, to the prejudice of this ſecond Creditor. Thus, on the contrary, if a Creditor ſigns, as Witneſs, a Contract of Marriage, or other Deed, by which his Debtor engages all his Eſtate, he ſhall not loſe his Mortgage for not having entred his Proteſtation. Thus he who ſigns, as Witneſs, a Teſtament, in which the Teſtator deviſes Houſes, or Lands, that are mortgaged to the ſaid Witneſs, will not loſe his Mortgage. And in general, we ought to judge of the effect of theſe Approbations by Signature, or otherwiſe, according to the circumſtances of the Quality of the Acts, of that of the Perſons, of the Knowledge which they may have of the wrong which either their Approbation, or their Silence, may do to their own Intereſt, and to that of others, of their Sincerity or Diſingenuity, of the Intention of the Contracters, and other circumſtances of the like Nature[r].

TITLE II.

Of the SEPARATION of the GOODS of the Deceaſed, from thoſe of the Heir, or Executor, among their reſpective Creditors.

The Subject Matter of this Title. WE have ſeen in the foregoing Title, that one of the uſes of a Mortgage is, to ſecure to the Creditor the Eſtate of the Debtor, into what hands ſoever it paſſes. But when it paſſes only from the Debtor to his Heir, or Executor, the Creditor preſerves his Right, altho' he have no Mortgage, becauſe the Heir, or Executor, ſucceeds to the Eſtate, only on condition that he acquit the Debts. Thus, all the Creditors of the deceaſed are, with regard to his Heir, or Executor, in the ſame condition in which they were, with reſpect to their Debtor; every one of them retaining on the Eſtate of the deceaſed, either their Mortgage, or their Privilege, or their ſimple Credit, ſuch as they had it in the Debtor's life-time. But this change which makes the Eſtate of the Debtor to paſs to his Heir, or Executor, having this effect, that the Creditors of the ſaid Heir or Executor, will likewiſe have their Right on that Eſtate which he acquires by Inheritance, or Succeſſion,

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[r] Non videtur autem conſenſiſſe creditor, ſi ſciente eo debitor rem vendiderit, cùm ideo paſſus eſt venire, quod ſciebat utique pignus ſibi durare. Sed ſi ſubſcripſerit fortè in tabulis emptionis, conſenſiſſe videtur, niſi manifeſtè appareat deceptum eſſe. *l.* 8. §. 15. *ff. quib. mod. pign.*

Inveniebatur Mævius inſtrumento cautionis cum republica facto à Seio interfuiſſe, & ſubſcripſiſſe, quo caverat Seius, fundum nulli alii eſſe obligatum. Quæro an actio aliqua in rem Mævio competere poteſt? Modeſtinus reſpondit, pignus cui is de quo quæritur conſenſit, minimè eum retinere poſſe. *l.* 9. §. 1 *ff. quib. mod. pign.*

Lucia Titia inteſtata moriens, à filiis ſuis per fideicommiſſum alieno ſervo domum reliquit. Poſt mortem, filii ejus iidem qui hæredes, cum diviſerunt hæreditatem matris, diviſerunt etiam domum. In qua diviſione dominus ſervi fideicommiſſarii *quaſi teſtis* affuit. Quæro, an fideicommiſſi perſecutionem acquiſitam ſibi per ſervum, eo quod interfuit diviſioni, amiſiſſe videatur? Modeſtinus reſpondit, fideicommiſſum ipſò jure amiſſum non eſſe—— *niſi evidenter apparuerit omittendi fideicommiſſi cauſa hoc eum feciſſe.* *l.* 34. §. 2. ff. de leg. 2. v. l. 8. ff. de reſc. vend.

Caius Seius ob pecuniam mutuam fundum ſuum Lucio Titio pignori dedit. Poſteà pactum inter eos factum eſt, *ut creditor pignus ſuum in compenſationem pecuniæ ſuæ certo tempore poſſideret.*

Verùm ante expletum tempus creditor cùm ſuprema ſua ordinaret, teſtamento cavit, *ut alter ex filiis ſuis haberet eum fundum*, & addidit *quem de Lucio Titio emi*, cùm non emiſſet. Hoc teſtamentum inter cæteros ſignavit, & Gaius Seius, qui fuit debitor. Quæro, an ex hoc quod ſignavit præjudicium aliquod ſibi fecerit: cùm nullum inſtrumentum venditionis proferatur, ſed ſolum pactum ut creditor certi temporis fructus caperet? Herennius Modeſtinus reſpondit, contractui pignoris non obeſſe, quod debitor teſtamentum creditoris, in quo ſe emiſſe pignus expreſſit, ſignaſſe proponitur. *l.* 39. *ff. de pign. act.*

It is neceſſary to remark on this Article, the difference there may be between a Creditor's ſigning an Inſtrument as a Party, and his ſigning it only as a Witneſs. Whatever he ſigns as a Party, binds him without doubt: But in Deeds which he ſigns as a Witneſs, and where the Signature is put only for a teſtimony to the truth of what is tranſacted between the contracting Parties, one cannot draw a conſequence from the Witneſs's ſigning, that may be of prejudice to him, unleſs he ſhould give occaſion by his ſigning for one of the Parties to be cheated, as in the caſe of the Witneſs who ſigns the Contract in which is inſerted the falſe Declaration explained in the Article. For in that caſe, the Silence of the Witneſs implies a diſingenuity which makes him acceſſory to the Knavery of his Debtor. But if a Witneſs does not contribute any thing on his part to the cheating and over-reaching any of the Parties, and if he gives no expreſs conſent which derogates from his Right, neither his preſence, nor his ſigning ought to hurt him; as appears in the Caſe of this Law 39 ff. de pign. act. *quoted on this Article, where he who had mortgaged his Lands to a Creditor does not loſe them for having ſigned, as Witneſs, the Teſtament of the ſaid Creditor, who declares his will to be, that one of his Children ſhould have the ſaid Lands, even altho' the Teſtator had added, that he had purchaſed thoſe Lands of the ſaid Witneſs.*

See the thirty third Article of the firſt Section.

ſion, it happens that when the Heir or Executor has not Eſtate enough of his own to ſatisfy his own Creditors, the Creditors of the deceaſed are in danger of ſeeing the Eſtate of the deceaſed go to the Creditors of the Heir, or Executor; and proviſion is made againſt this, by ſeparating the Eſtate of the deceaſed from that of his Heir, or Executor, for the benefit of their reſpective Creditors.

It is by the uſe of this Separation, that the Creditors of the deceaſed, who fear that the Heir, or Executor, is not ſolvent, hinder the confuſion of the Goods of the deceaſed with thoſe of the Heir, or Executor; that the Goods of their Debtor may be preſerved to them, and may not go to the Creditors of the ſaid Heir, or Executor.

But if the Creditors of the Heir, or Executor, are afraid, on their part, leſt the Heir, or Executor, who is their Debtor, engaging himſelf in an incumbred Inheritance, or Succeſſion, his Goods ſhould go to the Creditors of the deceaſed, to their prejudice, the ſame Equity demands, that they may have power to diſtinguiſh and ſeparate the Eſtate of the Heir, or Executor, from that of the deceaſed. As to which it is neceſſary to obſerve, that altho' the condition of the Creditors of the Heir, or Executor, and that of the Creditors of the deceaſed, ought to be equal, yet the *Roman* Law had ordered it otherwiſe, and did not allow the Separation of Goods to the Creditors of the Heir, or Executor, for this reaſon, that a Debtor being at liberty to bind himſelf, he may make the condition of his Creditors worſe, by entring into new Engagements, to their prejudice[a]. But this nicety has not been received into uſe with us; and it has been thought reaſonable, that the liberty which a Debtor may have to contract new Debts, altho' prejudice may ariſe from thence to his Creditors, ought not to be drawn to ſuch a conſequence. For if it is permitted to this Debtor, to engage himſelf to new Creditors, by accepting a Succeſſion charged with Debts, his Creditors ought not to be debarred from making uſe of the Right which they have on his Goods, to prevent their being ſubjected to the charges of that Succeſſion: and it is fully as equitable to grant them this Separation, as it is to grant it againſt them, to the Creditors of the deceaſed, for the Goods of the Succeſſion.

It is true, that in certain caſes the *Roman* Law did grant the Separation of Goods to the Creditors of the Heir, or Executor; as if he accepted a burdenſome Inheritance, or Succeſſion, in order to defraud his Creditors: and yet even in this caſe it did not grant it eaſily. And this Separation had likewiſe place in ſome other caſes, which it would be needleſs to mention here[b]; but theſe Exceptions were not ſufficient to do juſtice to the Creditors of the Heir, or Executor, and our Uſage allows them this Separation without diſtinction.

This remark concerning our Uſage in this matter, will ſerve as an advertiſement, that we are to extend to the Creditors of the Heir, or Executor, the Rules which ſhall be ſet down in this Title, altho' mention be made only of the Creditors of the deceaſed.

SECT. I.

Of the nature and effects of the Separation.

The CONTENTS.

1. *The caſe of this Separation.*
2. *The Separation is independent on the Mortgage.*
3. *Legatees have the right of Separation.*
4. *Separation for a Debt that is conditional, or of which the term is not yet come.*
5. *If the Heir, or Executor, has already alienated the Goods of the deceaſed, there can be no Separation.*
6. *The Engagement made by the Heir, or Executor, does not hinder the Separation.*
7. *The Separation takes place in a ſecond and third Succeſſion, and beyond that.*
8. *If the Debtor ſucceeds to his Surety, the Separation takes place.*
9. *The Separation does not prejudice the Right againſt the Heir, or Executor.*
10. *Privileges do not hinder the Separation.*

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[a] Ex contrario autem, creditores Titii non impetrabunt ſeparationem. Nam licet alicui adjiciendo ſibi creditorem, creditoris ſui facere deteriorem conditionem. *l.* 1. §. 2. *ff. de ſeparat.*

[b] *V. l.* 1. §. 5. *& ſeq. ff. de ſeparat.*

11. *If one of the Heirs, or Executors, be a Creditor, he may demand the Separation.*

I.

1. *The caſe of Separation.* WHen the Creditors of a deceaſed Perſon are afraid that the Heir, or Executor, is not ſolvent, they may procure an Order from the Judge, for ſeparating the Effects of the Inheritance, or Succeſſion, from thoſe of the Heir, or Executor, that they may ſecure to themſelves the Goods of the deceaſed their Debtor, againſt the Creditors of his Heir, or Executor[a].

[a] Sciendum eſt ſeparationem ſolere impetrari decreto prætoris: Solet autem ſeparatio permitti creditoribus ex his cauſis, ut putà debitorem quis Seium habuit: hic deceſſit: hæres ei extitit Titius: hic non eſt ſolvendo, patitur bonorum venditionem: creditores Seii dicunt bona Seii ſufficere ſibi, creditores Titii contentos eſſe debere bonis Titii. Et ſic quaſi duorum fieri bonorum venditionem. Fieri enim poteſt, ut Seius quidem ſolvendo fuerit, potueritque ſatis creditoribus ſuis, vel ita ſemel, & ſi non in aſſem, in aliquid tamen ſatisfacere: admiſſis autem commixtiſque creditoribus Titii, minùs ſint conſecuturi, quia ille non eſt ſolvendo: aut minus conſequantur quia plures ſunt. Hic eſt igitur æquiſſimum creditores Seii deſiderantes ſeparationem audiri, impetrareque à prætore, ut ſeparatim quantum cujuſque creditoribus præſtetur. *l. 1. ff. de ſeparat.* Eſt juriſdictionis tenor promptiſſimus, indemnitatiſque remedium edicto prætoris creditoribus hæreditariis demonſtratum, ut quoties ſeparationem bonorum poſtulant cauſa cognita, impetrent. *l. 2. C. de bon. aut Jud. poſſid.*

Altho' this Rule ſeems to be limited to the Creditors of the deceaſed, yet thoſe of the Heir, or Executor, are in Equity intitled to the ſame Right, as has been obſerved in the Preamble.

II.

2. *The Separation is independent on the Mortgage.* The right of this Separation is independent on the Mortgage, and Bond Creditors may demand it. For the bare effect of their Debt gives them a Preference on the Eſtate of their Debtor, before the Creditors of his Heir, or Executor, to whom the deceaſed was under no Obligation[b].

[b] *It is not the Mortgage that gives this Right, but the bare quality of Creditor.*

III.

3. *Legatees have the right of Separation.* The Legatees of the deceaſed have the ſame right to demand this Separation, for they are Creditors to the Succeſſion. But the Creditors of the deceaſed are preferr'd before them, becauſe he could not give Legacies to their prejudice[c].

[c] Quoties hæredis bona ſolvendo non ſunt, non ſolum creditores teſtatoris, ſed etiam eos quibus legatum fuerit, impetrare bonorum poſſeſſionem æquum eſt. Ita ut cùm creditoribus ſolidum acquiſitum fuerit, legatariis vel ſolidum, vel portio quæratur. *l. 6. ff. de ſep. l. 4. §. 1. eod.*

IV.

4. *Separation for a Debt that is conditional, or of which the term is not yet come.* A Creditor, or a Legatee, whoſe right depends on a condition, which has not as yet happened, or is ſuperſeded by a term which is not yet come, may notwithſtanding demand the Separation, for their ſecurity[d].

[d] Creditoribus qui ex die, vel ſub conditione debentur, & propter hoc nondum pecuniam petere poſſunt, æquè ſeparatio dabitur, quoniam & ipſis cautione communi conſuletur. *l. 4. ff. de ſeparat.*

V.

5. *If the Heir, or Executor has already alienated the Goods of the deceaſed, there can be no Separation.* If before the Separation was demanded, the Heir, or Executor, had alienated, without any intention of defrauding the Creditors, Goods of the Succeſſion, whether Moveables, or Immoveables, or even the whole Succeſſion, the Creditors of the deceaſed could not demand the Separation of what had been alienated[e]. For the Heir, or Executor, who in that quality was maſter of the Goods, had power to diſpoſe of them. But this alienation, with reſpect to the Immoveables, would be of no prejudice to the Creditors of the deceaſed, who had Mortgages on them: and they might exerciſe their Mortgage, and their Privilege, if they had any, againſt the Poſſeſſors, in the ſame manner as they might have done, if the deceaſed had made the alienation[f].

[e] Ab hærede vendita hæreditate, ſeparatio fruſtrà deſiderabitur: utique ſi nulla fraudis incurrat ſuſpicio. Nam quæ bona fide medio tempore per hæredem geſta ſunt, rata conſervari ſolent. *l. 2. ff. de ſeparat.*

Altho' it may ſeem as if this Law related only to the Sale of the Inheritance, or Succeſſion, yet the tenor and motive of it comprehend particular Alienations, and the laſt words of the Law ſhew it plainly enough.

[f] *The Alienations, into what hands ſoever the Lands and Tenements that are mortgaged paſs, do no prejudice to the Mortgage, as has been obſerved in the foregoing Title.*

It follows from this Rule, that with regard to the Immoveables alienated by the Heir, or Executor, the Creditors of the deceaſed, who had no Mortgage on them, have loſt their Right to them, and that there remains to them only the Perſonal Action againſt the Heir, or Executor, and the Right of a Separation of the Goods that may ſtill remain in the hands of the Heir, or Executor. And as to the Moveables alienated by the Heir, or Executor, the Creditors of the deceaſed, even thoſe who have Mortgages, have loſt their Right to them, in the ſame manner as they would have loſt it if the Alienation had been made by the deceaſed; for they had not acquired a Right of Property in them by the death of the deceaſed.

VI.

6. *The Engagement made by the Heir, or* If the Heir, or Executor, had pawned or mortgaged Moveables or Immoveables, belonging to the Inheritance, or Succeſſion,

Executor, does not hinder the Separation. Succeſſion, before the Separation was demanded, the Creditors of the deceaſed will nevertheleſs obtain a Separation of thoſe Goods that are engaged[g]. For the Separation has place as long as the property belongs to the Heir, or Executor, and that Engagement does not diveſt him of it.

[g] Sciendum eſt autem, etiam ſi obligata res eſſe proponatur ab hærede jure pignoris vel hypothecæ, attamen, ſi hæreditaria fuit, jure ſeparationis hypothecario creditori potiorem eſſe eum qui ſeparationem impetraverit. Et ita Severus & Antoninus reſcripſerunt. *l.* 1. §. 3. *ff. de ſeparat.*

VII.

7. The Separation takes place in a ſecond and third Succeſſion, and beyond that. If the Goods of an Inheritance, or Succeſſion, paſs from the Heir, or Executor, to his Heir, or Executor, and from him again to his Succeſſors, and ſo down to other Heirs, and Executors, ſucceſſively, ſo that the firſt Inheritance, or Succeſſion, and the following ones, are confounded together in the hands of the Heirs and Executors to whom they deſcend, the Creditors of each Inheritance, or Succeſſion, will follow the Goods belonging to the ſame, from one Heir and Executor to the other, and may demand a Separation of them[h].

[h] Secundùm hæc videamus, ſi primus ſecundum hæredem reſcripſerit, ſecundus tertium, & tertii bona veneant: qui creditores poſſint ſeparationem impetrare? & putem ſi quidem primi creditores petant, utique audiendos & adverſus ſecundi & adverſus tertii creditores. Si verò ſecundi creditores petant, adverſus tertii utique eos impetrare poſſe. *l.* 1. §. 8. *ff. de ſeparat.*

VIII.

8. If the Debtor ſucceeds to his Surety, the Separation takes place. If a Debtor for whom another Perſon was engaged as Surety, happens to ſucceed to him, the Creditor may demand, againſt the Creditors of his Debtor, the Separation of the Goods of the deceaſed, without any oppoſition from the Creditors of the Surety, or thoſe of the Debtor, who ſucceeds to him as Heir, or Executor: for altho' the Obligation of the deceaſed Surety be confounded in the perſon of the Debtor who ſucceeds to him, yet the Creditor does not loſe the Security which he had on the Goods of the Surety, no more than that which he ſtill retains on the Goods of his Debtor[i].

[i] Debitor fidejuſſori hæres extitit, ejuſque bona venierunt: quamvis obligatio fidejuſſionis extincta ſit, nihilominus ſeparatio impetrabitur, petente eo cui fidejuſſor fuerat obligatus: ſive ſolus ſit hæreditarius creditor, ſive plures. Neque enim ratio juris, quæ cauſam fidejuſſionis propter principalem obligationem, quæ major fuit, excluſit, damno debet afficere creditorem, qui ſibi diligenter proſpexerat. Quid ergò ſi bonis fidejuſſoris ſeparatis, ſolidum ex hæreditate ſtipulator conſequi non poſſit? Utrum portio cum cæteris hæredis creditoribus ei quærenda erit, an contentus eſſe debebit bonis quæ ſeparari maluit? Sed cum ſtipulator iſte, non adita fidejuſſoris à reo hæreditate, bonis fidejuſſoris venditis, in reſiduum promiſceri debitoris creditoribus potuerit, ratio non patitur eum in propoſito ſubmoveri. *l.* 3. *ff. de ſeparat.*

What is ſaid in this Article concerning the caſe where the Debtor ſucceeds to the Surety, would take place likewiſe, and that with greater reaſon, in the caſe where the Surety ſucceeds to the Debtor; and the ſame Creditor who can demand Separation of the Goods of the Surety againſt the Creditors of the Debtor who ſucceeds to him, may without doubt demand Separation of the Goods of the Debtor againſt the Creditors of the Surety who ſucceeds as Heir, or Executor, to the Debtor.

IX.

The Creditor who having demanded the Separation, has not been able to procure payment out of the Goods of the deceaſed, retains ſtill his Right againſt the Heir, or Executor. But the Creditors of this Heir, or Executor, will be preferred before him[l], if their Credit be prior to his Engagement to the Inheritance, or Succeſſion. *9. The Separation does not prejudice the Right againſt the Heir, or Executor.*

[l] Sed in quolibet alio creditore, qui ſeparationem impetravit, probari commodius eſt, ut ſi ſolidum ex hæreditate ſervari non poſſit, ita demùm aliquid ex bonis hæredis ferat, ſi proprii creditores hæredis fuerint dimiſſi. *l.* 3. §. 2. *ff. de ſeparat.*

X.

The Separation may be demanded againſt all Perſons who have Privileges, and even againſt the Exchequer[m]. *10. Privileges do not hinder the Separation.*

[m] Sed etiam adverſus fiſcum & municipes impetraretur ſeparatio. *l.* 1 §. 4. *ff. de ſeparat.*

XI.

If among the Co-Heirs, or Co-Executors, there be one of them who is Creditor to the deceaſed, he may demand the Separation, againſt the Creditors of the others, excepting only as to the portion of his Debt, which he himſelf ought to bear[n]. *11. If one of the Heirs, or Executors, be a Creditor, he may demand the Separation.*

[n] Si uxor tua pro triente patruo ſuo hæres extitit, nec ab eo quicquam exigere prohibita eſt: debitum à cohæredibus petere non prohibetur. Cùm ultra eam portionem qua ſucceſſit, actio non confundatur. Sin autem cohæredes ſolvendo non ſint, ſeparatione poſtulata, nullum ei damnum fieri patiatur. *l.* 7. C. *de bon. auth. jud. poſſ.*

SECT. II.

In what manner the Right of Separation is extinguiſhed, or loſt.

WE ſhall not inſert among the Rules of this Section, that of the *Roman* Law, which did not allow the Separation, after five Years; for this Preſcription is not in uſe with us.

The CONTENTS.

1. *If the confuſion hinders the Separation.*
2. *Novation hinders alſo the Separation.*
3. *Difficulties which are regulated by the prudence of the Judge.*

I.

1. If the confuſion hinders the Separation.

IF the Goods of the deceaſed happen to be conſounded with thoſe of the Heir, or Executor, ſo as that it is not poſſible to diſtinguiſh, and to ſhew what things are part of the Succeſſion, and what not, the Separation, in this caſe, will not take place; for the confuſion hinders the effect of it. And it ought to be preſumed, that what does not appear to be part of the Succeſſion, belongs to the Heir, or Executor. Otherwiſe the Creditors of this Heir, or Executor, would be obliged to prove the Right which he has to all the things he has in his poſſeſſion; which would neither be juſt, nor poſſible[a].

[a] Præterea ſciendum eſt, poſteaquam bona hæreditaria bonis hæredis mixta ſunt, non poſſe impetrari ſeparationem. Confuſis enim bonis & unitis, ſeparatio impetrari non poterit. Quid ergo ſi prædia extent, vel mancipia, vel pecora, vel aliud quod ſeparari poteſt? Hic utique poterit impetrari ſeparatio. *l.* 1. §. 12. *ff. de ſeparat.*

II.

2. Novation hinders alſo the Separation.

If a Creditor of the deceaſed innovates his Debt, and contents himſelf with the obligation of the Heir, or Executor, he cannot demand the Separation of the Goods of the deceaſed. For he is no longer a Creditor to the deceaſed, but to the Heir, or Executor[b].

[b] Illud ſciendum eſt eos demùm creditores poſſe impetrare ſeparationem, qui non novandi animo ab hærede ſtipulati ſunt. Cæterùm, ſi eum hoc animo ſecuti ſunt, amiſerunt ſeparationis commodum. *l.* 1. §. 10. *ff. de ſeparat.*

III.

3. Difficulties which are regulated by the prudence of the Judge.

If the Separation being demanded, there occur difficulties in it, as if the confuſion of the Goods makes the diſtinction of them uncertain, or that by reaſon of other circumſtances, there ariſes a doubt whether the Separation ought to take place, or not, it will depend on the Judge, to give ſuch order and directions therein, as he ſhall judge to be moſt prudent, according to the condition of the Things[c].

[c] De his autem omnibus admittenda ſeparatio ſit, necne, prætoris erit vel præſidis notio. *l.* 1. §. 14. *ff. de ſeparat.*

TITLE III.

Of the SOLIDITY among two or more DEBTORS, and among two or more CREDITORS.

The Nature of Solidity.

THere are two ways, by which two or more Perſons may be Debtors of one and the ſame Thing. One is, in the caſes where they all of them together owe the whole Debt, but ſo as that each of them owes only a portion of it. And the other, in the caſes where they are all bound for the whole Debt, in ſuch a manner, that any one of them alone may be conſtrained to pay the whole.

This ſecond manner, is what is called Solidity, it giving the Creditor a Right to exact the whole Debt from any one of the Debtors he pleaſes to chuſe. This Right may be acquired two ways; either by the effect of a Covenant, as if ſeveral Perſons borrow a Sum of Money, and oblige themſelves every one for the whole Sum, to the Creditor, who lends only to them all together, and on this condition, of their being bound every one for the whole Sum: or even by the nature of the Debt it ſelf, as if ſeveral Perſons have committed ſome Crime, ſome Offence, or cauſed ſome Damage, thro' a fault that may be imputed to them all. For in this caſe, ſeeing it is the deed of every one of them that has cauſed the Damage, they are all of them obliged in ſuch a manner to repair it, that each of them in particular is bound for the whole. And the being acceſſory to the Crime, or Offence, or the having a ſhare in the Fault, rendring every one of them guilty of it, it makes them conſequently anſwerable for the whole[a].

[a] Si communi conſilio plurium id factum ſit, licere vel cum uno, vel cum ſingulis experiri. Opus enim quod à pluribus pro indiviſo factum eſt, ſingulos in ſolidum obligare. *l.* 15. §. 2. *ff. quod vi aut clam.*

We ſhall ſpeak in this Title, only of the Solidity in Covenants, and the Rules concerning it, which ſhall be here explained, may ſuffice for the other; according as they are capable of being applied to it, and particularly to the Solidity which may ariſe from Faults, which are not accompanied with any Crime or Offence[b], and which are one of the matters that come within the deſign of this Work, the ſame having been treated of in the eighth Title of the ſecond Book.

[b] *See the fifth Article of the firſt Section of Damages occaſioned by Faults*, &c.

This Solidity is to be underſtood only of what concerns the intereſt of the Creditor, and does not hinder the Debt from being divided among the Debtors, according to the portion that each of them ought to bear of it.

As a Debt may be due in the whole by every one of the Debtors to the Creditor, ſo likewiſe there may be another ſort of Solidity, of a Debt due to many Creditors, whether by one Debtor alone, or by many, if the condition of the Debt be ſuch, that as every one of the Debtors who is bound for the whole Debt, may be conſtrained alone to pay the whole, ſo every one of the Creditors among whom the Solidity is, may have alone, and by himſelf, the Right to exact the whole Debt, and to diſcharge the Debtor of it, with reſpect to all the other Creditors.

SECT. I.

Of Solidity among Debtors.

The CONTENTS.

1. *Definition of Solidity.*
2. *There is no Solidity, unleſs it be expreſſed.*
3. *The Solidity does not hinder the diviſion of the Debt among the Debtors.*
4. *In all ſorts of Obligations, the Parties may bind themſelves for the whole.*
5. *The condition of Parties, who are obliged each of them for the whole, may be different.*
6. *Relief of him who pays for the others.*
7. *The Action againſt one of the Debtors, does not make the Solidity to ceaſe.*
8. *The perſonal exception which one of the Debtors may have, does not ſerve for the others.*
9. *The Demand of the Debt from one of the Debtors, hinders Preſcription by the others.*

I.

1. *Definition of Solidity.*

THE Solidity among Debtors, is the Engagement which obliges every one of them to the Creditor, for the whole Debt[a].

[a] Ubi duo rei facti ſunt, poteſt ab uno eorum ſolidum peti. Hoc eſt enim duorum reorum, ut unuſquiſque eorum in ſolidum ſit obligatus, poſſitque ab alterutro peti. *l.* 3. §. 1. *ff. de duob. reis.* Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ, à quo velit. *l.* 2. *C. eod.* Promittentes ſinguli in ſolidum tenentur. §. 1. *inſt. eod.* See the third Article.

II.

2. *There is no Solidity, unleſs it be expreſſed.*

The Obligation of two or more Debtors, who promiſe one and the ſame thing, does not bind every one of them for the whole, unleſs it be particularly ſo expreſſed in the Obligation. And each Debtor will be bound only for his own ſhare of the Debt. And it would be the ſame thing, if two or more Perſons were condemned by a Court of Juſtice, to pay one and the ſame thing, and that the Sentence did not expreſly bear, that each of them ſhould be liable for the whole[c]. For in a doubt, Obligations are to be interpreted in favour of thoſe who are bound[d].

[b] Cùm ita cautum inveniretur, *tot aureos rectè dari ſtipulatus eſt Julius Carpus: ſpopondimus ego Antoninus Achileus, & Cornelius Dius:* partes viriles deberi. Quia non fuerat adjectum ſingulos in ſolidum ſpopondiſſe, ita ut duo rei promittendi fierent. *l.* 11. *in fin. ff. de duob. reis.* Cùm apparebit emptorem, conductoremve, pluribus vendentem, vel locantem, ſingulorum in ſolidum intuitum perſonam. *l.* 47. *ff. locat.*

[c] Paulus reſpondit, eos qui unâ ſententiâ in unam quantitatem condemnati ſunt, pro portione virili ex cauſa judicati conveniri. *l.* 43. *ff. de re judic.* Si non ſinguli in ſolidum, ſed generaliter tu & collega tuus una & certa quantitate condemnati eſtis, nec additum eſt, ut quod ab alterutro ſervari non poteſt, id alter ſuppleret: effectus ſententiæ pro virilibus portionibus diſcretus eſt. Ideoque parens pro tua portione ſententiæ, ob ceſſationem alterius ex cauſa judicati conveniri non potes. *l.* 1. *C. ſi plures una ſent. cond. ſ.*

[d] *See the thirteenth Article of the ſecond Section of Covenants.*

III.

3. The Solidity does not hinder the Diviſion of the Debt among the Debtors.

Altho' it has been agreed that every one of the Debtors ſhould be bound for the whole Debt, yet it is nevertheleſs divided among them: and the Creditor cannot immediately ſue any one of them for the whole Debt. But before he demand from one the portions due by the others, he ought to diſcuſs every one for their own portion: and he may afterwards recover the portions of thoſe who were not able to pay, from the other remaining Debtors. For the Clauſe of Solidity being inſerted in the Obligation, only for the Creditor's greater ſecurity, the Solidity implies the condition, that each Debtor obliges himſelf to pay for the others, only in caſe that ſome of them fail to pay their proportions. Thus, when ſome of the Debtors prove inſolvent, or that becauſe of their abſence the Creditor cannot get payment of their portions of the Debt, the other Debtors anſwer for them, and every one bears his part of the deficiency, in proportion to his own Share[e]. But if the Debtors who are bound each of them for the whole Debt, renounce this benefit, which the Law gives them, and which is called the benefit of Diviſion, every one of them may be conſtrained alone to pay the whole Debt. For every one may renounce what the Law eſtabliſhes in his favour[f]. And he who is forced to pay the whole Debt, will have his Remedy againſt the other Debtors; as ſhall be ſhewn in the ſixth Article.

[e] Si quis alterna fidejuſſione obligatos ſumat aliquos, ſiquidem non adjecerit oportere & unum horum in ſolidum teneri, omnes ex æquo conventionem ſuſtinere. Si verò aliquid etiam tale adjiciatur, ſervari quidem pactum: non tamen mox ab initio unumquemque in ſolidum exigi: ſed interim ſecundùm partem quâ unuſquiſque obligatus eſt. *Nov.* 99. *c.* 1. Si verò minus idonei ſe habere reliqui videantur, ſive omnes, ſive quidam, ſive in partem, ſive in ſolidum, ſive abſentes fortè in illud teneri quod accipere ab aliis non potuit. Sic enim & illis ſervabitur pactionis modus, & nullum ſuſtinebit damnum actor. *Ibid.*

[f] *See the twenty ſeventh Article of the ſecond Section of the Rules of Law.*

It is becauſe of this Right which the Debtors, who are bound each of them for the whole Debt, have to demand the Obligation to be divided, that it is uſual to inſert into Bonds by which the Parties oblige themſelves every one for the whole Debt, a Clauſe whereby it is declared, that the Parties who are bound, renounce this benefit of Diviſion. And this Renunciation has this effect, that altho' all the Debtors be able to pay, yet the Creditor has the liberty to addreſs himſelf to any one of them for the whole Debt, without engaging in the diſcuſſion of every one of them in particular, for their reſpective proportions. This benefit of Diviſion is only for Civil Debts, and not for Crimes.

IV.

4. In all ſorts of Obligations, the parties may bind themſelves for the whole.

The Obligation may be ſuch, as to bind every one of the Parties for the whole Debt, let the cauſe of the Engagement be of what nature ſoever it will. Thus, ſeveral Perſons may oblige themſelves after this manner, in a Loan, in a Sale, in a Contract of Letting and Hiring, in a *Depoſitum*, and in all other ſorts of Engagements. And one may bind himſelf in this manner for a Legacy, for a Guardianſhip, for an Engagement entred into by Order of the Judge, and for all other Cauſes whatſoever.

[g] Eandem rem apud duos pariter depoſui, utriuſque fidem in ſolidum ſecutus, vel eandem rem duobus ſimiliter commodavi, fiunt duo rei promittendi; quia non tantùm verbis ſtipulationis, ſed & cæteris contractibus, veluti emptione, venditione, locatione, conductione, depoſito, commodato, teſtamento. *l.* 9. *ff. de duob. reis.* Duo rei locationis in ſolidum eſſe poſſunt. *l.* 13. §. 9. *ff. locat.* Et ſtipulationum prætoriarum duo rei fieri poſſunt. *l.* 14. *ff. de duob. reis.*

V.

5. The condition of parties who are obliged each of them for the whole, may be different.

Altho' the Solidity renders the condition of the Parties who are bound jointly together equal, in that every one of them is bound for the whole; yet they may be otherwiſe diſtinguiſhed, by differences which render the Obligation more or leſs hard, with reſpect to ſome, than to others. Thus, in the caſe of two Perſons bound ſolidly for the ſame thing, one may give particular Securities which the other does not, as a Pledge, or Surety. Thus, the Obligation of one may be pure and ſimple, whilſt that of the other is conditional; or the term of Payment may be ſhorter for one, than for the other. But theſe differences are no hindrance why the Creditor may not ſue him who owes without a Condition, or whoſe Term is come, without waiting for the Condition or Term of the other[h].

[h] Ex duobus reis promittendi alius in diem, vel ſub conditione obligari poteſt, nec enim impedimento erit dies, aut conditio quominùs ab eo qui purè obligatus eſt, petatur. *l.* 7. *ff. de duob. reis.* §. *ult. inſt. eod.* Duobus autem reis conſtitutis, quin liberum ſit ſtipulatori, vel ab utroque, vel ab altero dumtaxat fidejuſſorem accipere non dubito. *l.* 6. §. 1. *eod.* *V. l.* 9. §. 1. *eod.*

VI.

6. Relief of him who pays for the others.

If one of the Debtors who are obliged ſolidly together, pays for the others, he ſhall have his Remedy againſt them, for recovering their Proportions, and ſo much as every one of them ought to pay of the Portions of thoſe who prove inſolvent, but no more. For as the Debt is divided, with reſpect to the Creditor, ſo the Relief of him who pays for the others, is divided alſo, and is limited, with regard to each Debtor, to his Portion, becauſe it is only his Portion that is paid for him[i].

[i] Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ à quo velit. Et ideo ſi probaveris te conventum in ſolidum exolviſſe, Rector provinciæ adjuvare te adverſus eum, cum quo communiter mutuam pecuniam accepiſti, non cunctabitur. *l.* 2. *C. de duob. reis.*

It is in this manner that this Relief ought to have its effect, if the Debtor who pays for the others, has no other Right beſides the indemnity which they owe reciprocally one to another for their portions. For this is the effect of the benefit of Diviſion; and if the Relief were to be always for the whole Debt, each Debtor being ſued in an Action of Relief for the whole, might ſue his fellow Debtors in the ſame manner, which would occaſion a multiplicity of Actions of Relief, full of inconveniencies. But if they have renounced the Benefit of Diviſion with reſpect to the Creditor, and if he who pays for the others takes from the Creditor a Subſtitution to his Rights, the ſaid Debtor ſucceeding in that caſe in the room of the Creditor, he has an Action againſt every one of his fellow Debtors for recovering the whole, excepting the portion of the Debt which he himſelf was bound to pay.

VII.

7. The Action againſt one of the Debtors does not make the Solidity to ceaſe.

If among ſeveral Debtors who are bound every one of them for the whole Debt, the Creditor ſeeks for payment from one of them whom he chuſes, without ſuing the others; he retains nevertheleſs the liberty of bringing his Action afterwards againſt the other Debtors, whether the firſt to whom he addreſs'd himſelf, were ſolvent, or not[l].

[l] Idemque in duobus reis promittendi conſtituimus, ex unius rei electione præjudicium creditori adverſus alium fieri non concedentes. Sed remanere & ipſi creditori actiones integras & perſonales, & hypothecarias, donec per omnia ei ſatisfaciat. *l.* 28. *C. de fidejuſſ.*

VIII.

8. The perſonal Exception which one of the Debtors may have, does not ſerve for the others.

All the Exceptions, which the Parties who are obliged may have againſt the Creditor, and which are not limited to their Perſons, but which have relation to the common Obligation, ſerve for the diſcharge of all the Parties obliged. Thus, for Example, if the Obligation hath been contracted by force, if it is contrary to good manners, if it is null, if it is acquitted; theſe kind of Exceptions which relate to the Obligation, are common to all the Parties who are bound by it. But the perſonal Exceptions which ſome of the Parties obliged may have, ſuch as a Minority, the Interdiction of a Prodigal, or ſome change of Condition, which ſhould make the recovering of the Debt either impoſſible, or difficult, to the Creditor; ſuch as a natural, or civil Death, and the other Obſtacles of the like nature, which might happen on the part of ſome of the Debtors, would not hinder the Effect of the Solidity, with regard to the others[m]. For theſe Exceptions, and theſe Changes, do not extinguiſh the Debt, and each Debtor owes the whole Debt. But if one of the Debtors had a perſonal Exception, which ſhould extinguiſh the Debt, as to his Portion, this Exception would avail the others for that Portion. Thus, for Example, if one of the Debtors ſhould appear to be in his own Right, a Creditor to their common Creditor, his Fellow-Debtors might demand of their common Creditor, a compenſation of the Portion of the Debt which would fall to the ſhare of their Fellow-Debtor, who is Creditor to him. And as to the Overplus of what might ſtill be due from their Creditor, to this their Fellow-Debtor, they could not demand a compenſation of it, unleſs they had otherwiſe the Right of this their Fellow-Debtor[n].

[m] In his qui ejuſdem pecuniæ exactionem habent in ſolidum, vel qui ejuſdem pecuniæ debitores ſunt quatenus alii quoque proſit vel noceat pacti exceptio, quæritur: & in rem pacta omnibus proſunt, quorum obligationem diſſolutam eſſe ejus qui paciſcebatur interfuit. Itaque debitoris conventio fidejuſſoribus proficiet. *l.* 21. *§. ult. ff. de pact.*

Perſonale pactum ad alium non pertinere. *l.* 25. *§. eod. V. tot. Tit. C. de fidejuſſ. min.* Cùm duo eandem pecuniam debent, ſi unus capitis deminutione exemptus eſt obligatione alter non liberetur. Multum enim intereſt, utrum res ipſa ſolvatur, an perſona liberetur; cum perſona liberatur, manente obligatione, alter durat obligatus. Et ideò, ſi aqua & igni interdictum eſt, alicujus fidejuſſor poſteà ab eo datus tenetur. *l. ult. ff. de duob. reis.* See the tenth Article of the firſt Section of Sureties, and the firſt, ſecond, third, fourth, and fifth Articles of the fifth Section of the ſame Title.

[n] Si duo rei promittendi ſocii non ſint, non proderit alteri quod ſtipulator alteri reo pecuniam debet. *l.* 10. *ff. de duob. reis.*

It is in the ſenſe of this Article that we are to underſtand this laſt Text. For it would not be juſt to compel one of the Debtors to pay the portion of him who ſhould have a compenſation to make with the Creditor. Since if this compenſation were not made, and the Debtor who had right to make it ſhould prove inſolvent, thoſe who ſhall have paid for him would be without relief, for having paid what he did not owe, or what he might have juſtly compenſated.

IX.

9. The demand of the Debt from one of the Debtors, hinders Preſcription by the others.

If the Creditor of ſeveral Perſons who are indebted for one and the ſame Thing, brings his Action againſt any one of them, his Demand will preſerve his whole Right, and will hinder Preſcription, with reſpect to the other Debtors[o].

See the ſeventeenth Article of the fifth Section of Poſſeſſion and Preſcription, and the Law which is there quoted, and the fifth Article of the following Section.

SECT. II.

Of Solidity among Creditors.

The CONTENTS.

1. *Wherein conſiſts this Solidity.*
2. *How it is acquired.*
3. *If one Creditor demands the Debt without the others.*
4. *If he innovates, or makes over the Debt to another.*
5. *The Demand by one is of uſe to the others.*
6. *One of theſe Creditors cannot do any prejudice to the others.*

I.

1. Wherein conſiſts the Solidity. THE Solidity among ſeveral Creditors hath not this effect, that every one of them may appropriate the whole Debt to himſelf, and deprive the others of their Shares; but it conſiſts only in this, that every one of them has a Right to demand and receive the whole, and the Debtor remains quit, with reſpect to them all, by paying the Debt to any one of them[a].

[a] Ex pluribus reis ſtipulandi, ſi unus acceptum fecerit, liberatio contingit in ſolidum. *l.* 13. §. *ult. ff. de acceptil.* Et uni rectè ſolvi. *l.* 31. §. 1. *ff. de novat.* Ex hujuſmodi obligationibus & ſtipulationibus ſolidum ſingulis debetur. §. 1. *inſt. de duob. reis.* Alter debitum accipiendo omnium perimit obligationem. *d.* §.

II.

2. How it is acquired. This Solidity depends on the Title which may give it, and on that which may ſhew, that what is owing to ſeveral Perſons, is due to every one of them in the whole. Thus, when two Perſons lend a Sum of Money, or ſell a Houſe, or Lands, they may treat in ſuch a manner, as that the Payment may be made to any one of the two ſingly; and they will be Creditors each of them for the whole, either of the Money lent, or of the Price of the Sale. But if it were only ſaid, that a Debtor ſhould owe a Sum of Money to two Creditors, without mentioning any thing of the Solidity, in that caſe, each Creditor could demand no more than his own Portion[b].

[b] Cum tabulis eſſet comprehenſum, *illum & illum centum aureos ſtipulatos*, neque adjectum, *ita ut duo rei ſtipulandi eſſent*, virilem partem ſinguli ſtipulati videbantur. *l.* 11. §. 1. *ff. de duobus reis.*

It appears by this Text that theſe words duo rei ſtipulandi *implied the Solidity.*

III.

3. If one Creditor demands the Debt without the others. If in the caſe of two or more Creditors, where each of them has a Right to demand and receive the whole Debt, one of them does demand it; the Payment cannot be made to the other Creditors without him. For he has determined the Debtor not to pay, unleſs he conſents to it: and it may ſo happen, that thoſe who do not put in their Claim, may have loſt their Right[c].

[c] Ex duobus reis ſtipulandi ſi ſemel unus egerit, alteri promiſſor pecuniam offerendo, nihil agit. *l.* 16. *ff. de duob. reis.*

IV.

4. If he innovates, or makes over the Debt to another. When one of the Creditors of one and the ſame Debt, may alone demand the whole Debt, and receive it, he may alſo innovate the Debt, and delegate, or aſſign it over to others; for he might diſcharge the Debt, and even give an Acquittance, without receiving any thing[d]. But this Creditor ought to account to the others for theſe Changes[e].

[d] Si duo rei ſtipulandi ſint, an alter jus novandi habeat, quæritur: & quid juris unuſquiſque ſibi acquiſierit. Ferè autem convenit, & uni rectè ſolvi, & unum judicium petentem, totam rem in litem deducere: item unius acceptilatione perimi utriuſque obligationem. Ex quibus colligitur unumquemque perinde ſibi acquiſiſſe, ac ſi ſolus ſtipulatus eſſet, excepto eo, quod etiam facto ejus cum quo commune jus ſtipulantis eſt, amittere debitorem poteſt. Secundum quæ, ſi unus ab aliquo ſtipuletur, novatione quoque liberare eum ab altero poterit, cùm id ſpecialiter agit: eo magis cum eam ſtipulationem ſimilem eſſe ſolutioni exiſtimemus. Alioquin, quid dicemus, ſi unus delegaverit creditori ſuo communem debitorem, iſque ab eo ſtipulatus fuerit, aut mulier fundum juſſerit doti promittere viro, vel nuptura ipſi, doti eum promiſerit? Debitor ab utroque liberabitur. *l.* 31. §. 1. *ff. de Novat.* See what Novation and Delegation are, in the Titles where they are expreſſly treated of.

[e] *See the ſixth Article.*

V.

5. The Demand by one is of uſe to the others. If where ſeveral Perſons have one and the ſame Right, one of them brings his Action for the Debt, his Demand interrupts the Preſcription againſt the other Creditors[f].

[f] *See the ninth Article of the foregoing Section, and what is cited on it.*

VI.

6. One of theſe Creditors cannot do any prejudice to the others. The uſe which one of the Creditors may make of the Right to demand alone, and receive the whole Debt, cannot hurt the others. And he ought to account to them for the manner in which he ſhall have uſed this Right[g].

[g] *This is a conſequence of the nature of this kind of Solidity among Creditors. For they have not left their Debt to the hazard which of them can get payment of it firſt.*

TITLE IV.

Of CAUTIONS, or SURETIES.

Uſe of Cautions and Sureties. NO body is ignorant of the frequent Uſe of Cautions, or Sureties. Theſe two Names are given to thoſe who oblige themſelves for others whoſe Obligation is not thought ſufficient, whether it be for Money, or for other Cauſes. They are called Cautions, becauſe their Obligation is a Security: They are called Sureties, becauſe it is upon their Faith that thoſe to whom they engage themſelves rely. This is the original Signification of theſe two words.

The Obligation therefore of Cautions, or Sureties, is an Acceſſory to another Obligation. Thus we call the Perſon for whom the Surety binds himſelf, the principal Debtor.

The Uſe of Sureties extends to all manner of Engagements, and comprehends two ſorts of Suretiſhips. One is concerning the Payment of a Sum of Money, or the performance of ſome other Engagement; ſuch as the Undertaking of a Work, a Warranty, and others of the like nature, to aſſure the perſon to whom the Surety engages himſelf, that what is promiſed by the principal Debtor, ſhall be performed. The other ſort of Suretiſhip relates to the validity of the Obligation, in the caſes where it may be liable to be vacated, as if the principal Debtor were a Minor, altho' able to pay, the Engagement of the Surety would be not only to pay the Debt, if the Minor's Obligation were not annulled, but to make good the Obligation, in caſe the Minor ſhould be relieved from it, and to pay for him[a].

Suretiſhips may be divided into three ſorts. The firſt is of thoſe that are given willingly, and by mutual conſent, for all manner of Engagements, whether they be formed by Covenant, or otherwiſe. Thus, one gives Caution for a Loan, for a Warranty, for the price of a Sale, for the rent of a Leaſe, and for other Obligations, which are contracted by Covenants. Thus Tutors and Guardians ſometimes give Security.

The ſecond ſort is of Suretiſhips enjoined by ſome Law. Thus, by the *Roman* Law, Plaintiffs and Defendants were obliged to give Caution for ſeveral cauſes relating to Judicial Proceedings[b]. Thus, in *France*, by an Edict of the Month of *January* 1557, thoſe to whom any thing falls by Devolution, are obliged to give Caution *to pay what ſhall be adjudged.* And there are other caſes, in which the Ordinances oblige to give Caution, which it would be to no purpoſe to mention here.

The third ſort of Suretiſhips, is of thoſe which are ordered by the Judge, whether he does it at the inſtance, or upon an offer of the parties, or *ex officio.* Thus, ſometimes a thing that is in diſpute is adjudged to one of the parties proviſionally, he giving Security to reſtore it, if it be ſo decreed: Thus, Bail is ordered to be given for the Appearance of a Priſoner, who is ſet at liberty on this condition: Thus, in ſettling the rank of payment among Creditors, it is ordered that thoſe who ſhall receive Sums which may be liable to be demanded back, ſhall give Caution to pay them back again to prior Creditors, to whom the ſaid Sums ſhall be found to be due, as in the caſe of a conditional Debt, as has been remarked on the ſeventeenth Article of the third Section of Pawns and Mortgages.

[*As to what the* Roman *Law directed in relation to Caution being given by all Plaintiffs and Defendants, for proſecuting and defending the* Suit, *and paying what ſhould be adjudged, either for Damages or Expences, this is ſtrictly obſerved in the High Court of Admiralty of* England. *Clarke's* Praxis Curiæ Admiralitatis Angliæ. *Tit.* 11. 13.]

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[a] *See the ſecond Article of the fifth Section.*

[b] *V. Tit. inſt. de ſatiſd. & ff. lib.* 2. *Tit.* 6. 8. 9. 11.

SECT. I.

The nature of the Obligation of Cautions, or Sureties, and the manner in which it is contracted.

The CONTENTS.

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3. *It may be given for a Natural Obligation.*
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7. *Surety without the knowledge of the Debtor.*
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11. *The Minor ſaves his Surety harmleſs, if he is not relieved from his Obligation.*
12. *The giving of counſel, and recommending, do not bind one as Surety.*
13. *Qualities of Caution, or Security, taken in a Court of Juſtice.*
14. *Heirs, or Executors, of Sureties.*
15. *When a Surety is once received, he cannot afterwards be rejected.*
16. *The Sureties for perſons that are accountable, are not bound for the penalties to which they may be liable.*

I.

1. *Definition of Sureties.* SUreties, are thoſe who oblige themſelves for other perſons, and who anſwer in their names for the ſecurity of ſome Engagement, ſuch as a Loan, a Warranty, or any other Obligation[a].

[a] Aut proprio nomine quiſque obligatur, aut alieno. Qui autem alieno nomine obligatur, fidejuſſor vocatur. Et plerumque ab eo quem proprio nomine obligamus alios accipimus qui eadem obligatione teneantur: dum curamus, ut quod in obligationem deduximus, tutius nobis debeatur. *l.* 1. §. 8. *ff. de oblig. & act.* See the following Article.

II.

2. *Caution may be given for all manner of Engagements.* There is no honeſt and lawful Engagement, to which we may not add the ſecurity of a Caution, to that which the principal Debtor gives himſelf[b], provided that the giving of the ſaid Caution be not contrary to good manners. For there are lawful Engagements, in which it would not be decent to give Security[c].

[b] Omni obligationi fidejuſſor accedere poteſt. *l.* 1. *ff. de fidejuſſ.* Et generaliter omnium obligationum fidejuſſorem accipi poſſe nemini dubium eſt. *l.* 8. §. 6. *eod.* §. 1. *inſt. eod.*

[c] *See the ninth Article.*

III.

3. *It may be given for a Natural Obligation.* This uſe of Suretiſhips in all manner of Engagements, extends not only to thoſe which are made with the mutual conſent of the parties by Covenants, to thoſe of Tutors and Curators, to thoſe even of Sureties themſelves; (for we may take ſecurity for a Surety;) and in general, to all other ſorts of Engagements, in which the Civil Laws give the Creditor an Action againſt the perſon who is obliged, and which are called, for this reaſon, Civil Obligations[d]: But Caution may alſo be given for that ſort of Obligations, which are called barely Natural, of which we have ſpoken in the ninth Article of the fifth Section of Covenants. For in theſe ſorts of Obligations, there is formed a natural Engagement, which he who becomes Surety for it makes good in his perſon, altho' in the perſon of the principal Debtor it be uſeleſs. Thus, in the Cuſtoms where the Wife who is in the power of her Huſband cannot be bound any manner of way, if the Huſband becomes Surety for the Obligation of his Wife, he ſhall be obliged, altho' the Obligation of the Wife remains always null[e].

[d] Præterea ſciendum, fidejuſſorem adhiberi omni obligationi poſſe, ſive re, ſive verbis, ſive conſenſu. Pro eo etiam qui jure honoratio obligatus eſt, poſſe fidejuſſorem accipi, ſciendum eſt. *l.* 8. §. 1 & 2. *de fidejuſſ.*

A tutore, qui teſtamento datus eſt, ſi fuerit fidejuſſor datus, tenetur. *d. l.* 8. §. 4. *ff. de fidejuſſ.*

Pro fidejuſſore fidejuſſorem accipi nequaquam dubium eſt. *d. l.* 8. §. *ult.*

This Surety of a Surety that is taken in a Court of Juſtice, is termed in France *a Certifier; becauſe he certifies, or undertakes that the firſt Surety is good.*

[e] Fidejuſſor accipi poteſt quoties eſt aliqua obligatio *civilis,* vel *naturalis* cui applicetur. *l.* 16. §. 3. *ff. de fidej.* At nec illud quidem intereſt utrum *civilis,* an *naturalis* ſit obligatio: cui adjicitur fidejuſſor. Adeò quidem, ut pro ſervo quoque obligetur. §. 1. *inſt. eod.*

See the ninth Article of the fifth Section of Covenants.

IV.

4. *Security for a Debt to be contracted.* We may give Security not only for a preſent Obligation, or for one that

has been already contracted, but alſo for an Obligation to be contracted; as if he who foreſees a Buſineſs for which he may ſtand in need of Money, gives beforehand the ſecurity of a Surety, to the perſon who is to lend him the Money; the ſaid Surety obliging himſelf before-hand for the Money that is to be lent. And this might happen, if, for Example, he who is to be Surety ſhould have affairs to call him away before the Money is actually paid to the Borrower, or in other caſes, and for other cauſes, as for the Warranty of a Sale, or ſome other Engagement[f].

[f] Stipulatus ſum à reo, nec accepi fidejuſſorem, poſteà volo adjicere fidejuſſorem, ſi adjecero, fidejuſſor obligatur. *l. 6. ff. de fidejuſſ.* Fidejuſſor & præcedere obligationem, & ſequi poteſt. §. 3. *inſt. eod.*

Adhiberi autem fidejuſſor tam futuræ, quam præſenti obligationi poteſt, dummodò ſit aliqua, vel naturalis futura obligatio. *l. 6. §. ult. ff. de fidejuſſ.* Si ita ſtipulatus à Seio fuero, *quantam pecuniam Titio quandoque credidero, dare ſpondes?* Et fidejuſſores accepero: deinde Titio ſæpiùs credidero: nempe Seius in omnes ſummas obligatus eſt, & per hoc fidejuſſores quoque. *l. 55. eod.* Fidejuſſor futuræ quoque actionis accipi poteſt. *l. 50. ff. de pecul.*

V.

5. The Surety can be bound for no more than the Debtor.

Of what nature ſoever the principal Obligation be, the Engagement of the Surety can never be harder than that of the principal Debtor. For his Obligation is only an Acceſſory to the other[g]; and if he ſhould oblige himſelf to any thing more, or to conditions that are more burdenſome, he would be Surety only for what is contained in the principal Obligation. And the Obligation for the overplus will not be reckoned a part of the Suretiſhip, but his own proper Debt, if by the circumſtances the Obligation for the overplus ought to ſubſiſt.

[g] Illud commune eſt in univerſis qui pro aliis obligantur, quod ſi fuerint in duriorem cauſam adhibiti, placuit eos omninò non obligari. *l. 8. §. 7. ff. de fidejuſſ. l. 16. §. 1. & 2. eod.*

Hi qui *acceſſionis loco* promittunt in leviorem cauſam accipi poſſunt, in deteriorem non poſſunt. *l. 34. eod.*

Fidejuſſores ita obligati non ſunt, ut plus debeant quàm debet is pro quo obligantur. Nam eorum obligatio acceſſio eſt principalis obligationis: nec plus in acceſſione poteſt eſſe, quàm in principali re. §. 5. *inſt. eod.*

See the laſt Text quoted on the following Article.

VI.

6. But he may be bound for leſs.

The Obligation of the Surety may be leſs than that of the principal Debtor. Thus, he may oblige himſelf only for a part of the Debt, or of ſome other Engagement[h]. Thus, he may oblige himſelf only upon ſome condition, altho' the Debt be pure and ſimple[i]. Thus, he may take a longer term than that of the principal Obligation[l], or a place more convenient for payment[m]. And in a word, he may ſoften his condition all the ways they can agree on.

[h] Fidejuſſores & in partem pecuniæ & in partem rei rectè accipi poſſunt. *l. 9. ff. de fidejuſſ.*

At ex diverſo ut minus debeant obligari poſſunt. Itaque ſi reus decem aureos promiſerit, fidejuſſor in quinque rectè obligatur. §. 5. *inſt. eod.*

[i] Item ſi ille pure promiſerit, fidejuſſor ſub conditione promittere poteſt. *d.* §. 5. *l.* 6. §. 1. *ff. eod.*

[l] Non ſolùm autem in quantitate, ſed etiam in tempore minus aut plus intelligitur. Plus eſt enim ſtatim aliquid dare: minus eſt poſt tempus dare. *d.* §. 5.

[m] Qui certo loco dari promiſit, aliquatenus duriori conditioni obligatur—— Quare ſi reum purè interrogavero, & fidejuſſorem cum adjectione loci accepero, non obligabitur fidejuſſor. *l.* 16. §. 1. *ff. de fidejuſſ.*

VII.

7. Surety without the knowledge of the Debtor.

One may become Surety without an Order from the perſon for whom he binds himſelf, and even without his knowledge[n]. For on the part of the Creditor, it is juſt that he be at liberty to take his Security independently of the will of his Debtor: and as to the Surety himſelf, he may do this good office to his abſent Friend, in the ſame manner as one may take care of the affairs of an abſent perſon[o].

[n] Fidejubere pro alio poteſt quiſque, etiamſi promiſſor ignoret. *l.* 30. *ff. de fidejuſſ.* Fidejuſſori negotiorum geſtorum eſt actio, ſi pro abſente fidejuſſerit. *l.* 20. §. 1. *ff. mand.*

[o] *See the Title of thoſe who manage the Affairs of others without their knowledge.*

VIII.

8. In Crimes, there is no giving of Security, no more than Warranty.

In the matter of Crimes and Offences, thoſe who commit them by order of other perſons, or who make themſelves Accomplices of them, cannot take Security, nor Warranty, for being ſaved harmleſs from the events which may follow thereupon; nor for aſſuring to themſelves the profits which may ariſe from thence. For the Obligation of ſuch a Surety, and of ſuch a Warranty, would be another Crime. But he who has committed a Crime, or an Offence, may give Security for the Civil Intereſt, and even for the Fines, and other pecuniary Mulcts, which he may have incurred by his Offence. For it is juſt, and for the publick Good, that they ſhould be acquitted[p].

[p] Sed & ſi ex delicto oriatur actio, magis putamus teneri fidejuſſorem. *l.* 8. §. 5. *ff. de fidejuſſ.* Id quod vulgò dictum eſt, *maleficiorum fidejuſſorem accipi non poſſe*, non ſic intelligi debet, ut in pœnam furti is cui furtum factum eſt, fidejuſſorem accipere non poſſit. Nam pœnas ob maleficia ſolvi magna ratio ſuadet. Sed ita potiùs, ut qui cum alio cum

quo furtum admiſit, in partem quam ex furto ſibi reſtitui deſiderat, fidejuſſorem obligare non poſſit. Et qui alieno hortatu ad furtum faciendum provectus eſt, ne in furti pœna ab eo qui hortatus eſt, fidejuſſorem accipere poſſit. In quibus caſibus illa ratio impedit fidejuſſorem obligari, quia ſcilicet in nullam rationem adhibetur fidejuſſor: cùm flagitioſæ rei ſocietas coita nullam vim habet. *l. 70. §. ult. ff. de fidejuſſ.*

IX.

9. Some honeſt and fair Engagements, in which it is not lawful to take Security.

There are ſome honeſt and lawful Engagements, in which one cannot take Security, becauſe the nature of the Engagement would make the taking of Security to be reckoned an undecent thing. Thus, it would be contrary to good manners for a Partner to give Security to his Co-Partner, that he will not cheat him: or for an Umpire to give Security that he will pronounce Sentence in the matter referred to him, or judge uprightly. Thus, in a caſe of another nature, one ought not to take Security for the reſtitution of a Dowry, neither from the Huſband, nor from other perſons who are to receive it for his uſe; ſuch as his Father, or his Guardian. For the Dowry being an Acceſſory to the Engagement of the Marriage, it would be unworthy of the ſtrict Union of Matrimony, which puts the Wife under the power of the Huſband, with whom ſhe intruſts her perſon, to demand any ſuch Security[q]. And it would be a ſeed of diſcord in Families, which ought to be united by Marriages. But the Father and Mother of the Huſband may oblige themſelves for their Son, to make reſtitution of the Dowry. For the Obligation of their Goods, is the ſame with that of the Son, who is to inherit them. And it is uſual, that he who marries has no other Eſtate beſides what his Parents give him, either at the time of the Marriage, or at their death; which makes their Obligation for the Security of the Dowry to be juſt and reaſonable.

[q] Sive ex jure, ſive ex conſuetudine lex proficiſcitur, ut vir uxori fidejuſſorem, ſervandæ dotis exhibeat, tamen jubemus eam aboleri. *l. 1. C. de fidej. vel mand. dot. dent.*

Generali definitione conſtitutionem priſtinam ampliantes ſancimus, nullam eſſe ſatiſdationem, vel mandatum pro dote exigendum vel à marito, vel à patre ejus, vel ab omnibus qui dotem ſuſcipiunt. Si enim credendam mulier ſeſe, ſuamque dotem patri mariti exiſtimavit, quare fidejuſſor vel alius interceſſor exigitur, ut cauſa perfidiæ in connubio eorum generetur. *l. 2. eod.* Seipſam marito committit. *l. 8. C. de pact. conv.*

Seeing our Uſage allows an indefinite liberty of inſerting in Contracts of Marriage all ſorts of Covenants, and even ſome which would be unlawful in other Contracts, ſuch as the Inſtitution of an Heir that is irrevocable; it would ſeem that for that reaſon, and in conſideration of the favour of Dowries, the taking of Security for a Dowry ought not to be forbidden, and that the Surety who binds himſelf on that account, ought not to be diſcharged from his Engagement, eſpecially if the Dowry be in danger. But nevertheleſs we have thought proper to inſert here the Rule which was preſcribed in this matter by the Chriſtian Emperors, and which is ſo agreeable to the mutual love and confidence which our Religion enjoins to married perſons.

X.

10. The Surety is not diſcharged by the Reſtitution of the principal Debtor.

Altho' the Obligation of a Surety be only an Acceſſory to that of the principal Debtor, yet he who has bound himſelf Surety for a perſon who may get himſelf relieved from his Obligation, ſuch as a Minor, or a Prodigal who is interdicted, is not diſcharged from his Suretiſhip by the Reſtitution of the principal Debtor: and the Obligation ſubſiſts in his perſon; unleſs the Reſtitution were grounded upon ſome fraud, or other vice which ſhould have the effect to annul the right of the Creditor. But the bare Reſtitution of the principal Debtor, is an event which the Creditor did foreſee and guard againſt, by ſecuring his Debt by the additional Obligation of a Surety, who on his part could not be ignorant of this conſequence of his Engagement[r].

[r] Si ea quæ tibi vendidit poſſeſſionem interpoſito decreto præſidis, *ætatis tantummodò auxilio* juvatur, non eſt dubium, fidejuſſorem ex perſona ſua obnoxium eſſe contractui. Verùm ſi dolo malo apparuerit contractum interpoſitum eſſe: manifeſti juris eſt, utrique perſonæ tam venditoris, quàm fidejuſſoris conſulendum eſſe. *l. 2. C. de fidejuſſ. min.* Marcellus ſcribit, ſi quis pro pupillo ſine tutoris authoritate obligato, prodigove vel furioſo fidejuſſerit, magis eſſe ut ei non ſubveniatur. *l. 25. ff. de fidejuſſ.* Quòd ſi pro furioſo jure obligato fidejuſſorem accepero, tenetur fidejuſſor. *l. 70. §. 4. eod.* Rei autem cohærentes exceptiones, etiam fidejuſſoribus competunt, ut rei judicatæ, doli mali, juriſjurandi, quod metus cauſa factum eſt—Idem dicitur, & ſi pro filiofamilias contra ſenatuſconſultum quis fidejuſſerit, aut pro minore vigintiquinque annis circumſcripto. Quod ſi deceptus ſit in re, tunc nec ipſe ante habet auxilium, quam reſtitutus fuerit, nec fidejuſſori danda eſt exceptio. *l. 7. in f. ff. de except.*

We muſt obſerve from this laſt Law, the difference which the Romans *made between the Surety for Money borrowed by a Son who was under his Father's Juriſdiction, and the Surety of a Minor. The Surety for a Son living under the Paternal Authority was not obliged, no more than the Son himſelf, becauſe of the vice of the Obligation which was prohibited by Law.* l. 9. §. 3. ff. de Senat. Maced. *But the Surety for a Minor was not diſcharged with him, if the Minor was deceived only in the thing, and not thro' any fraud uſed by the Creditor; as for example, if the Minor having borrowed Money, he had not laid it out to any profitable uſe. For in this caſe the Obligation is annulled only becauſe of the Minority, and not on account of any vice in the Obligation.* Ætatis tantummodò auxilio. *d. l. 2. Cod. de fidej. min.*

See the firſt, ſecond, third, fourth and fifth Articles of the fifth Section of this Title, and the eighth Article of the firſt Section of the Solidity among two or more, &c. As to the Obligation of a Son ſubject to the Paternal Authority,

Authority, ſee the fourth Section of the Loan of Money and other things to be reſtored in kind.

XI.

11. The Minor ſaves his Surety harmleſs, if he is not relieved from his Obligation.

The Surety for a Minor has his Action of Relief againſt him to ſave him harmleſs, if the Obligation has been profitable to the Minor. But if it has not been advantagious to him, and he, on that account has been relieved from it, he may likewiſe be relieved from his Obligation to indemnify his Surety[f].

[f] Poſtquàm in integrum ætatis beneficio reſtitutus es, periculum evictionis emptori, cui prædium ex bonis paternis vendidiſti, præſtare non cogeris. Sed ea res fidejuſſores, qui pro te intervenerunt, excuſare non poteſt. Quare mandati judicio, ſi pecuniam ſolverint, aut condemnati fuerint, convenieris: modò ſi eo quoque nomine reſtitutionis auxilio non juvaberis. *l. 1. C. de fidej. min.* See the ſecond Article of the fifth Section.

XII.

12. The giving of counſel and recommending, do not bind one as Surety.

The Engagement of Sureties conſiſts in this, that they oblige themſelves in their own names, to be anſwerable for the effect of the Obligation for which they become Sureties. But thoſe who without any deſign of engaging themſelves, recommend the perſon who is to be bound, or adviſe the treating with him, do not by that means bind themſelves as Sureties; unleſs there were on their part ſome fraud, or other circumſtances, which ought to make them Guarantees of the event[t].

[t] *See the laſt Article of the firſt Section of Proxies, Mandates,* &c.

XIII.

13. Qualities of Caution, or Security taken in a Court of Juſtice.

When a private perſon receives Security, he accepts, or rejects, as he thinks good, thoſe who are offered to him as Sureties, and he ſettles his Security in ſuch manner as he and his Debtor can agree. But when Caution, or Security, is taken in a Court of Juſtice, it is the Office of the Judge to receive or reject it, according as the perſon who offers the Security, and the Surety himſelf, can ſhew that the Security is ſufficient; which depends on three qualities that are to be conſidered in Sureties, according to the Engagements for which they are to be anſwerable; the ſolvency of the Perſons, the facility of ſuing them at Law, and the validity of their Engagement. Thus, the want of an Eſtate, the dignity of the Perſons, and the other qualities which make the ſuing them at Law difficult, and their incapacity of being bound, are cauſes for rejecting the Cautions, or Sureties, that are offered in a Court of Juſtice[u].

[u] Fidejuſſor in judicio ſiſtendi cauſa locuples videtur dari, non tantùm ex facultatibus, ſed etiam ex conveniendi facilitate. *l. 2. ff. qui ſatiſd. cog.* Si fidejuſſor non negetur idoneus, ſed dicatur habere fori præſcriptionem, & metuat petitor ne jure fori utatur: videndum quid juris ſit, & Divus Pius (ut & Pomponius libro epiſtolarum refert, & Marcellus libro tertio digeſtorum, & Papinianus libro tertio quæſtionum) Cornelio Proculo reſcripſit, meritò petitorem recuſare talem fidejuſſorem. Sed ſi aliàs caveri non poſſit, prædicendum ei, non uſurum eum privilegio ſi conveniatur. *l. 7. eod.*

Qui ſatiſdare promiſit, ita demùm impleſſe ſtipulationem ſatiſdationis videtur, ſi eum dederit acceſſionis loco, qui *obligari poteſt, & conveniri.* l. 3. ff. de fidej.

Altho' ſome of theſe Texts do not relate to all manner of Sureties, yet we may apply them to the Rule explained in this Article.

XIV.

14. Heirs or Executors of Sureties.

The Engagements of Sureties paſs to their Heirs[x], or Executors, excepting ſuch as affect the perſon of the Surety, ſuch as Impriſonment, or the like, if the Engagement was ſuch that the Surety was bound to deliver himſelf up priſoner. For he had power to bind his own perſon, but not the perſon of his Heir, or Executor. And as the Heirs, or Executors of Sureties enter into their Engagements, ſo they have likewiſe the ſame benefits which the Laws grant to the Sureties themſelves[y].

[x] Fidejuſſor & ipſe obligatur, & hæredem obligatum relinquit, cùm rei locum obtineat. *l. 4. §. 1. ff. de fidejuſſ. §. 2. inſt. eod.*

[y] Sicut ipſi fidejuſſori ita hæredibus quoque eorum ſuccurrendum. *l. 27. §. 3. eod,*

See what theſe benefits are, Sect. 2. Art. 1. and 6. Sect. 4. Art. 1. See the Remark on the firſt Article of the fourth Section.

XV.

15. When a Surety is once received, he cannot afterwards be rejected.

He who has accepted of a Surety, having once declared his approbation of him, cannot afterwards demand another; even altho' the ſaid Surety ſhould prove inſolvent[z].

[z] Planè ſi non idoneum fidejuſſorem dederit, magis eſt ut ſatiſdatum ſit: quia qui admiſit eum fidejubentem, idoneum eſſe comprobavit. *l. 3. in f. ff. de fidejuſſ.*

XVI.

16. The Sureties for perſons that are accountable, are not bound for the Penalties to which they may be liable.

The Sureties for Officers, and other perſons imployed in the Receipt of the publick Money, are not anſwerable for the Pecuniary Mulcts, to which the ſaid perſons may be liable, on account of their miſdemeanor[a].

[a] Fidejuſſores Magiſtratuum in pœnam vel multam quam non ſpopondiſſent non debere conveniri decrevit. *l. 68. ff. de fidejuſſ.* Fidejuſſores Magiſtratuum in his quæ ad reipublicæ adminiſtrationem pertinent teneri, non in his quæ ob culpam, vel delictum eis pœnæ nomine irrogentur, tam mihi quàm Divo Severo patri meo placuit. *l. ult. C. de per. eor. qui pro mag. int.*

SECT.

SECT. II.

Of the Engagements of the Surety to the Creditor.

The CONTENTS.

1. *The Surety cannot be ſued till after the diſcuſſion of the principal Debtor.*
2. *Exception as to Judicial Sureties.*
3. *Another Exception, when the Debtor is abſent, and has no viſible Eſtate.*
4. *The diſcuſſion does not extend to Goods alienated by the Debtor.*
5. *The Surety cannot oblige the Creditor to ſue the Debtor.*
6. *In what manner ſeveral Sureties are bound.*
7. *If the Obligation of one of the Sureties is annulled, the others anſwer for his portion.*
8. *What are the Exceptions of the Debtor, that are common to the Surety.*
9. *The Engagement of the Surety follows the Obligation.*

I.

1. The Surety cannot be ſued till after the diſcuſſion of the principal Debtor.

THE Obligation of the Surety being only acceſſory to, and coming in aid of that of the principal Debtor, and for ſatisfying what he ſhall fail to acquit, the ſaid Obligation is as it were conditional, not to have its effect, except in the caſe where the Debtor is not able to pay. Thus, the Surety cannot be ſued, till after the Creditor has uſed all neceſſary diligence for the diſcuſſion of the principal Debtor, and has not been able to recover payment[a].

[a] Qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis quos pro eo obligavit ſuum conſequi. *§. ult. inſt. de replic.*

Si quis igitur crediderit. & fidejuſſorem, aut mandatorem, aut ſponſorem acceperit, is non primùm adverſus mandatorem, aut fidejuſſorem, aut ſponſorem accedat: neque negligens debitoris interceſſoribus moleſtus ſit: ſed veniat primùm ad eum qui aurum accepit, debitumque contraxit, & ſi quidem inde receperit, ab aliis abſtineat. Quid enim ei in extraneis erit à debitore completo? ſi vero non valuerit à debitore recipere aut in partem, aut in totum, ſecundùm quod ab eo non potuerit recipere, ſecundùm hoc ad fidejuſſorem, aut ſponſorem, aut mandatorem veniat: & ab illo quod reliquum eſt ſumat. *Nov.* 4. *c.* 1 In id quod defuiſſet fidejuſſores conveniendos. *l.* 68. §. 1. *in f. ff. de fidejuſſ. V. l.* 13. *in f. l.* 55. *in f. eod. l.* 116. *ff. de verb. oblig.*

Beſides this benefit of Diſcuſſion which is explained in this Article, there are two others which Sureties have. See the ſixth Article of this Section, and the firſt Article of the fourth Section, with the Remark upon it. *This benefit of Diſcuſſion is granted only to thoſe who are bound barely as Sureties; for their Obligation is explained by this quality. But if thoſe who with regard to the principal Debtor are only his Sureties, make themſelves principal Debtors with reſpect to the Creditor, and oblige themſelves, as is uſual, in this quality, equally with the principal Debtor, for the whole Debt, renouncing this benefit of Diſcuſſion, they are no more to be conſidered as Sureties.* See the third Article of the firſt Section of the Solidity among two or more, *&c.* with the Remark on it. See the two following Articles.

II.

2. Exception as to Judicial Sureties.

Thoſe who are Judicial Sureties, may be proſecuted without a previous diſcuſſion of the principal Debtor[b], not only becauſe they oblige themſelves to the Court of Juſtice, the Authority whereof requires it ſhould be ſo; but alſo becauſe of the nature of the Debts in which this Security may be found to be neceſſary. For they are ſuch, that one ought not to allow in them the delay of a diſcuſſion. Thus, for Example, if purſuant to an Order of Juſtice for the payment of Creditors, one of them receives a Sum of Money, on condition that he give Security to reſtore it to other perſons to whom the ſaid Money ought to go, in a certain caſe, as that of the birth of a Child, who is called to a Subſtitution, or other the like caſe; the giving of this Security is ordained only to the end that the ſaid Money may be immediately repaid, if the caſe does happen, and that it be delivered to the perſon who ought to have it, in the ſame manner as if the Money had remained in the hands of the Receiver of all Monies depoſited in Court, which ought to be delivered up without delay. And we ſhall ſee in the other caſes of Judicial Sureties, a like Equity for not admitting in them the benefit of diſcuſſion.

[b] In ſtipulatione judicatum ſolvi, poſt rem judicatam ſtatim dies cedit: ſed exactio in tempus reo principali indultum differtur. *l.* 1. *ff. jud. ſolv. V. inſt. de ſatiſd. & l. ult.* §. 1. *C. de uſur. re jud.*

III.

3. Another Exception, when the Debtor is abſent, and has no viſible Eſtate.

If the principal Debtor is abſent, or has not a viſible Eſtate, ſo that no Action can be brought againſt him, nor he made to pay, the Surety may be ſued; unleſs he obtains a delay from the Court, in order to find out ſome Effects belonging to the Debtor, or to make him pay the Debt; after which delay if the Creditor is not ſatisfied, he may compel the Surety to pay the Debt[c].

[c] Si vero interceſſor, aut mandator, aut qui ſponſioni ſe ſubjecerit, adſit: principalem verò abeſſe

contigerit, acerbum eſt, creditorem mittere aliò, cùm poſſit mox interceſſorem, aut mandatorem, aut ſponſorem exigere——& cauſæ præſidens judex det tempus interceſſori. (Idem eſt dicere ſponſori & mandatori) volenti principalem deducere, quatenus ille priùs ſuſtineat conventionem, & ſic ipſe in ultimum ſubſidium ſervetur. *Nov.* 4. *c.* 1.

IV.

4. *The diſcuſſion does not extend to Goods alienated by the Debtor.*

The diſcuſſion which the Creditor is obliged to make of the Goods of the Debtor, before he ſues the Surety, does not extend to the Goods on which he has a Mortgage, and which have paſſed from the hands of the Debtor to Purchaſers and third Poſſeſſors; but only to the Goods which the Debtor has actually in his poſſeſſion. And the Creditor cannot ſue the third poſſeſſors, till he has firſt diſcuſſed the Goods of the Debtor, and likewiſe proſecuted his Perſonal Action againſt the Surety. But he cannot exerciſe the Mortgage which he has upon the Eſtate of the Surety, except in the caſe where he cannot recover payment out of what is in the hands of the third Poſſeſſor[d].

[d] Sed neque ad res debitorum, quæ ab aliis detinentur, veniat priùs antequam tranſeat viam ſuper perſonalibus contra mandatores, & fidejuſſores, & ſponſores. Sicque ad res veniens principalis debitoris, ſive ab alio detineantur, & detinentes eas conveniens, ſi neque inde habuerit ſatisfactionem tunc veniat adverſus res fidejuſſorum, & mandatorum & ſponſorum. *Nov.* 4. *c.* 2.

By the Cuſtoms of ſome Provinces in France, *this Diſcuſſion is obſerved; but in other Cuſtoms the third Poſſeſſor may be ſued without this previous Diſcuſſion.* See the ſixth Article of the third Section of Mortgages, and the Remark which is there made upon it.

V.

5. *The Surety cannot oblige the Creditor to ſue the Debtor.*

Altho' it be the intereſt of the Surety, that the Creditor ſhould recover payment from the Debtor, yet he cannot oblige the Creditor to ſue him for it. For the Creditor may defer the diſcuſſion of the principal Debtor, without loſing the Security which he has taken, by having another perſon bound for the Debt[e]. But if a Minor, whoſe Guardian had given Security for his Adminiſtration, being come of age, and finding his Guardian indebted to him, and at that time able to pay him, ſhould neglect to ſue him, and that in the mean while the Guardian ſhould become inſolvent, his Surety ought not in this caſe to be eaſily condemned to the Minor[f]. For the Engagement of this Surety was only to anſwer for the Guardian's Adminiſtration, and for his being able to pay, after the expiration of the Guardianſhip, whatever he ſhould chance to be indebted to the Minor. Thus, the Surety having ſatisfied his Engagement, ſince the Guardian was ſolvent after the expiration of the Guardianſhip, the negligence of the Minor in not ſuing him after the Account was ſtated, might be imputed to him, according to the circumſtances.

[e] Si fidejuſſor creditori denunciaverit, ut debitorem ad ſolvendam pecuniam compelleret, vel pignus diſtraheret, iſque ceſſaverit: an poſſit eum fidejuſſor doli mali exceptione ſummovere? Reſpondit non poſſe. *l.* 62. *ff. de fidejuſſ.*

See the third Article of the third Section, as to the diligence which the Surety may uſe on his part againſt the Debtor.

[f] Si fidejuſſores in id accepti ſunt *quod à curatore ſervari non poſſit*, & poſt legitimam ætatem tam ab ipſo curatore, quàm ab hæredibus ejus ſolidum ſervari potuit, & ceſſante eo qui pupillus fuit, ſolvendo eſſe deſierit, non temere utilem in fidejuſſores actionem competere. *l.* 41. *ff. de fidejuſſ.*

VI.

6. *In what manner ſeveral Sureties are bound.*

If ſeveral perſons become Sureties for one and the ſame thing, every one of them is anſwerable for the whole. For every one of them engages for the whole Debt, or other Engagement, and to make up what the principal Debtor ſhall not be able to pay. Thus, their Obligation naturally binds every one of them for the whole Debt, after the diſcuſſion of the principal Debtor. But their Obligation is divided in the ſame manner, and for the ſame reaſon, as that of principal Debtors, who are jointly bound each of them for the whole Debt. Thus, when the Sureties are ſolvent, the Creditor can demand from each of them only his ſhare of the Debt. But the portions of thoſe who are inſolvent are thrown upon the others, and every one bears his part thereof upon the foot of his own portion of the whole Debt[g].

[g] Si plures ſint fidejuſſores, quotquot erunt numero ſinguli in ſolidum tenentur. Itaque liberum eſt creditori à quo velit ſolidum petere. Sed ex epiſtola Divi Hadriani compellitur creditor à ſingulis, qui modo ſolvendo ſunt litis conteſtatæ tempore partes petere. Ideòque ſi quis ex fidejuſſoribus eo tempore ſolvendo non ſit, hoc cæteros onerat. §. 4. *inſt. de fidejuſſ.* Inter fidejuſſores non ipſo jure dividitur obligatio ex epiſtola Divi Hadriani: & ideò ſi quis eorum ante exactam à ſe partem ſine hærede deceſſerit, vel ad inopiam pervenerit, pars ejus ad cæterorum onus reſpicit. *l.* 26. *ff. eod.* Ut autem is qui cum altero fidejuſſit non ſolus conveniatur, ſed dividatur actio inter eos qui ſolvendo ſunt, ante condemnationem ex ordine poſtulari ſolet. *l.* 10. §. 1. C. *eod.* See the firſt Article of the fourth Section.

This Right which Sureties have to divide their Obligations, is called the benefit of Diviſion. *See the third Article of the firſt Section of the Solidity,* &c. *the firſt Article of this Section, and the firſt Article of the fourth Section, with the Remarks on thoſe Articles, where it appears that thoſe who have this benefit may renounce it.*

VII.

7. *If the Obligation of one of the Sureties is annulled, the others anſwer for his portion.*

If of two or more Sureties, one happens to have ſufficient reaſons for vacating his Obligation; as if it was a Minor, or a married Woman who had no power to bind her ſelf, or who is not bound according to form, the other Sureties will be anſwerable for the portion of this Surety who is diſcharged.

[k] Si Titius & Seia pro Mævio fidejuſſerint, ſubducta muliere dabimus in ſolidum adverſus Titium actionem. Cùm ſcire potuerit, aut ignorare non debuerit, mulierem fruſtra intercedere. *l. 48. ff. de fidejuſſ.*

VIII.

8. *What are the exceptions of the Debtor that are common to the Surety.*

All the defences which the Debtor has againſt the Creditor, are common to the Sureties. As if the Obligation, or a part of it, happens to be acquitted; if it is preſcribed, if the Debt was referred to the Debtor's Oath, and he had ſworn, either that he never owed any thing, or that he had paid it; or if he has other Exceptions of the like nature. For the Surety is only anſwerable for what ſhall be legally due: And whatever annuls or diminiſhes the Obligation of the Debtor, annuls or diminiſhes the Obligation of the Surety, which is an Acceſſory to the other: Thus, he may make uſe of theſe defences, altho' the principal Debtor ſhould decline to uſe them himſelf[l]. But if the defences of the principal Debtor are only drawn from his own perſon; as if he may obtain relief becauſe he was a Minor when he contracted the Obligation; if he cannot be ſued becauſe he has made over all his Effects to his Creditors, or becauſe they have been confiſcated; theſe ſorts of Exceptions will not avail the Surety: For it was to guard againſt them that the Creditor got the Surety to be bound[l].

[l] Ex perſona rei, & quidem invito reo, exceptio & cætera rei commoda fidejuſſori, cæteriſque acceſſionibus competere poteſt. *l. 32. ff. de fidejuſſ. l. 19. ff. de exception.*

Defenſiones, ſive exceptiones ad interceſſores extendi, quibus reus principalis, integro manente ſtatu, munitus eſt, conſtat. *l. 11. C. de except. ſeu praſc. §. 4. inſt. de replicat.* Si reus juravit, fidejuſſor tutus ſit. *l. ult. in f. ff. de jurejur.*

See the firſt and the following Articles of the fifth ection.

[l] Sane quædam exceptiones non ſolent (fidejuſſoribus) accommodari. Ecce enim debitor ſi bonis ſuis ceſſerit, & cum eo creditor experiatur, defenditur per exceptionem, ſi bonis ceſſerit: ſed hæc exceptio fidejuſſoribus non datur. Ideò ſcilicet quia qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis quos pro eo obligavit, ſuum conſequi. *d. §. 4. inſt. de replic.* Si Lyſias ademptâ parte bonorum exulare juſſus eſt, non niſi pro parte quam retinuit creditoribus obligatus eſt. Verùm qui pro eo ſuam fidem aſtrinxerunt, jure priſtino conveniri poſſunt. *l. 1. C. de fidejuſſ.* See the ſixth Article of the fifth Section.

IX.

9. *The engagement of the Surety follows the Obligation.*

The Engagement of the Surety is not limited to the perſon of the Creditor, to whom he obliges himſelf, but his Obligation is annexed to that of the principal Debtor, and paſſes with it to the perſons who ſhall afterwards have the right to it. And if, for Example, an Heir, or Executor, takes Security from one that is Debtor to the Inheritance, and is obliged afterwards to reſtore the Inheritance to another, either becauſe of a Subſtitution, or becauſe his Inſtitution not ſubſiſting, he ceaſes to be Heir, or Executor; this Surety will remain obliged to him to whom the Inheritance ſhall be reſtored[m].

[m] Hæres à debitore hæreditario fidejuſſorem accepit, deinde hæreditatem ex Trebelliano reſtituit, fidejuſſoris obligationem in ſuo ſtatu manere, ait. Idemque in hac cauſa ſervandum, quod ſervaretur cùm hæres contra quem emancipatus filius bonorum poſſeſſionem accepit, fidejuſſorem accepit. Ideoque in utraque ſpecie tranſeunt actiones. *l. 21. ff. de fidejuſſ.*

This Surety cannot pretend that he became bound only in conſideration of the ſaid Heir or Executor. For beſides that he ought to have expreſſed ſo much, it might be replied to him, that if he had not engaged himſelf, the Creditor might have ſued the Debtor, or taken other Sureties.

SECT. III.

Of the Engagements of the Debtor towards his Surety, and of the Surety towards the Debtor.

The CONTENTS.

1. *The Debtor ought to ſave the Surety harmleſs.*
2. *Indemnity for the conſequences of the Suretiſhip.*
3. *A caſe where the Surety may ſue the Debtor for his indemnity, before he has been called upon by the Creditor.*
4. *If the Surety pays before the Term.*
5. *He may pay after the term, without being called on.*
6. *If he pays imprudently what was not due.*
7. *If the Surety pays, being ignorant of the Exceptions which the Debtor has againſt the Debt.*

8. *If the Surety pays, notwithſtanding he had an Exception for his own perſon.*
9. *If the Surety does not make any defence, when ſued, or neglects to appeal from the Sentence.*
10. *If the Surety does not acquaint the Debtor, that he has paid the Debt for him.*
11. *Surety for a thing depoſited, or for a thing lent.*
12. *If the Creditor gives the Surety a diſcharge of the Debt.*

I.

1. The Debtor ought to ſave the Surety harmleſs.

THE principal Debtor is obliged to ſave his Surety harmleſs, either by getting him diſcharged from his Suretiſhip, or by acquitting the Debt. And altho' there ſhould be no expreſs promiſe to indemnify him, yet it is enough that it does appear that the Surety is obliged for the Debtor only in this quality. For it implies the Engagement to ſave him harmleſs[a].

II.

2. Indemnity for the conſequences of the Suretiſhip.

If the Creditor, not receiving ſatisfaction from the principal Debtor, brings his Action againſt the Surety, and forces him to pay the Debt, the Surety will recover from the Debtor, both the Principal Sum and Intereſt, which he ſhall have paid to the Creditor, as alſo the Intereſt of the ſaid Principal and Intereſt. For with regard to him, all the Money which he has paid on the Debtor's account, is a Capital of which he ought to be indemnified, in the ſame manner, and with much more reaſon than a Factor, or Agent, who does the buſineſs of an abſent perſon without his knowledge; ſeeing what Monies they advance, they do it of their own accord, and that it is by conſtraint that the Surety makes payment. And if he ſuffers otherwiſe any damage, or is put to any charges; as if the Creditor ſues him, if he attaches his Goods, he will alſo be reimburſed of the Expences which he ſhall have been put to, and of all his damages, and likewiſe of the charges he ſhall be at in ſuing the Debtor for his reimburſement[b].

III.

3. A caſe where the Surety may ſue the Debtor for his indemnity, before he has been called upon by the Creditor.

If the principal Debtor fails to pay the Creditor at the term, the Surety may ſue him, after the term is expired, to oblige him to acquit the Debt, altho' the Creditor demand nothing. And if the indemnity of the Surety were in hazard, he might ſue the Debtor, even before the term, for his own ſafety. Thus, when the Debtor ſquanders away his Eſtate, or that his Goods are attached, the Surety may put in his claim, and take ſuch other meaſures for his own ſafety, as the circumſtances of the danger ſhall render neceſſary[c].

IV.

4. If the Surety pays before the term.

If the Surety pays before the term, he cannot bring his Action for Relief againſt the Debtor, till after the term is elapſed[d]. For he had no power to make the condition of the Debtor worſe, who is not bound to pay till the term comes.

V.

5. He may pay after the term without being called on.

The Surety may, if he pleaſes, pay after the term. And altho' he has neither been adjudged to pay the Debt, nor ſued by the Creditor, yet he will nevertheleſs have his Action of Relief againſt the Debtor[e]. For the Obligation both of the Debtor and Surety, was to pay at the term. So that he acquits the common Engagement.

VI.

6. If he pays imprudently what was not due.

Altho' the Surety may pay the Debt without being ſued for it, he ought not however to do any prejudice to the exceptions which the principal Debtor might have againſt the Creditor. And if, for example, the Surety knowing that the Debtor had either paid, or had ſufficient grounds for annulling the Debt, pays it nevertheleſs, he cannot recover from the Debtor what he ſhall have acquitted in this manner[f].

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[a] Ait prætor, ſi quis negotia alterius——geſſerit, judicium eo nomine dabo. *l. 3. ff. de negot. geſt.* Sed videamus an fidejuſſor hîc habere aliquam actionem poſſit, & verum eſt negotiorum geſtorum eum agere poſſe. *l. 4. eod. l. 20. §. 1. ff. mand.*

[b] *This is a conſequence of the preceding Article.* Si quid autem fidejuſſor pro reo ſolverit, ejus recuperandi cauſa habet cum eo mandati judicium. §. 6. *inſt. de fidejuſſ.* Si fidejuſſor multiplicaverit ſummam, in quam fidejuſſit, ſumptibus ex juſta ratione factis, totam eam præſtabit is pro quo fidejuſſit. *l. 45. §. 6. ff. mand.* Sive, cùm frumentum deberetur, fidejuſſor africum dedit: ſive quid ex neceſſitate ſolvendi plus impendit, quàm eſt pretium ſolutæ rei—— id mandati judicio conſequeretur. *l. 50. §. 1. eod.*

See touching the intereſt of Sums paid by the Surety, the fourth Article of the ſecond Section of Proxies; and the fifth Article of the ſecond Section of thoſe who manage the Affairs of others.

[c] Non abſimilis illa quæ frequentiſſimè agitari ſolet, fidejuſſor an & priuſquam ſolvat, agere poſſit, ut liberetur. Nec tamen ſemper expectandum eſt, ut ſolvat, aut judicio accepto condemnetur, ſi diu in ſolutione reus ceſſabit, aut certe bona ſua diſſipabit: præſertim ſi domi pecuniam fidejuſſor non habebit, qua numerata creditori, mandati actione conveniat. *l. 38. §. 1. ff. mand.*

[d] Si fidejuſſor, vel quis alius pro eo ante diem creditori ſolverit, expectare debebit diem quo eum ſolvere oportuit. *l. 31. ff. de fidejuſſ.*

[e] Fidejuſſores & mandatores etſi ſine judicio ſolverint, habent actionem mandati. *l. 10. §. 11. ff. mand.* See the following Articles,

VII.

7. If the Surety pays, being ignorant of the exceptions which the Debtor has againſt the Debt.

If the Surety, being ſummoned to pay, acquits the Debt fairly and honeſtly, in order to prevent an Execution, or Attachment of his Goods, and being ignorant either that the Debtor had a compenſation to make, or that he has paid the Debt, or that he had other grounds of defence againſt the Creditor; he will nevertheleſs have his relief againſt the Debtor. For the Debtor ought to blame himſelf, that he did not give notice to the Surety not to pay the Debt[g]. But if the Surety pays raſhly, without being called on, without neceſſity, and without acquainting the Debtor, who might, on his part, not have had time to inform the Surety of the reaſons he had to offer why he ought not to be compelled to pay the Debt; there might be ground, according to the circumſtances, for imputing to the Surety that he had paid it wrongfully.

VIII.

8. If the Surety pays, notwithſtanding he had an exception for his own perſon.

If the Surety had any defence peculiar to himſelf, which was not common to the Debtor; as if he was a Minor, and for that reaſon might get himſelf relieved from his Obligation, or if he had any other Perſonal Exception, and if he pays the Debt voluntarily, without taking advantage of the ſaid Exception, he will nevertheleſs have his Action for relief againſt the Debtor. For by having waved his own Right, he has done no wrong to the Debtor, and he has only acquitted him of what he owed[h].

IX.

9. If the Surety does not make any defence, when ſued, or neglects to appeal from the Sentence.

If the Surety, being ſued by the Creditor, does not uſe the means for obtaining a delay which he might make uſe of; as if he does not alledge in his defence ſome Nullities in the proceedings in the Cauſe, which would not be ſufficient to diſcharge the Debtor, and he, after having acquainted the Debtor with the Creditor's Demand, pays the Debt; the Debtor cannot blame him for not having taken the advantage of ſuch defences. But if the Surety being condemned to pay the Debt, whether it be after having defended himſelf, or without making any defence, he does not appeal from the Sentence, or if he does appeal, but does not acquaint the Debtor therewith; and in general, whatever be the conduct of the Surety, and whatever event it may have, it is by the circumſtances of his conduct, and of that of the Debtor, that we muſt diſcern whether the Surety ought to have defended himſelf or not, or to have appealed or not; whether he has defended himſelf well or ill, if he has given timely notice to the Debtor, if he has paid the Debt right or wrongfully, if he has paid more than was due; and by theſe circumſtances, we are to judge whether the Surety ought to recover either barely what was owing by the Debtor, or alſo the charges he has been at, or if he ought to loſe them[i].

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[f] Si quidem ſciens prætermiſerit exceptionem vel doli, vel non numeratæ pecuniæ, videtur dolo verſari: diſſoluta enim negligentia propè dolum eſt. *l. 29. ff. mand.* See the following Article.

[g] Si fidejuſſor conventus, cùm ignoraret non fuiſſe debitori numeratam pecuniam, ſolverit ex cauſa fidejuſſionis: an mandati judicio perſequi poſſit id quod ſolverit, quæritur. Et ſi quidem ſciens—— Ubi verò ignoravit, nihil quod ei imputetur. Pari ratione, & ſi aliqua exceptio debitori competebat, pacti forte conventi, vel cujus alterius rei, & ignarus hanc exceptionem non exercebit, dici oportere ei mandati actionem competere. Potuit enim atque debuit reus promittendi certiorare fidejuſſorem ſuum, ne forte ignarus ſolvat indebitum. *l. 29. ff mand.* Si cùm debitor ſolviſſet, ignarus fidejuſſor ſolverit, puto eum mandati habere actionem. Ignoſcendum eſt enim ei, ſi non divinavit debitorem ſolviſſe. Debitor enim debuit notum facere fidejuſſori jam ſe ſolviſſe, ne fortè creditor obrepat, & ignorantiam ejus circumveniat, & excutiat ei ſummam in quam fidejuſſit. *d. l. 29. §. 2.*

[h] Fidejuſſor ſi ſolus tempore liberatus, tamen ſolverit creditori, rectè mandati habebit actionem adverſus reum: quamquam enim jam liberatus ſolvit, tamen fidem implevit, & debitorem liberavit. *l. 29. §. 6. ff. mand.*

[i] Quædam tamen & ſi ſciens omittat fidejuſſor, caret fraude. Ut putà ſi exceptionem procuratoriam omiſit, ſive ſciens, ſive ignarus, de bona fide enim agitur, cui non congruit de apicibus juris diſputare: ſed de hoc tantum debitor fuerit, nec ne. *l. 29. §. 4. ff. mand.*

Si hi qui pro te fidejuſſerant, in majorem quantitatem damnati, quàm debiti ratio exigebat, ſcientes & prudentes auxilium appellationis omiſerunt poteris mandati agentibus his æquitate judicis tueri te. Igitur, ſi ignoraverunt, excuſata ignorantia eſt. Si ſcierunt, incumbebat eis neceſſitas provocandi. Cæterum dolo verſati ſunt, ſi non provocaverunt. Quid tamen, ſi paupertas eis non permiſit, excuſata eſt eorum inopia. Sed & ſi teſtato convenerunt debitorem, ut ſi ipſe putaret, appellaret, puto rationem eis conſtare. *l. 8. §. 8. eod.*

X.

10. If the Surety does not acquaint the Debtor, that he has paid the Debt for him.

If the Surety having paid the Debt, without acquainting the Debtor, the Debtor pays it a ſecond time; the Surety will have no relief againſt him. For he would be in the fault, for having ſuffered the Debtor to be in danger of paying twice[1].

[1] Hoc idem tractari & in fidejuſſore poteſt, ſi cùm ſolviſſet, non certioraverit reum: ſic deinde reus ſolvit, quod ſolvere eum non oportebat. Et credo ſi cùm poſſet eum certiorare, non fecit, oportere mandati agentem fidejuſſorem repelli. Dolo enim proximum eſt, ſi poſt ſolutionem non denuntiaverit debitori. *l. 29. §. 3. ff. mand.*

IX.

11. Surety for a thing depoſited, or for a thing lent.

The Engagement of the Surety being only acceſſory to that of the principal Debtor, he is bound only preciſely for that which is owing by the perſon for whom he engages himſelf. Thus, for Example, if one had taken Security from a Depoſitary, or from him who had borrowed a thing for uſe, he who becomes Surety for ſuch an Engagement, would not be obliged to make good the thing depoſited or lent, if it ſhould chance to periſh by an accident; but he would only be bound to anſwer for the fraud and negligence of the principal Debtor; for it was in that only, that the Obligation conſiſted[m].

[m] Et commodati & depoſiti fidejuſſor accipi poteſt, & tenetur. Sed ita demum, ſi aut dolo malo, aut culpa hi fecerunt pro quibus fidejuſſum eſt. *l. 2. ff. de fidej. & mand.*

XII.

12. If the Creditor gives the Surety a diſcharge of the Debt.

If the Creditor, or another perſon having his right, gives an Acquittance to the Surety, with intention to make him a preſent of the Debt, as a recompence for ſome ſervice, or out of ſome other motive, this Surety may recover the Debt from the Debtor; for this favour was deſigned for the Surety alone, and not intended for the benefit of the Debtor. But if the Creditor had a mind only to diſcharge the Surety, without giving him the Debt, the right of the Creditor will remain intire againſt the Debtor, and the Surety will only be diſcharged of his Suretiſhip. And this will depend on the manner in which the Creditor ſhall have expreſſed himſelf, in order to make his intention known[n].

[n] Si fidejuſſori donationis cauſa acceptum factum ſit à creditore, puto ſi fidejuſſorem remunerari voluit creditor, habere eum mandati actionem. Multò magis, ſi mortis cauſa accepto tuliſſet creditor, vel ſi eam liberationem legavit. *l. 10. §. ult. ff. mand.* Si vero non remunerandi cauſa, ſed principaliter donando, fidejuſſori remiſit actionem, mandati eum non acturum. *l. 12. eod.*

Si is qui fidejuſſori donare vult creditorem ejus habeat debitorem ſuum, eumque liberaverit, continuo aget fidejuſſor mandati: quatenus nihil intereſit, utrùm nummos ſolverit creditori, an eum liberaverit. *l. 26. §. 3. eod.*

SECT. IV.

Of the Engagements of Sureties to one another.

The CONTENTS.

1. *In what manner one of the Sureties paying the Debt, may ſue his Fellow-Sureties for their ſhares of it.*
2. *Fellow-Sureties anſwer for one another.*

I.

1. In what manner one of the Sureties paying the Debt, may ſue his Fellow-Sureties for their ſhares of it.

If one of the Sureties pays the Debt, he ſhall have his relief only againſt the Debtor, and not againſt his Fellow-Sureties: For he acquits only his own Engagement: And ſince the payment which he makes, without making uſe of the benefit of Diviſion againſt the other Sureties, extinguiſhes the principal Obligation, that of the Fellow-Sureties, which was only an Acceſſory to it, ſubſiſts no longer. But if in paying the Debt, he gets himſelf to be ſubſtituted to the Creditor, he will have his right for recovering the ſhares of every one of the other Sureties. This ſubſtitution by the Creditor having this effect, that altho' it ſeem that the right of the Creditor be annulled by the payment, yet this right ſubſiſts, ſo as to paſs from the perſon of the Creditor, to him who pays for the others. For it is as it were a Sale, which the Creditor makes to him, of his Rights. And if the Creditor refuſes the Subſtitution, he who pays the Debt may procure an Order for it from the Judge[a].

[a] Cùm alter ex fidejuſſoribus in ſolidum debito ſatisfaciat, actio ei adverſus eum qui una fidejuſſit, non competit. Potuiſti ſanè cum fiſco ſolveres deſiderare, ut jus pignoris quod fiſcus habuit in te transferretur: & ſi hoc ita factum eſt, ceſſis actionibus uti poteris. Quod & in privatis debitis obſervandum eſt. *l. 11. C. de fidejuſſ. l. 39. ff. eod. §. 4. inſt. eod.* Fidejuſſoribus ſuccurri ſolet, ut ſtipulator compellatur ei qui ſolidum ſolvere paratus eſt, vendere cæterorum nomina. *l. 17. ff. eod.*

Cùm is qui & reum & fidejuſſores habens ab uno ex fidejuſſoribus accepta pecunia, præſtat actiones, poterit quidem dici nullas jam eſſe cùm ſuum perceperit, & perceptione omnes liberati ſunt. Sed non ita eſt, non enim in ſolutum accepit, ſed quodammodo nomen debitoris vendidit: & ideo habet actiones, quia tenetur ad id ipſum ut præſtet actiones. *l.* 36. *ff. eod. l.* 41. §. 1. *eod.* See the ſixth Article of the ſecond Section.

This Subſtitution of the Surety to the Creditor for recovering the Shares of his Fellow-Sureties, is a third benefit granted to Sureties. So that Sureties have three benefits which leſſen their Engagement, and facilitate their Relief. The firſt is the benefit of Diſcuſſion, *explained in the firſt Article of the ſecond Section. The ſecond is the benefit of* Diviſion, *explained in the ſixth Article of the ſame Section. And the third is this benefit of the* Ceſſion of the Rights of the Creditor, *explained in this Article. The effect of the firſt benefit of Diſcuſſion is, that the Surety cannot be ſued till after the Goods of the principal Debtor have been diſcuſſed. The effect of the ſecond benefit of Diviſion is, that when there are ſeveral Sureties for one and the ſame Debt, each of them can only be ſued for his own ſhare, if the others are able to pay; but if any of them be inſolvent, or their Obligation be found to be null, or be liable to be reſcinded, their Shares will be thrown upon the others, as has been ſaid in the ſixth Article of the ſecond Section. And the effect of the third benefit of the Ceſſion of the Rights of the Creditor, is, that the Surety who pays the Creditor, recovers from every one of the other Sureties their proportions of what he has paid.*

We are to underſtand the uſe of the benefits of Diſcuſſion and Diviſion only in favour of thoſe who have not renounced them. For if they have renounced them, they are, with regard to the Creditor, in the ſame condition as the Debtor. See the third Article of the firſt Section of the Solidity, *&c.*

II.

2. Fellow-Sureties anſwer for one another.

It is an Engagement of Sureties among themſelves, that if there be ſeveral Sureties for one and the ſame Debtor, and there be one of them that is inſolvent, or whoſe Obligation is null, or liable to be reſcinded, every one of the others ought to bear his proportion of the ſhare of the Surety who is inſolvent [b], or whoſe Obligation does not ſubſiſt [c]. For they are all of them Sureties for the whole Debt [d].

[b] Si quis eorum ante exactam à ſe partem ſine hærede deceſſerit, vel ad inopiam pervenerit, pars ejus ad cæterorum onus reſpicit. *l.* 26. *ff. de fidejuſſ.*

[c] Si Titius & Seia pro Mævio fidejuſſerint, ſubducta muliere dabimus in ſolidum adverſus Titium actionem. Cùm ſcire potuerit, aut ignorare non debuerit; mulierem fruſtra intercedere. *l.* 48. *ff. de fidejuſſ.*

[d] *See the ſixth Article of the ſecond Section.*

SECT. V.

How the Engagement of Sureties ends, or is annulled.

The CONTENTS.

1. *There can be no Surety of an Obligation that is unlawful.*
2. *The Exception which the principal Debtor has on account of his own perſon, does not diſcharge the Surety.*
3. *Fraud of the Creditor, with regard to the Surety.*
4. *Circumſtances which may render the Obligation of the Surety null, or valid.*
5. *The Surety is diſcharged, if the Obligation does not ſubſiſt any more.*
6. *Or if it is innovated.*
7. *The Surety in a Leaſe, is not bound, upon the renewal of the Leaſe.*
8. *If the Debtor ſucceeds to the Creditor, or the Creditor to the Debtor.*
9. *If the Creditor, or Debtor, ſucceeds to the Surety, or the Surety to any one of them.*
10. *The Creditor's purſuit of one of the Fellow-Sureties, does not diſcharge the others.*
11. *The Surety for the delivery of a thing that periſhes.*

I.

1. There can be no Surety of an Obligation that is unlawful.

IF in the principal Obligation, there is any eſſential vice which may annul it, as if it has been contracted by force, if it is contrary to Law, or to Good Manners, if it is founded only on a fraud, or on ſome error which may ſuffice to annul it; in all theſe caſes the Obligation of the Surety is likewiſe annulled [a]. For no one can take Surety for validating Engagements that are vicious in themſelves.

[a] Rei cohærentes exceptiones etiam fidejuſſoribus competunt —— Ut doli mali —— Quod metus cauſa factum eſt. *l.* 7. §. 1. *ff. de except.*

Fidejuſſor obligari non poteſt ei apud quem reus promittendi obligatus non eſt. *l.* 16. *ff. de fidejuſſ.*

See an example of a Surety for an Engagement contrary to Good Manners. Nov. 51. in Præfat. V. l. 46. & l. 56. ff. de fidejuſſ.

II.

2. The exception which the principal Debtor has on account of his own perſon, does not diſcharge the Surety.

If the principal Obligation was annulled only becauſe of ſome perſonal Exception which the principal Debtor had, as if it was a Minor, who, in conſideration of his being under Age, got himſelf relieved from an Engagement by which he ſuffered ſome prejudice, and that there had been no fraud on the Creditor's part; the Reſtitution of the Minor would have indeed this effect, that it would annul his Obligation to the Creditor, and his Engagement to ſave harmleſs his Surety, if he deſired to be relieved from it. But the ſaid Reſtitution of the Minor would not in the leaſt invalidate the Surety's Obligation to the Creditor [b]. For it was only to make good the Obligation of the Minor, in caſe he ſhould be relieved from it on account of his Age, that the Creditor took the additional Security of a Surety.

[b] Poſtquam in integrum ætatis beneficio reſtitutus es, periculum evictionis emptori, cui præſidium ex bonis paternis vendidiſti, præſtare non cogeris. Sed ea res fidejuſſores qui pro te intervenerunt excuſare non poteſt. Quare mandati judicio, ſi pecuniam ſolverint, aut condemnati fuerint, convenieris; modò ſi eo quoque nomine reſtitutionis auxilio non juvaberis. *l.* 1. C. *de fidejuſſ. min.*

See the two following Articles, and the tenth and eleventh Articles of the firſt Section.

III.

3. Fraud of the Creditor with regard to the Surety. If beſides the perſonal Exception which might be a ſufficient ground for annulling the Obligation of the principal Debtor, without invalidating that of the Surety, there was any fraud on the part of the Creditor, whether in the buſineſs which was the ſubject matter of the Obligation, or in the manner of engaging the Surety; the Obligation of this Surety would be annulled. Thus, for Example, if one who is willing to lend Money to a Minor upon Security, gives to the perſon who is to become Surety for the Minor, falſe proofs of his being of Age, the Obligation of the Surety will be annulled[c].

[c] Si ea quæ tibi vendidit poſſeſſiones interpoſito decreto præſidis ætatis tantummodo auxilio juvatur, non eſt dubium fidejuſſorem ex perſona ſua obnoxium eſſe contractui. Verùm ſi dolo malo apparuerit contractum interpoſitum eſſe manifeſti juris eſt, utrique perſonæ tam venditricis, quàm fidejuſſoris conſulendum eſſe. *l.* 2. C. *de fidejuſſ. min.*

IV.

4. Circumſtances which may render the Obligation of the Surety null, or valid. In all the caſes where the principal Obligation is liable to be annulled, it is by the circumſtances that we are to judge whether the Obligation of the Surety will ſubſiſt or not. Thus the Surety of a Minor remains bound, in the caſe of the eleventh Article of the firſt Section. And on the contrary, he is diſcharged in the caſe of the third Article of this Section. Thus, when the Obligation has for its cauſe ſome Commerce, or ſome Diſpoſition, prohibited by a Law, as if he who has a mind to give ſomething to a perſon to whom it is prohibited, by ſome Law, or Cuſtom, to give any thing, makes a fictitious Contract for the benefit of the ſaid perſon, or of a third perſon who lends his name for that purpoſe, and that he adds to the ſaid Contract the ſecurity of a Surety, the Obligation of the Surety will be without effect, as well as that of the principal Debtor. Thus in general, to judge of the validity, or invalidity of the Engagement of the Surety, it is neceſſary to conſider the quality of the principal Obligation, whether it be lawful or unlawful; the ſincerity or diſingenuity of the Parties; the motive which has induced the Creditor to take an additional Security, as if it was becauſe the Obligation was unlawful, or only to ſupply the inſolvency, or incapacity of the principal Debtor, as if it was a Minor, who becauſe of his Minority, could not validly oblige himſelf, altho' the Obligation were not unlawful in its own nature: if he who is bound as Surety for another, has voluntarily offered himſelf, and engaged the Creditor to accept of him, or if he has been engaged by any unfair dealing, on the part of the Creditor: And it is by theſe circumſtances, and others of the like nature, that we are to judge of the effect which the Obligation of the Surety ought to have[d].

[d] Interceſſionis quoque exceptio, item quod libertatis onerandæ cauſa petitur, etiam fidejuſſori competit. Idem dicitur & ſi pro filiofamilias contra ſenatuſconſultum quis fidejuſſerit, aut pro minore viginti quinque annis circumſcripto. *l.* 7. §. 1. *ff. de except. præſc. & præjud.*

Cùm lex venditionibus occurrere voluerit, fidejuſſor quoque liberatur: eò magis quòd per ejuſmodi actionem ad reum pervenitur. *l.* 46. *ff. de fidejuſſ.*

Marcellus ſcribit, ſi quis pro pupillo ſine tutoris auctoritate obligato, prodigove, vel furioſo fidejuſſerit, magis eſſe ut ei non ſubveniatur. *l.* 25. *eod.*

Si à furioſo ſtipulatus fueris, non poſſe te fidejuſſorem accipere certum eſt. Quia non ſolùm ipſa ſtipulatio nulla interceſſit, ſed ne negotium quidem ullum geſtum intelligitur. Quòd ſi pro furioſo jure obligato fidejuſſorem accepero, tenetur fidejuſſor. *l.* 7. §. 4. *eod.*

In cauſæ cognitione verſabitur, utrùm ſoli ei ſuccurrendum ſit, an etiam aliis qui pro eo obligati ſunt, ut putà fidejuſſoribus. Itaque ſi cùm ſcientem minorem, & ei fidem non haberem, tu fidejuſſoris pro eo, non eſt æquum fidejuſſori in necem meam ſubveniri: ſed potiùs ipſi deneganda erit mandati actio. In ſumma perpendendum erit prætori, cui potiùs ſubveniat utrùm creditori, an fidejuſſori. Nam minor captus neutri tenebitur, faciliùs in mandatore dicendum erit non debere ei ſubvenire. Hic enim velut affirmator fuit, & ſuaſor ut cum minore contraheretur. *l.* 13. *ff. de min.*

V.

5. The Surety is diſcharged, if the Obligation does not ſubſiſt any more. If the Debtor annuls his Obligation, either by payment, or by ſome other way that diſcharges him, as if the matter being referred to his Oath, he ſwears that he has paid the Debt, or that he did not owe any thing, if he is diſcharged by a Sentence, by a Tranſaction, or other Covenant with the Creditor; in all theſe caſes, the Engagement of the Surety is annulled. For he was obliged only to pay what ſhould be due[e].

[e] Non eſt ambigui juris electo reo, & ſolvente fidejuſſorem liberari. *l.* 2. *C. de fidejuſſ. tut. vel cur.*

Rei autem cohærentes exceptiones, etiam fidejuſſoribus competunt, ut rei judicatæ, doli mali, jurisjurandi. *l.* 7. §. 1. *ff. de except.*

Igitur & ſi reus pactus ſit in rem, omnino competit exceptio fidejuſſori. *d.* §. 1. Non poſſunt conveniri fidejuſſores, liberato reo tranſactione. *l.* 68. §. 2. *ff. de fidejuſſ.*

See the eighth Article of the ſecond Section.

VI.

6. *Or if it is innovated.* If the Debt is innovated between the Creditor and the Debtor, without the Surety's obliging himſelf anew, his Obligation does not ſubſiſt any longer. Thus he who was Creditor for the Price of a Sale, and who had a Surety bound for it, having given an Acquittance thereof, and having taken from the Buyer alone his Bond, as for Money lent, cannot after that demand any thing of the Surety. For altho' what he had promiſed to pay be not acquitted, and that the Debtor remains obliged for a Debt, to which the Sale had given riſe, and for which the ſaid Surety had engaged himſelf; yet the Creditor having extinguiſhed the firſt Obligation, that of the Surety, which was only an Acceſſory to the other, is alſo extinct[f].

[f] Ubicumque reus ita liberatur à creditore, ut natura debitum maneat, teneri fidejuſſorem reſpondit, cùm verò genere novationis tranſeat obligatio, fidejuſſorem aut jure aut exceptione liberandum. *l.* 60. *ff de fidejuſſ.*

Novatione legitimè perfecta, debiti in alium tranſlati, prioris contractûs fidejuſſores, vel mandatores liberatos eſſe non ambigitur. Si modò in ſequenti ſe non obligaverunt. *l.* 4. *C. eod.*

VII.

7. *The Surety in a Leaſe is not bound upon the renewal of the Leaſe.* If a former Obligation being expired, the Debtor has renewed it by a ſecond; he who was Surety for the firſt Obligation, will not be ſo for the ſecond, unleſs he obliges himſelf anew. Thus, he who renews with his Farmer a Leaſe that is expired, either by granting him a new Leaſe, or by a tacit continuance of the former, will not have him engaged a Surety who was bound for the firſt Leaſe, unleſs he obliges himſelf anew. For it is another Obligation[g].

[g] Qui impleto tempore conductionis remanſit in conductione, non ſolum reconduxiſſe videbitur, ſed etiam pignora videntur durare obligata. Sed hoc ita verum eſt, ſi non alius pro eo in priore conductione res obligaverat. Hujus enim novus conſenſus erit neceſſarius. Eadem cauſa erit & ſi reipublicæ prædia locata fuerint. *l.* 13. §. 11. *ff. locati. l.* 7. *C. eod.*

VIII.

8. *If the Debtor ſucceeds to the Creditor, or the Creditor to the Debtor.* If the Creditor becomes Heir, or Executor to the Debtor, or the Debtor to the Creditor, the confuſion which is made in the perſon of the ſaid Heir, or Executor, of the qualities of Creditor and Debtor, makes that the Obligation does not ſubſiſt any more: and this confuſion annuls likewiſe the Obligation of the Surety. For he cannot owe to the Heir, or Executor, a Debt againſt which the Heir, or Executor himſelf is bound to indemnify him. And there is no longer either Debt or Debtor[h].

[h] A Titio, qui mihi ex teſtamento ſub conditione decem debuit, fidejuſſorem accepi, & ei hæres extiti: deinde conditio legati extitit. Quæro, an fidejuſſor mihi teneatur? Reſpondi, ſi ei à quo tibi erat ſub conditione legatum, cùm ab eo fidejuſſorem accepiſſes, hæres extiteris, non poteris habere fidejuſſorem obligatum: quia nec reus eſt pro quo debeat, ſed nec res ulla quæ poſſit deberi. *l.* 38. §. 1. *ff. de fidejuſſ.* Quòd ſi ſtipulator reum hæredem inſtituerit, omnimodo obligationem fidejuſſoris peremit, ſive civilis, ſive tantùm naturalis in reum fuiſſet: quoniam quidem nemo poteſt apud eumdem pro ipſo obligatus eſſe. *l.* 21. §. 3. *eod. V. l.* 71. *eod.*

IX.

9. *If the Creditor or Debtor ſucceeds to the Surety, or the Surety to any one of them.* If it happens that the Debtor or Creditor be Heir, or Executor to the Surety, or that the Surety ſucceed in that quality to one or other of them, in all theſe caſes there ariſe different confuſions of the qualities of Debtor, Creditor, and Surety, every one of which annuls the Engagement of the Surety. For if he ſucceeds to the Debtor, he himſelf becomes principal Debtor, and conſequently ceaſes to be Surety. And if he ſucceeds to the Creditor, he is no longer bound, ſeeing he cannot be bound to himſelf. But if it is the Creditor that ſucceeds to the Surety, he will not be bound to himſelf, but will retain only his right againſt the Debtor. And laſtly, if it is the Debtor that ſucceeds to the Surety, there remains no longer any Suretiſhip, but only a principal Obligation in the perſon of the Debtor. And he could not even plead the Exceptions which the Surety may have had to alledge in his own perſon; as if he was, for Example, a Minor[i].

[i] Cùm reus promittendi fidejuſſori ſuo hæres extitit, obligatio fidejuſſoria perimitur. Quid ergo eſt: tanquam à reo debitum petatur. Et ſi exceptione fidejuſſori competente uſus fuerit, in factum replicatio dari debebit, aut doli mali proderit. *l.* 14. *ff. de fidejuſſ.*

Quòd ſi creditor fidejuſſori hæres fuerit, vel fidejuſſor creditori, puto convenire confuſione obligationis non liberari eum. *l.* 71. *in f. princ. ff. eod.*

Generaliter Julianus ait, eum qui hæres extitit ei pro quo intervenerat, liberari ex cauſa acceſſionis, & ſolummodò quaſi hæredem rei teneri. Denique ſcripſit, ſi fidejuſſor hæres extiterit ei pro quo fidejuſſit,

juſſit, quaſi reum eſſe obligatum, ex cauſa fidejuſſionis liberari. *l. 5. ff. de fidejuſſ.*

X.

10. The Creditor's purſuit of one of the Fellow-Sureties does not diſcharge the others.

Since the Engagement of the Fellow-Sureties does not ceaſe to ſubſiſt, although the Creditor ſues one of them, before he brings his Action againſt the others; therefore when there are ſeveral Sureties for one and the ſame Debt, the Suit which the Creditor commences againſt one of them, does not hinder him from bringing his Action afterwards againſt the others[l].

[l] Generaliter ſancimus, quemadmodum in mandatoribus ſtatutum eſt ut conteſtatione contra unum ex his facta alter non liberetur, ita & in fidejuſſoribus obſervari, &c. *l. 28. C. de fidejuſſ.*

XI.

11. The Surety for the delivery of a thing that periſhes.

Altho' the Obligation of him who is bound to give or reſtore a thing, be annulled, if the thing periſhes by an accident; and that the Surety, if there was any, be no longer obliged: yet nevertheleſs, if the thing does not periſh till after the Debtor has been in fault for not delivering it; as if a Seller does not deliver what he has ſold, or if one does not reſtore what he has hired, or borrowed, his Obligation continues to ſubſiſt, and makes that of the Surety to ſubſiſt likewiſe[m]. For he ought to anſwer for the deed of the perſon for whom he engaged himſelf.

[m] Cum facto ſuo reus principalis obligationem perpetuat, etiam fidejuſſoris durat obligatio: veluti ſi moram fecit in Sticho ſolvendo, & is deceſſit. *l. 58. §. 1. ff. de fidejuſſ.* See the ninth Article of the third Section of Covenants, and the third Article of the ſeventh Section of the Contract of Sale.

TITLE V.

Of INTEREST, COSTS *and* DAMAGES, *and* RESTITUTION *of* FRUITS.

Of the ſeveral ſorts of Damages, and of their cauſes.

It is a natural conſequence of all the kinds of particular Engagements, and of the general Engagement to do wrong to no body, that they who cauſe any Damage, whether it be by contravening ſome Engagement, or failing in the performance of it, are obliged to repair the Damage which they have done.

All the ſorts of Damages, whatever cauſe they may proceed from, may be reduced to two kinds. One is, of the viſible Damages cauſed by thoſe who occaſion the loſs or deſtruction of ſome thing, or who damnify it; as he does who having borrowed a Horſe, loſes him, or lames him: or he who turns his Cattle a grazing into the Field of another perſon who does not owe him that Service. The other kind, is of the Damages cauſed by thoſe who without deſtroying or damaging any thing, give occaſion to ſome loſs of another nature. As if he who owes a Sum of Money does not pay it at the term, if he who ſells fails to deliver the thing ſold, if he who undertakes a Work does not perform it.

We may diſtinguiſh Damages by another view, according to the intention of thoſe who cauſe them. Some are the effects of a bad deſign, as of a Crime, of an Offence, of a Cheat: And others happen without any bad deſign in the perſon who is accountable for them; but barely either out of negligence, or thro' ſome fault, or even thro' an inability to perform ſome Engagement.

Of what nature ſoever the damage be, and from what cauſe ſoever it may proceed, he who is anſwerable for it ought to repair it, by an amends proportionable either to his fault, or to his offence, or other cauſe on his part, and to the loſs which has happened thereby, according to the Rules which ſhall be explained in this Title.

Before we enter on the explanation of theſe Rules, it is neceſſary to make here ſome reflexions on the Principles on which they depend, the knowledge whereof may make the uſe of theſe Rules more eaſy and more profitable in the ſeveral caſes where it is neceſſary to apply them.

Difference between Intereſt, and Coſts and Damages.

All the ſorts of Reparations of Damage, are reduced to two kinds: One which is called barely Intereſt; and the other Coſts and Damages. Intereſt is the reparation, or ſatisfaction which he who owes a Sum of Money is bound to make to his Creditor, for the damage which he does him by not paying him the Money he owes him. As if he who has borrowed a Sum of Money, does not pay it at the term: if a Purchaſer does not pay the price of the Sale: if a Tenant does not pay the Rent of the Houſe which he hires, or a Farmer the Rent of his Farm. All the other reparations of Damage, of what nature ſoever the Damage be, are called Coſts and Damages; as if a Tenant neglects to make the repairs which he is bound to by his Leaſe, and the Houſe be thereby damaged: if a Partner neglects to take care of a thing belonging to all the Partners in common, with which he is intruſted, and the ſame periſhes: if a Tutor fails to gather in the Debts that are owing to his Minor, and they be loſt: if a Seller does not warrant the Purchaſer againſt an Eviction. The ſame name of Coſts and Damages, is given likewiſe to the Reparations which are due from thoſe who have cauſed any Damage by a Crime, or an Offence. And in Crimes, the ſatisfaction for the Damage is called the Civil Intereſt, which is the ſame thing with Coſts and Damages; but this word of Civil Intereſt is made uſe of, to diſtinguiſh this reparation of the Damage from the other Penalties which are inflicted for Crimes.

There is this difference by the Law, and by our Uſage, between the Damages which ariſe from the bare default of paying a ſum of Money that is due, and the Damages which have other cauſes, that all the Damages which thoſe may ſuffer who are not paid a ſum of Money at the term of payment, are all uniform, and fixed by the Law to a certain portion of the Sum that is due, for the ſpace of a year, and proportionably for a longer or ſhorter time. Thus we have ſeen the Intereſt of Money at the rate of between eight and nine *per Cent.* that is, the twelfth part of the principal Sum; then between ſix and ſeven *per Cent.* then reduced lower, to between five and ſix; and at preſent it is fixed at five *per Cent.* But the other ſorts of Damages are indefinite, and are extended or limited differently, by the prudence of the Judge, to more or leſs, according to the nature of the fact, and the circumſtances. Thus, whoever owes Money, whether on the ſcore of Loan, or for other cauſes, owes for all manner of damage, if he does not pay it, only the Intereſt that is ſettled by Law. But a Tenant who fails to make the Repairs which his Leaſe obliges him to; an Undertaker who fails to perform the Work which he has undertaken to do, or who does it ill; a Seller who does not deliver the thing which he has ſold; or who having delivered it, does not warrant it againſt an Eviction; owe indefinitely the damages which may enſue upon their not performing their Engagement; and they are regulated differently according to the diverſity of the loſſes which happen, the quality of the facts which occaſion them, and the other circumſtances.

Why the Intereſt of Money is fixed, and Coſts and Damages undetermined.

This difference between the Intereſt ſettled by Law for ſums of Money owing, and thoſe Reparations of Damage, of which the eſtimation is undetermined, hath its foundation in the differences which are between the failing to pay a ſum of Money that is owing, and the other various cauſes which give occaſion to ſome damage.

We may remark as the firſt and moſt ſenſible of theſe differences, that among all the cauſes which may give occaſion to a reparation of Damages, there is none ſo frequent as the default of paying a ſum of Money that is due; and that there is likewiſe none from whence there ariſes ſo great a variety of damages to be repaired; ſo that if every Creditor had a right to have the damage eſtimated which he may ſuffer for want of the Money that was due to him, each demand of payment would be attended with an infinite number of diſcuſſions of the different damages which the Creditors might alledge they had ſuſtained. One would pretend, that for want of payment, his Goods had been ſeized, and ſold, and he by that means ruined; another would alledge that his Houſe had fallen down for want of Money to repair it: a Merchant would pretend a conſiderable loſs in his Trade: and according as the different wants and junctures ſhould diverſify the events, every one would diſtinguiſh himſelf by the circumſtances of his Loſs, and of his Damage.

Had there therefore been no other cauſe for fixing by a Law an uniform Reparation for all the ſorts of Damages which may ariſe from the non-payment of Sums of Money, beſides the conſideration of retrenching this infinite multitude of different Liquidations and Lawſuits which would follow thereupon, we could not well be without ſuch a Regulation. But another difference which diſtinguiſhes the Engagement of Debtors of Sums of Money, from all other ſorts of Engagements, is a Natural Cauſe, which makes this Regulation to be as equitable in it ſelf, as it is uſeful to the Publick.

This difference conſiſts in this, that the Damages which proceed from other cauſes than the non-payment of Money, ariſe from ſome Engagement which diſtinguiſhes and points out the nature of the Damage which one may be accountable for, if he fails to perform his Engagement; which is not to be met with in the Engagement of thoſe who owe Sums of Money. Thus, for example, when a Tenant obliges himſelf to the ſmall Repairs of a Houſe which he rents, his Engagement points out to him preciſely, that he obliges himſelf to thoſe Repairs, in order to preſerve the Houſe in the good condition in which it is at the time it is let to him, and that conſequently if he fails to make the ſaid Repairs, he will be liable for the Damage that ſhall enſue thereupon, and be obliged to reſtore the Houſe in the ſame condition in which it was at the time when he hired it. Thus, when an Undertaker of a Building obliges himſelf to make it ſuch as it ought to be according to his bargain, his Engagement tells him the quality which the Work he undertakes ought to be of; that he is to anſwer for the defects of the materials, if by his Contract he is bound to furniſh them, and for the faults of his Conduct and Workmanſhip. Thus, he who is engaged in a Guardianſhip, cannot be ignorant that his Engagement obliges him to an exact and faithful Adminiſtration, and that if he neglects either to call in the Debts, to cultivate the Lands, or to repair the Houſes, he will be accountable for the conſequences of his negligence. And it is the ſame thing in all the other ſorts of Engagements, excepting that to pay the Money one owes. Thus in theſe Engagements, the deed of the perſon who is bound to repair the damage, is a cauſe which determines preciſely the quality of the reparation which he may be liable to make. But the Engagement of thoſe who owe Sums of Money, has no relation to any kind of particular and determined Damage that is to happen, if they do not pay; and does not mark whether it will be the ruin of a Building, or a Bankrupcy, or any other particular Damage, of a thouſand that may happen. But the quality of this Damage will depend on the particular circumſtances in which the Creditor who is not paid at the term ſhall find himſelf. And as the wants are diverſified according to the differences of the Events and Conjunctures in which thoſe perſons happen to be, who are diſappointed of what is due to them; ſo the Damages which happen to them from thence, are alſo of natures altogether different; and they are unforeſeen, as well as the wants from whence they may proceed.

This infinite variety of Damages which may enſue, upon the non-payment of a Sum of Money, is an effect of the nature of Money; which of it ſelf having no particular and determined uſe, as all other ſorts of things have; but having this general uſe of making the Price of all Things that may be valued, it is to every perſon inſtead of thoſe things which he ſtands in need of. Thus, the uſe of Money being different according to the divers ways of imploying it, and according to the particular occaſions which one may have for it, the damages which may happen to thoſe who are not paid by their Debtors, are different likewiſe, according to the diverſity of the uſes to which they intended to put the Money that was due to them.

It follows from this difference between the Engagement of thoſe who are indebted in Sums of Money, and all other ſorts of Engagements; that as in all other Engagements, the perſons who are obliged may diſtinguiſh by the nature of their Obligation, what the damage will be for which they will be accountable, in caſe they do not perform their Engagement, and that this knowledge makes them foreſee preciſely what they oblige themſelves to, and what the damages which they ſhall cauſe may amount to; one finds in every one of the ſaid Engagements, a juſt foundation whereby to diſtinguiſh the reparation that may be due, and to aſcertain the ſame. But as the bare quality of the Engagement of thoſe who owe Money does not diſtinguiſh their condition, and does not point out to them preciſely what may be the damage that may enſue, upon their failing to make payment, and that beſides they are all obliged only to one and the ſame thing, which is, to pay a Sum of Money; their Engagement is not a Principle by which we can diſtinguiſh the Reparations to which they may be liable, nor does it oblige them differently to the reſpective damages which the Creditors may ſuffer, according to the diverſity of the Events. But theſe Events are, with reſpect to the Debtors, as Accidents, which they could not foreſee, and which their Obligation did not comprehend.

It follows from this difference between the Engagement of perſons who are indebted for ſums of Money, and all the other ſorts of Engagements, that in one and the ſame Contract, of the nature of thoſe which are binding on both ſides, it may happen, and does often ſo fall out, that altho' the Engagement of the Contracters be reciprocal, that is, that each of them on his part be bound to the other; yet their Engagements are neither alike in their nature, nor equal in their eſtimation, but are of different natures; and the ſame Contract limits the Engagement of one of the Contracters to the bare Intereſt of a Sum of Money, if it is not paid at the term of payment, whilſt the Engagement of the other party is indefinite, and may be extended to damages of a far greater value. Thus in a Contract of Sale, the Obligation of the Seller informs him, that he is obliged to deliver the thing ſold, and to warrant it with the qualities which it ought to have; which lets him know, that if the thing ſold is not delivered, if it has not thoſe qualities which it ought to have, if it is evicted from the Purchaſer, he muſt anſwer for the damages which ſhall enſue thereupon, according to the Rules explained in the ſecond, tenth, and eleventh Sections of the Contract of Sale. But the ſame Contract of Sale doth not form any ſuch Engagement on the part of the Buyer. For it does not point out to him what damage the Seller may ſuſtain for want of his Money, whether he ſhall ſuffer any at all, or whether, on the contrary, it may not endanger the loſs of his Trade and Commerce; whether ſuch a diſappointment may not occaſion his Goods to be ſeized and ſold; or what other damage the Seller may ſuſtain thereby. Thus, whereas with regard to the Seller, the Events which ſubject him to damages having been foreſeen, he cannot ſay, when they happen to the Buyer, that they are Accidents which he could not foreſee, and for which he ought not to be anſwerable; whereas the Buyer, on the contrary, may ſay, in reſpect of the different loſſes which may happen to the Seller, that not any one of them has been foreſeen, and that therefore thoſe which happen are, with regard to him, Accidents which his Obligation did not point out to him: and he may alledge, that if the Seller had propoſed, that in caſe ſuch Accidents ſhould happen, the Buyer ſhould be anſwerable for them, he would not have bought upon thoſe terms, nor expoſed himſelf to the danger of ſuch conſequences, in caſe of failure to pay the price of the thing ſold.

It is eaſy to perceive the ſame difference of Engagements, in one and the ſame Contract, in Leaſes of Lands and Houſes, and in other ſorts of Engagements, even thoſe that are entred into without Covenant. But we muſt not draw this conſequence from the difference we ſee between the Engagement of one party, and that of the other, that thoſe who owe only Money are not liable to damages, if they fail in their payment, under pretext that their Engagement does not preciſely point out to them what will be the damage that will enſue upon their non-payment. For it being certain that they do wrong to their Creditors by not paying them, it is juſt that they ſhould make them amends; and in order to ſettle this reparation of damages, it was neceſſary to have a fixed Rule, that might be common to all Debtors in Sums of Money, and that ſhould be founded on other principles than thoſe which regulate the damages of all other kinds. And there could not have been made a more equitable Regulation in this matter, than what has been found out, by fixing the reparation of damages which the Debtor of a Sum of Money is liable to, in caſe he fails to pay it at the term, to a certain portion of the Sum due; for this reparation is founded on two Principles which are perfectly juſt and equitable. One is, that all Debtors for Sums of Money being under the ſame Engagement, and owing only one thing of the ſame kind, they are obliged only to the ſame reparation of damages. And the other is, that it being neceſſary to fix this reparation of damages upon one and the ſame foot, it could not be made more juſt and more certain, than by fixing it at the value of the common profits that may be made of Money by a lawful Commerce. And this is what has been done by comparing Money, which makes the price of all things, to thoſe things which produce naturally ſome profit, and by regulating the profit of a Sum of Money, according to the profit that is made of a Thing of like value. And ſeeing the moſt ordinary, and moſt natural profits, are thoſe which Lands yield, the reparation of damages which ought to be made to Creditors in Sums of Money, who are not paid at the term of payment, is eſtimated at the rate of the uſual Produce or Revenue of a piece of Land of the ſame value with the Sum that is due. Thus, for example, if the common value of the Revenue of Lands is a *French Sol*, or Penny, in the Livre, the reparation of damages which will be due from a Debtor who owes the Sum of a Thouſand Livres which he does not pay, will be of fifty Livres a year, which is the Revenue that is commonly reaped every year from a Piece of Ground that may be worth a Thouſand Livres. And it is upon the ſame foot that Annuities are regulated, where he who purchaſes an Annuity out of the Eſtate of his Debtor, does nothing elſe but purchaſe a yearly Revenue in Money, which may be of the ſame value with the ordinary Revenue that may be made of a Piece of Ground which might be purchaſed for the Money he lays out on the Annuity. But ſince the value of the Revenue of Lands is ſubject to changes, and that the ſame riſes, or falls, according to the ſcarcity, or plenty of Money, and for other cauſes which render it neceſſary to make different Eſtimations, according to the changes which the times may produce, the Laws regulate differently the Standard of the Intereſt of Money, and that of Annuities, according as thoſe changes may require. Thus we have ſeen in *France*, as has been already obſerved, Annuities, and Intereſt of Money, reduced from ten, to between eight and nine *per Cent.* and lowered, by degrees, to five in the Hundred, which is the preſent Standard.

Exceptions to the Rule which fixes the Intereſt of Money.

All theſe conſiderations, which juſtify the Rule by which the Intereſt of Sums of Money is fixed at a certain portion of the Principal, are to be underſtood only of the caſes where the Debtors cannot be charged with any blame, that may deſerve a Reparation of another kind. And this Rule does not juſtify the Debtors, who being able to pay, are unwilling to do it, and much leſs does it juſtify thoſe, who, rather than pay their Debts, hoard up their Money, and let poor Families ſtarve, for want of their own. This ſort of Iniquity is of another kind than the bare delay of Debtors, who have not wherewithal to pay their Debts at the time appointed: and this hardſhip would deſerve puniſhments of a ſeverer kind, than a bare reparation proportioned to the damages which it may occaſion. It was for this reaſon that the Ordinance of *Orleans* in *France* required the Judges to condemn thoſe who ſhould be found in arrears for Wages due to Labourers and Workmen, to pay the double of what they owed[a]. And altho' this Ordinance be not obſerved, and that ſuch unjuſt Debtors go unpuniſhed, yet we thought fit to inſert this Remark, to ſhew that this Impunity is not agreeable to the Spirit of the Law, and that there are occaſions in which the crying Injuſtice of thoſe Debtors might be puniſhed, agreeably to the Intention of the Law.

We muſt alſo except from this Rule which fixes the Intereſt of Sums of Money that are owing, Bankers who do not punctually anſwer Bills of Exchange. For this kind of Obligation hath particular Characters which diſtinguiſh it; as to which the Reader muſt conſult what has been ſaid thereof, in the fourth Section of the Title of Perſons who drive any publick Trade, &c. where we ſee that the engagement in Bills of Exchange is not only to pay a Sum, but implies the circumſtance of remitting the Money from one place to another; which renders the party who fails in the performance of his engagement liable to other damages beſides the bare delay of paying what he owes. And this matter is regulated by the Ordinance of 1673, in the Title of Bills of Exchange; and in that of the Intereſt of Change and Rechange[b].

Neither muſt we comprehend under this Rule, the Engagement of Debtors to their Sureties. For it is not Money that Debtors owe to their Sureties; but they are bound to ſave them harmleſs from the damages which they may ſuſtain on the part of the Creditor, if he is not paid; as if he diſtrains their Goods. Thus, the indemnity which the Debtor owes to his Surety, obliges him to make good the damages which he may have ſuffered by a Seizure of his Goods, at the inſtance of the Creditor.

Other Remarks concerning Damages.

After having made this diſtinction between the Intereſt of Money, and Damages, it is neceſſary to obſerve, as to Damages, that it is by two views that we may judge whether there be any at all due, and that we ought to regulate them. For we ought firſt of all to conſider the quality of the fact from whence the damage proceeded, as if it is a Crime, an Offence, a Cheat: Or if it is barely ſome fault, ſome neglect, or an involuntary non-performance of an Engagement. For according to theſe differences, the Reparation of Damages may be greater or leſſer, as we ſhall ſee hereafter. And we ought alſo to conſider the Events which have enſued upon the ſaid fact, and whether they be ſuch as ought

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[a] *Article 60. of the Ordinance of* Orleans.

[b] *V. tit. ff. de eo quod certo loco.*

ought to be imputed to him who is Author of the fact, or whether there be other cauſes mixed with it, ſo that all thoſe conſequences ought not to be imputed to him.

As to what concerns the quality of the fact of the perſon from whom a reparation of damages is demanded, the queſtion is only to know, if there be on his part any deſign to hurt, or any knavery, or if there be no ſuch thing. And ſeeing it is an eaſy matter to know it, either by the fact it ſelf, or by the circumſtances, without any help of Rules, it is ſufficient to remark barely here, that it is by this firſt view, that we ought to examine the queſtions concerning Damages.

As to the events which may enſue upon the fact of him who is charged with the Damage, there may ariſe difficulties about them, which may very well deſerve Rules for deciding them. For it is to be obſerved, that it often happens, that there ariſes from one only fact a chain of conſequences and events, which cauſe divers damages, whether it be that thoſe events have been the immediate conſequences of the ſaid fact, ſo as that it may be averred that it was the real and only cauſe of them; or that they may be aſcribed to other cauſes which have no dependance on the ſaid fact, but to which that fact had barely given occaſion, or that they happen to be joined with the ſaid fact by ſome accidents. And according to theſe differences of Events, there may be a difference in the Damages, ſo that ſome of them may be juſtly imputed to the Author of the fact, and it may not be reaſonable to charge him with others.

We ſhall be able to judge of theſe ſeveral ſorts of Events, and of the regard which ought to be had to them in Queſtions relating to Damages, by the two following Examples. And we ſhall ſee likewiſe at the ſame time, the divers effects which the fact of the perſon who is anſwerable for the damage ought to have in theſe Queſtions, according to the quality of the fact, and the motive thereof.

We may ſuppoſe for the firſt Caſe, that a Merchant having hired a Shop for a Fair, in a Town which was not the place of his uſual reſidence, and that having carried thither his Merchandize, it happens that he who had let him the Shop is himſelf turned out of the poſſeſſion thereof, either by an Eviction, or by a Power of Redemption, or by a Seizure of his Eſtate, and that the Shop is let to others, by the authority of a Court of Juſtice, ſo that the perſon who let it to the Merchant is not able to perform his Contract, and that therefore the Merchant finds himſelf under a neceſſity of hiring another Shop like to the former, but at a much dearer rate: Or that not being able to get another Shop, he loſes his Market, and for want of the aſſiſtance which he expected from the Sale of his Goods, to pay a preſſing Debt, he becomes Bankrupt. We ſee in this caſe many damages which may follow from theſe different Events, which it is neceſſary to diſtinguiſh, in order to diſcern between thoſe which are in ſuch a manner a conſequence of the non-performance of the covenants of the Leaſe, that they ought to be imputed to him who was bound to give the Shop; and the Events which may proceed from ſome other cauſe, jointly with that of the non-performance of the Leaſe, and for which it may not be reaſonable to make the Leſſor of the Shop accountable.

We ſee in the firſt of theſe Events, where the Merchant has hired another Shop, that all the damage conſiſts in his having hired it at a dearer rate; and that the ſaid damage having for its only cauſe the non-performance of the firſt Leaſe, he ought to be indemnified as to what it has coſt him more to get this other Shop. But in the ſecond caſe, where the Merchant could not get another Shop, we ſee that he ſuſtains three different ſorts of damages; that of the charges of tranſporting his Merchandize thither and back again, that of the loſs of the profit which he would have made by the ſale of his Goods, and that of the Bankrupcy.

The loſs of the charges for the Carriage of the Goods, is a neceſſary conſequence of the non-performance of the Contract for letting the Shop; and ſeeing this loſs proceeds from no other cauſe, one may impute it to him who let the Shop.

The loſs of the profit which might have been made by the ſale of the Goods, is alſo a conſequence of this non-performance of the Leaſe of the Shop; but this loſs is not of the ſame nature with that of the charges of the Carriage. For whereas the loſs by the Carriage of the Goods may be eaſily eſtimated, and is an effect which hath for its certain and preciſe cauſe the non-performance of the Leaſe; the loſs of this profit which might have been made by the ſale of the Goods, cannot be ſo eaſily known: for this knowledge depends on future and uncertain events. It is well known, that the profit which this Merchant might make at the Fair, did not depend barely on his having a Shop or Booth in it; but it might happen, either becauſe of the great quantity of Goods of the ſame kind with his, or becauſe of the ſcarcity of Money, and the ſmall number of Buyers, or through other cauſes, that there would be but little profit to be made, or perhaps none at all: and it might happen likewiſe that becauſe of the ſcarcity of thoſe Goods, the plenty of Money, and the great number of Buyers, the profit would have been great. So that it cannot be known exactly what this loſs may have amounted to. But even altho' it could be known exactly what quantity of Goods this Merchant might have been able to ſell, and what gain he might have made, judging of his profit by that which other dealers in the ſame Commodity had made; yet it would not be reaſonable to charge all that loſs on him who ought to have furniſhed the Shop. For beſides that this Merchant having ſtill the Goods in his poſſeſſion, might yet make profit by them, and perhaps more than he would have done at the Fair, for which the Shop was hired, no body knew any thing at that time of the events which might make the profit either greater or leſſer, or which might occaſion, perhaps, that there would be no profit at all, or that there would be loſs, inſtead of gain. So that they did not reckon that the penalty for the non-performance of the Leaſe ſhould amount to the value of the greateſt gain that this Merchant could hope for from a good market. But becauſe he who has failed to deliver the Shop ought to ſuffer ſome puniſhment for his not performing his Bargain; it is juſt to award under all theſe views ſome reparation of damages, and to regulate the ſame according to the circumſtances.

As to the third Damage, which is that of the Bankrupcy, this unforeſeen event having for its particular cauſe, the condition in which the affairs of the ſaid Merchant were at that time, it is an accident with regard to him who had promiſed the Shop, and which conſequently ought not to be laid to his charge.

We may ſuppoſe, for a ſecond Caſe, that a Merchant having agreed with the Maſter of a Manufacture, for a certain quantity of Goods, to be delivered to him on a certain day, that they might be imbarked on board a Fleet appointed to ſail at that time, and that the Merchant having paid beforehand the price of the ſaid Goods, or a part thereof, and being come with Carriages to receive them, they are not delivered to him. We ſee alſo in this caſe ſeveral damages, the charges of the Carriages, the loſs of the profit which this Merchant might hope to have made by the ſale of thoſe Goods in the place whither he purpoſed to ſend them, and that of the gain which he might have been able to make upon other Goods which he would have bought up in the ſame place, and likewiſe the Intereſt of the Money which he had advanced. The charges of the Carriages are due to him without any manner of difficulty, as well as the Intereſt of the Money which he advanced. The profit which he might hope to make upon the Goods which he intended to buy up with the Produce of his outward bound Cargo, is too remote from the deed of the perſon who has failed to deliver the Goods for the Imbarkation, and ought not to be imputed to him. And as for the profit which might have been made by thoſe Goods, if they had been imbarked, we muſt conſider, on one hand, that for want of having had thoſe Goods delivered to him, the Merchant is deprived of the hopes of the gain which he might have expected, and that he who was bound to deliver them, having failed in the performance of his engagement to do it, ought to bear the puniſhment of his non-performance of his promiſe, by making ſome reparation of the damage. And on the other hand likewiſe, we ought to conſider that this gain was not certain, that the Ship might periſh by Shipwrack, or fall into the hands of Pirates or Enemies; and that other accidents might have prevented the making any profit at all. So that in this uncertainty of events, it would not be juſt that the reparation of damages ſhould be equal to the gain which one might hope for from a ſucceſs altogether favourable. But it ought to depend on the prudence of the Judge, to ſettle and to moderate ſome reparation of damages, according to the circumſtances, and the particular Uſages obſerved in ſuch caſes, if there be any.

We ſee by theſe Examples, and it is eaſy to remark in others[c], of what conſequence it is to diſtinguiſh the events, in order to know wherein the reparation of damages ought to conſiſt. And it remains that we ſhould conſider the divers effects which the different qualities of the facts from whence they proceed may have in Queſtions relating to Damages. Thus, for Example, in the firſt Caſe of the non-performance of the Leaſe of the Shop promiſed to the Merchant, if we ſuppoſe that, inſtead of an Eviction, or a Seizure, which may have hindred the execution of the Leaſe, it had happened that the Shop was burnt by a fire communicated from the neighbouring Houſe, or that on the very day of the Fair the ſaid Shop had been ſet apart for ſome publick Office, by the Authority of Juſtice, and that the Proprietor had not time nor opportunity to give notice to the Merchant of the ſaid changes; ſeeing the ſaid changes would be accidents which had happened without any fault on his part, he would not be liable to any reparation of damages, by the general Rule that no body is to anſwer for Accidents, except there be ſome fault on their part[d]. But if we ſuppoſe that he who let the Shop to this Merchant, did afterwards let it to another, and put him into poſſeſſion of it, that he might have a greater Rent for it; this Knavery will ſubject the Owner of the Shop to a much greater reparation of damages, than if the non-performance of the Leaſe had been occaſioned only by a Seizure, or Eviction of the Shop. For whereas in the caſe of an Eviction, or Seizure, we ought to moderate the reparation that is to be made to the Merchant, for his loſs in being diſappointed of the Sale of his Goods, according to the Remarks which have been made; his knaviſh dealing cuts off all pretenſions to any mitigation of the damages: and the Sentence which condemns the Party in damages, ought to have the utmoſt extent that the Rigour of the Law can give it, becauſe the knavery implies a will and intention to do all the hurt that is poſſible.

We may conclude from all theſe Remarks, that in all the caſes where the queſtion is to know if any Damages are due, and in what they conſiſt, it is neceſſary to conſider the quality of the fact which has occaſioned the damage, the ſhare which the perſon who is charged with the damage may have had in the fact, his intention, whether the ſaid fact happened by accident, what have been the conſequences of it, either immediate, or more remote, and which may have proceeded from other cauſes. And it is by all theſe views, and by a conſideration of the particular circumſtances of every caſe, that the Judges ought, according to their prudence, to decide queſtions of this nature. As to which it is likewiſe neceſſary to obſerve, that there are caſes in which the conſequence of the non-performance of an Engagement may be ſuch, that altho' there were no bad intention on the part of him who has failed to perform his Engagement, yet he might deſerve not only to be condemned in a conſiderable Sum of Money, for Reparation of Damages, but alſo to be puniſhed otherwiſe. As in the caſe of thoſe who undertake to furniſh Arms, Proviſions, Forrage, or other things for an Army, and who fail in the performance of their Contracts. For in Contracts of this importance, wherein the Publick and State is concerned, imprudences and other faults, let them be never ſo ſmall, are of ſuch conſequence, that they deſerve to be puniſhed with great ſeverity, and are ſuch as may be ranked in the number of Crimes, according to the circumſtances.

We may add to all theſe Remaks, a diſtinction which it is neceſſary to make between two ſorts of caſes where damages happen that are to be eſtimated. One is, of the caſes where the damage is preſent, and where the reparation may be known, and regulated by a view of the events which have actually happened. And the other is, of the caſes where the damage is not preſent, but to come, and depends on future and uncertain events, altho' it be neceſſary to regulate the reparation for the damages, before they happen. We may ſee in one and the ſame kind of Contract, an example of each of theſe two ſorts.

If the Leaſe of a Farmer, which was only for one year, be interrupted juſt before Harveſt, by a change of the Proprietor, as if the Land was evicted from him who had leaſed it out, or if he ſold it, he ought to make good to the Farmer the preſent loſs which he ſuffers by not being allowed to gather the Crop that is on the Ground; and it is no hard matter to adjuſt this reparation of damages, becauſe it appears wherein the loſs does conſiſt. But if the Leaſe was for ſeveral years, and the ſame be interrupted

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[c] *See the ſeventeenth and eighteenth Articles of the ſecond Section of the Contract of Sale, the eighth Article of the third Section of Letting and Hiring, the twelfth, thirteenth, and fourteenth Articles of the fourth Section of Partnerſhip, and the ſixth Article of the ſecond Section of Proxies.*

[d] *See the ninth Article of the third Section of Covenants.*

from the firſt, or ſecond year, the damages will conſiſt in the loſs which the Farmer ſuſtains by not enjoying his Farm for the remainder of his term. Thus the Eſtimate of the Reparation of Damages, will depend on the ſeveral views of the Events which this Farmer might have reaſon to hope for, or fear, according to the quality of the Fruits or Revenues which his Farm yielded. It was poſſible that there might happen Hails, Froſts, Barrenneſs, a fall in the price of Proviſions, and other cauſes of Loſſes: and it might likewiſe ſo fall out, that there might be plentiful Crops, that the price of Proviſions might likewiſe riſe, that there might be favourable opportunities for the Sale of them, and other cauſes of Profit: and, in a word, it might happen that the ſaid Farmer would neither have been a gainer, nor a loſer. But becauſe Farmers uſually make their bargains ſo as to be gainers, and that it is even the intention of the Proprietors, that their Farmers ſhould reap ſome profit; the uncertainty of theſe Events is no reaſon why a reparation of damages ſhould not be due to this Farmer. And all that Human Reaſon can do in a caſe where it is neceſſary to decree a reparation of damages to be made, and impoſſible to know what the Damage may amount to, is to take a Medium of the Profits which Farmers of ſuch Lands may commonly make, adding thereto the conſiderations which the particular circumſtances may deſerve, as if the Farmer had enjoyed his Farm for the greateſt part of the time of his Leaſe with a great deal of profit, or a great deal of loſs; for in the firſt caſe, the Reparation of Damages ought to be leſs, and greater in the ſecond: if the ſaid Farmer found any where elſe an opportunity of taking much ſuch another Farm; or if no ſuch opportunity offered: if he had many years of his Leaſe to come; for in this caſe one ought not to allow for each year the ſame Reparation of Damages, as if there remained only one or two years of his Leaſe to run; becauſe the Farmer might provide himſelf of another Farm in ſo long a time, and he might have many more caſualties to fear. And we ought alſo to conſider the cauſe of the interruption of the Leaſe; if it is an Eviction that was not foreſeen, a voluntary Sale, or an Accident: For according to the cauſe, either there is no Reparation due at all, as if the Land was carried away by a Flood; or it might be leſſer, or greater, according as the Proprietor had more or leſs ſhare in it.

It is by all theſe views, and others of the like nature, that we may regulate the Reparations of Damages of this kind. Which may be reduced to the Remark already made, that the Reparations of Damages ought to be regulated by a view of the cauſe of the damage, and of the events which are the conſequences of it.

Hitherto we have ſaid nothing of the vulgar diſtinction in the matter of Damages, between thoſe which are due for a Damage, or Loſs that one ſuffers by a diminution of his preſent Goods, which he is actually poſſeſſed of, and thoſe which are due on the account of a Gain that ceaſes. For it will be eaſier to diſtinguiſh theſe two ſorts of Damages, after the other diſtinctions that have been remarked. Thus, for example, in the caſe of the Merchant to whom the Shop had been let, we ſee that the loſs of the charges of tranſporting his Goods is of the firſt ſort, and the loſs of the profit which he might have made by the Sale of them is of the ſecond; as well as that of the Farmer, whoſe Leaſe is interrupted. And as to the difference that may be between theſe two ſorts of Damages, in what regards the application of the ſeveral Reflections abovementioned, both to the one ſort and the other, it is eaſie to diſtinguiſh them aright. And one will be able to judge both by theſe Reflections, and by the Rules which ſhall be explained in this Title, of the uſe that is to be made of them in the ſeveral caſes of Damages of all kinds.

The Reparations of Damages are regulated either by the Judge, or by ſkilful Perſons.

We muſt obſerve in the laſt place on the ſubject of the Eſtimate that is to be made of Damages, that in conſequence of the Remarks already made, this Eſtimate may be ſettled in two manners, either by the Judge himſelf, or by ſkilful Perſons, and this depends on the quality of the Damages that are to be eſtimated. For if they are ſuch as the Judge may regulate himſelf, there is no occaſion to call for the aſſiſtance of ſkilful Perſons: who are not to be employed except in the caſes where this Eſtimate depends on ſome Art or Profeſſion, or on ſome facts which it would not be ſuitable to the Function or Dignity of the Judge to enquire into. We ſhall explain theſe ſorts of Damages by two Examples.

If he who has purchaſed an Eſtate is evicted thereof, and demands for his Damages only the Fines of Alienation which he had paid to the Lord of the Mannor, and the charges he had been at for drawing and engroſſing the Writings, and taking poſſeſſion of the Eſtate; the Judge may by himſelf regulate theſe Damages, for he may eaſily ſee in what they conſiſt. But if it is the Damages due by an Architect for a faulty Building which are to be regulated, this ſaid Eſtimate, which depends on the quality either of the Materials, or of the Work, demands the Judgment of perſons ſkilled in thoſe matters.

But if the caſe be ſuch, that the Eſtimate of the Damages depends barely on Reflections to be made on the quality of the Fact which has occaſioned the Damage, and on the Events which have been the conſequences or effects thereof, in order to diſtinguiſh between what ought to come under the Reparation, and what not, and that there be nothing beſides which requires the judgment of ſkilful Perſons; ſeeing theſe ſorts of Reflections are equally conſiſtent with the Dignity and Function of the Judge, he may take cognizance of them, and may regulate by his own Prudence the Damages of this kind. Thus, the Ordinances of *France* require, that the Judges themſelves ſhould regulate the Damages cauſed by falſe Impriſonments, unjuſt Seizures of Goods and Executions[e], becauſe the liquidating of theſe ſorts of Damages depends on the conſideration of the quality, and circumſtances of the facts which occaſion them. Thus, for example, if a Creditor cauſes his Debtor to be thrown into Jail, when he has no right to uſe the ſaid conſtraint, whether it be that his Debt does not give him that power, or that the Age of his Debtor, or ſome other cauſe, does make the ſaid impriſonment to be unjuſt, and that the ſaid Debtor be a Day-Labourer, or other perſon who by his Labour maintains his Family, which for want of this aſſiſtance ſuffered likewiſe other loſſes; it will depend on the Prudence of the Judge to regulate a Reparation both for the loſs of the day's work of this Priſoner, and for the other Damages, according as the injuſtice of the ſaid Creditor may deſerve upon conſideration of the circumſtances.

We have judged it neceſſary to make here all theſe Remarks on the nature and Principles of this matter of Intereſt, and Damages, in order to explain the difficulties which the Laws themſelves acknowledge to be therein; ſince we ſee a Law of the Emperor *Juſtinian*, in which, to prevent theſe difficulties, and the infinite number of queſtions that ariſe from thence, he reduced all the Caſes where there happens any Damages to two kinds. The one is, of thoſe Caſes where the queſtion is about a certain quantity, or which have their nature fixed and regulated, ſuch as Sales and Leaſes, and under this kind he comprehended all Contracts. The other kind is of all the other Caſes whatſoever without diſtinction, whatever might be the cauſe of the Damage.

As for the Caſes of the firſt kind, which have their nature fixed, and where the queſtion is concerning a certain quantity, he eſtabliſhed it for a Rule, that the Damages ſhould not exceed the double of the ſaid quantity: And as to all the other Caſes where there ſhould happen any Damages, he ordered that they ſhould be regulated by the prudence of the Judge, according to the Eſtimate of the real Damage that was ſuſtained[f].

Seeing this Regulation which limits the Damages to the double in all Contracts, and in the caſes where the queſtion is about a certain quantity, and which have their nature fixed and regulated, is a manner of deciding which does not unravel nor reſolve the difficulties, and which often would not do juſtice to thoſe who ſuffer damage, it is therefore not in uſe with us. For beſides that it does not diſtinguiſh between the Facts in which there is Knavery, and thoſe in which there is none, there is no more reaſon for leſſening or retrenching any thing of the lawful Reparation of Damages in the Caſes where the queſtion is about a certain quantity, and in Contracts, than there is in the other Caſes of different natures. Thus, for Example, if a Tenant of a Houſe who pays only one hundred Crowns for the Rent of it, had ſo far neglected to make the Repairs which he was bound to make, that he had cauſed a damage exceeding one thouſand Livres, or if the Houſe had been burnt by his fault, it would not be juſt that he ſhould be quit for his Rent, nay, not for the double, nor even for the triple of it.

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[e] *Ordinance of* Blois, *Article* 145.

[f] Cùm pro eo quod intereſt dubitationes antiquæ in infinitum productæ ſint: melius nobis viſum eſt hujuſmodi prolixitatem, prout poſſibile eſt, in anguſtum coarctare. Sancimus itaque in omnibus caſibus qui certam habent quantitatem, vel naturam, veluti in venditionibus & locationibus, & omnibus contractibus, hoc quod intereſt, dupli quantitatem minimè excedere. In aliis autem caſibus qui incerti eſſe videntur, judices qui cauſas dirimendas ſuſcipiunt, per ſuam ſubtilitatem requirere, ut hoc quod reverà inducitur damnum, hoc reddatur, & non ex quibuſdam machinationibus, & immodicis perverſionibus in circuitus inextricabiles redigatur: ne dum in infinitum computatio reducitur, pro ſua impoſſibilitate cadat: cùm ſciamus eſſe naturæ congruum, eas tantummodo pœnas exigi quæ vel competenti moderamine proferuntur, vel à legibus certo fine concluſæ ſtatuuntur. Et hoc non ſolùm in damno, ſed etiam in lucro noſtra amplectitur conſtitutio: quia & ex eo veteres id quod intereſt ſtatuerunt. Et ſit omnibus, ſecundùm quod dictum eſt finis antiquæ prolixitatis, hujus conſtitutionis recitatio. *l. un. C. de Sent. quæ pro eo quod int. prof.*

It is to be obſerved, as to this Rule of *Juſtinian*, which limited thus the Damages to the double in all thoſe caſes which have been mentioned, that it ſeems to have been made in imitation of another Rule, which ordered that the Intereſt of Money lent ſhould never exceed the value of the Principal [g]. And whereas this Rule concerning the Intereſt of Money, took place at firſt only iu the caſes where the Intereſt actually owing amounted to the value of the Principal Sum; *Juſtinian* extended it to all the caſes where the Intereſt paid at different times, exceeded the principal Sum that was due [h].

This Rule relating to the Intereſt of Money, may have been made out of hatred to uſurious and extravagant Intereſt, which, altho' tolerated in the *Roman* Law, was not very favourable; but it is not in uſe with us in *France*, except in ſome places. For ſeeing no Intereſt is adjudged to the Creditor, unleſs the ſame be demanded, and that it be juſtly due during the whole time of the delay, it would not be juſt to make him loſe it. Thus, for Example, if a Merchant, or other Creditor, having occaſion for his Money, and not being able to recover payment, after he has obtained Judgment for his Debt, finds himſelf obliged to ſeize upon the Effects of his Debtor, or to appear for his intereſt in a Seizure already made by other Creditors, and that the Debtor prolongs the Suit relating to the ſaid Seizure for many years, by Appeal, or other ways; it would be contrary to Equity, that after twenty years of delay, he ſhould be deprived of the lawful Reparation of Damages that would be due to him.

Expences.

There is alſo another ſort of Damages, which is that of Expences due from the perſon who is caſt in a Law-Suit; and that conſiſts in the reimburſement of the Charges, which the perſon who gains the Suit has been at in carrying it on. But beſides this Reparation of Damages, which the Ordinances oblige the Judges to decree to all thoſe who gain their Law-Suits [i], there was in the *Roman* Law other Coſts and Damages againſt thoſe whoſe Demands, or Defences were found to be nothing but Injuſtice and Cavil [l]: and the *Romans* likewiſe made uſe of this precaution, to oblige the Plaintiff, and Defendant, and their Advocates, to make Oath, at the very beginning of the Suit, that it was not out of malice, or for the ſake of cavilling, that they carried on the Suit, but that they looked upon their Cauſe to be juſt and well grounded [m]. This Oath is not in uſe with us in *France*, and it was only a ſure occaſion of Perjury. But the Condemnation of thoſe in Coſts who proſecute or defend ill-grounded Law-Suits, has been found ſo juſt, that *Francis* the Firſt revived it, having ordained, that in all Matters Civil and Criminal, the Coſts occaſioned by the temerity of him who is caſt in the Law-Suit, ſhould be given againſt him, if they are demanded; and that they ſhould be taxed and moderated by the ſame Judge who decides the Law-Suit [n]. But altho' this Ordinance be not at preſent put in execution, and that we ſee very ſeldom ſuch Condemnations, yet the Equity of this Rule is not aboliſhed, neither can it be; and the Judges are at liberty to obſerve it on all occaſions where the Spirit of theſe Laws may require it.

We ſhall not treat, under this Title, of the matter of Expences, becauſe it is a part of the Order obſerved in Judicial Proceedings. And as to the Coſts and Damages which may be due from thoſe who proſecute or defend unjuſt Law-Suits, theſe ſorts of Coſts and Damages have no other particular Rules, than thoſe of the other kinds. And it is ſufficient to take notice here of this Rule, which ſhall have its rank in this Title in its proper place.

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[g] *L.* 27. §. 1. *C. de uſur. Nov.* 121. 138. 160.

[h] Uſuræ per tempora ſolutæ non proficiunt reo ad dupli computationem. Tunc enim ultra ſortis ſummam uſuræ non exiguntur, quoties tempore ſolutionis ſumma uſurarum excedit eam computationem. *l.* 10. *C. de uſur.* Cùm igitur leges noſtræ nihil ultra duplum ſolvi velint: & nos in hoc tantum differentiam habemus cum prioribus, quod illæ quidem debita conſtituant uſque ad duplum, ſi nulla particularis facta fuiſſet ſolutio: Nos verò recipiamus ut particulares etiam ſolutiones debita diſſolvant, ſi uſque ad duplum pertingant. *d. Nov.* 121. *c.* 1.

See the Ordinance of Charles IV. *in* 1324. *of* Charles VIII. *in* 1493. *Article* 50. *the Ordinance of* 1667. *Tit.* 31. *Art.* 1.

[l] Improbus litigator & damnum, & impenſas litis inferre adverſario ſuo cogatur. §. 1. *in f. inſt. de pœn. tem. litig.*

[m] *Toto Tit. C. de Jurejur. propt. cal. dando.*

[n] *See the Ordinance of* 1539. *Art.* 88. *&* 89.

Reſtitution of Fruits. There remains ſtill another matter to be conſidered under this Title; which is that of the Reſtitution of Fruits. We have added this matter to that of Intereſt, and of Coſts and Damages, becauſe the Reſtitution of Fruits is a kind of Reparation of Damages, which is due from him who has unjuſtly enjoyed a Land, the enjoyment whereof belonged to another perſon; and becauſe Fruits are the Revenue of Lands, as Intereſt is that of Money, or rather becauſe the Intereſt of Money has been invented after the Example of the Fruits of the Ground, and becauſe Intereſt of Money is inſtead of thoſe Fruits, as has been already obſerved.

SECT. I.

Of Intereſt.

After the Remarks that have been made in the Preamble to this Title, on the differences between Damages and Intereſt, it is not neceſſary to explain here what is the ſubject matter of this Section, and of that which follows. Since it appears clearly enough that the ſubject matter of the preſent Section, is the Reparation of Damages which is due from Debtors who owe Sums of Money, and who fail in the payment thereof; and that the matter of the other Section comprehends all the other kinds of Reparation of Damages.

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I.

1. Definition of Intereſt. By Intereſt is meant the Reparation of Damages which the Law directs to be made to Creditors in Sums of Money, by Debtors who fail to pay what they owe[a].

[a] In bonæ fidei contractibus uſuræ ex mora debentur. *l.* 32. §. 2. *ff. de uſur.* Propter moram ſolventium infliguntur. *l.* 17. §. 3. *in fin. eod.*

The word Uſury, *which we read in theſe texts, has the ſame ſignification in the* Roman *Law, as the word* Intereſt *has with us; with this difference, that we take the word Uſury always in evil part, becauſe we give this name only to unlawful Intereſt; ſuch as Intereſt for Money lent, as has been explained in the Preamble of the Title of the Loan of Money, and that in the* Roman *Law, which allowed the taking of Intereſt for Money lent, and by which it was lawful to covenant for Intereſt upon a ſimple Bond, or Promiſſory Note for Money lent, the word Uſury was not taken in a bad ſenſe, but ſignifies the Intereſt which the Laws allow to be taken for Money lent.*

We ſhall not take up time here to explain the Principles of the Roman *Law, touching the difference between the Contracts which the* Romans *called* bonæ fidei, *of which mention is made in the firſt text cited on this Article, and thoſe which they termed* ſtricti juris. *For as to what concerns this diſtinction in general, it is ſufficient to obſerve what has been ſaid thereof in the twenty ſecond Article of the third Section of* Covenants: *And as to the relation which that diſtinction may have to the matter of Intereſt for Sums of Money lent, the principles thereof ſhall be explained in this Section.*

See the following Article.

II.

2. In what it conſiſts. The Intereſt which Debtors in Sums of Money owe for default of payment, is fixed by the Law, at a certain proportion of ſo much in the Pound, every year, and for more or leſs time in proportion[b]. And this Intereſt is computed on this foot from the moment that the Debt becomes due, till it is acquitted.

[b] Uſurarum modus ex more regionis ubi contractum eſt, conſtituitur. *l.* 1. *ff. de uſur.* Quæ in regione frequentantur. *l.* 37. *ff. eod.*

This Regulation of the Intereſt of Money, as well as that of Annuities, depends on the Edicts which fix it *differently according to the different times, as has been obſerved in the Preamble to this Title.*

III.

3. When it becomes due. Debtors incur the penalty of Intereſt by their delay to pay what they owe[c], according as the ſaid delay may be imputed to them, and may have that effect. Which depends on the nature of the Credits, and on the circumſtances[d]. For in ſome Debts the bare default of paying at the term of payment makes the Intereſt to run for the benefit of the Creditor, altho' he do not demand it: and in other Debts, this Intereſt is not due except from the time that a Demand has been made of the Debt, in a Court of Juſtice, altho' there was a term fixed for payment, and that it was expired. We ſhall be able to judge of this diſtinction by the Rules which follow.

[c] Uſuræ non propter lucrum petentium, ſed propter moram ſolventium infliguntur. *l.* 17. §. 3. *in fin. ff. de uſur.*

[d] Mora fieri intelligitur non ex re, ſed ex perſona. Id eſt ſi interpellatus oportuno loco non ſolverit. Quod apud Judicem examinabitur. *l.* 23. *ff. de uſur.* An mora facta intelligitur, neque conſtitutione ulla, neque juris auctorum quæſtione decidi poſſe: cùm ſit magis facti, quàm juris. *d. l.* 32.

See the Remark upon the fifth Article.

IV.

4. The Purchaſer of Lands owes the Intereſt of the Price. The Purchaſer of a Land, or Tenement; who has got poſſeſſion thereof, owes the Intereſt of the Price, if he does not pay it at the term of payment, altho' it be not demanded of him, or if he does not conſign it, in caſe the Seller refuſes to receive it. And with much more reaſon would the Intereſt be due, if there was no term fixed for payment of the price, or if it was agreed that the Buyer ſhould pay ready Money, at the time that the Lands ſhould be delivered to him, and that he had failed to make payment[e]. For this Intereſt is due for the Fruits of the Ground. And although the Purchaſer reaps leſs profit from the Lands, than the Intereſt of the Price amounts to, or that even by ſome accident the Land yields him no Revenue at all, he will nevertheleſs be liable to pay the ſaid Intereſt for the Right of Enjoyment: and the Accidents which deprive him of the enjoyment affect him as Proprietor, and do not diſcharge him of the Intereſt, which ought not to ceaſe, nor to be diminiſhed by reaſon of the ſaid loſs, as it would not be augmented, were the Fruits of never ſo great value. But this Rule hath its uſe only in the caſes where the Contract of Sale has not otherwiſe regulated what relates to the Intereſt of the Price. For if the Contracters have explained their minds touching this matter, their agreement will be inſtead of a Law.

[e] Uſuras emptor, cui poſſeſſio rei tradita eſt, ſi pretium venditori non obtulerit, quamvis pecuniam obſignatam in depoſiti cauſam habuerit, æquitatis ratione præſtare cogitur. *l.* 2. *C. de uſur.*

Poſt traditam poſſeſſionem defuncto venditore, cui ſucceſſor incertus fuit, medii quoque temporis uſuræ pretii, quod in cauſa depoſiti non fuit, præſtabuntur. *l.* 18. §. 1. *ff. de uſur.*

Veniunt autem in hoc judicium infrà ſcripta, imprimis pretium quanti ea res venit: item uſuræ pretii poſt diem traditionis. Nam cùm re emptor fruatur, æquiſſimum eſt eum uſuras pretii pendere *l.* 13. §. 20. *ff. de act. empt. & vend. l.* 2. *C. eod* See the fifth Article of the third Section of Covenants.

As to the conſigning of the Price, ſee the eighth Article of the ſecond Section of Payments.

V.

5. Intereſt after a demand of the Debt. If that which is due proceeds from a Cauſe which in its own nature produces no Revenue, the Intereſt thereof will be due only after the Debt has been demanded in a Court of Juſtice: and in this caſe it is only this legal Demand that makes the delay of payment to be imputed to the Debtor[f]. Thus, a Debtor who owes a Sum of Money which he has borrowed, failing to pay it at the time appointed, does not owe Intereſt for it: and the Intereſt will not run but from the time that it has been demanded in a Court of Juſtice. Thus he who has been condemned either in Coſts[g], or in Damages[h], will not owe Intereſt for the ſaid Sum, till after that the ſaid Coſts and Damages have been liquidated, and the Creditor has demanded in a Court of Juſtice, the Intereſt of the Sum at which they have been taxed. For in all theſe caſes, the Debt not producing Intereſt in its own nature, the Debtor does not begin to owe any until the Creditor ſets forth by his Demand the damage which he ſuffers: and the Debtor, on his part, owes then the ſaid Intereſt, as a puniſhment for his delay of payment.

[f] Lite conteſtatâ uſuræ currunt. *l.* 35. *ff. de uſur.*

The Intereſt, according to our Uſage, runs not only from the time of Conteſtation of Suit, as is ſaid in this Law, but from the time of the Demand made by the Service of the Citation. As to which it is neceſſary to obſerve, that by Conteſtation of Suit is meant that which paſſes before the Judge between the Plaintiff, who explains his Demand, and the Defendant who conteſts it. Lis autem conteſtata videtur, cùm judex per narrationem negotii cauſam audire cœperit. *l. un. C. de lit. conteſt.* Poſt narrationem negotii propoſitam, & contradictionem objectam. *l.* 14. §. 1. *C. de jud.*

After which the Judge makes his firſt Order, or Aſſignation, in the Cauſe.

This Conteſtation of Suit was neceſſary in the Roman *Law, to make the Defendant guilty of delay. For oft times he was ignorant what the perſon who ſummoned him had a mind to demand of him.* Deducunt hominem invitum ad judicem datum, & nihil ſcientem compellunt facere litis conteſtationem. *Nov.* 53. *cap.* 3. *But by our Uſage, purſuant to the Ordinances which are confirmed by that of* 1667, *Title* 2. *Art.* 1. *the Plaintiff being obliged to explain his Cauſe of Action in his Citation, it is juſt that the Defendant ſhould be deemed refractory after he is ſerved with the Citation, and that he, knowing from the tenour of the Citation what is demanded of him, and not complying therewith, ſhould bear the puniſhment of his backwardneſs to acquit what he juſtly owes.*

By the Ordinance of Orleans, *Art.* 60. *the Intereſt for Sums of Money due upon Promiſſory Notes, or Bonds, ought to be decreed from the day of the Service of the Citation.*

[g] *The Intereſt of Coſts given to the Party who gains the Cauſe, is due after a legal demand thereof; and that with much greater Reaſon than the Intereſt of Money advanced by one Co-Partner for another, or by thoſe who take care of the Affairs of others without their knowledge, or by thoſe who have any thing in common with others.* See the eleventh Article of the fourth Section of Partnerſhip, the fifth Article of the ſecond Section of thoſe who manage the Affairs of others, *&c.* and the fourth Article of the ſecond Section of thoſe who chance to have any thing in common together.

[h] *We have inſerted in this Article for one of the Examples of the caſes where Intereſt is not due till after Demand thereof, that of Damages; which is to be underſtood of that ſort of Damages which ſhall be treated of in the ſecond Section, and not of Intereſt, which is the ſubject of this Section, and which cannot produce Intereſt, as ſhall be ſhewn in the ninth Article of this Section; whereas Damages may produce Intereſt, for the reaſon which ſhall be explained in the Remarks on the tenth Article.*

VI.

6. *A caſe where one may ſtipulate Intereſt, when it would not otherwiſe be due by the nature of the Debt.*

There are caſes in which one may ſtipulate Intereſt for Sums of Money which of their own nature would yield none, and where the agreement makes the Intereſt to be lawful according to the circumſtances which give occaſion thereto. Thus in a Sale of Moveables which would not produce any Revenue, the Seller may ſtipulate Intereſt for the Price, till it be paid; for that Intereſt makes a part of the Price. Thus, in a Tranſaction, where the pretenſions of the Parties are regulated at a certain Sum of Money which one party is to give to the other, it may be covenanted that Intereſt ſhall be paid for the Money, and that even from the day of the Tranſaction, altho' there be a term fixed for payment thereof. For this Intereſt is made a condition of the Tranſaction, either to compenſate what he who ſtipulates the Intereſt may remit in another reſpect, or for other cauſes. And ſuch a ſtipulation may be conſidered as having the effect of a Condemnation, by the Sentence or Decree of a Court of Juſtice. For Tranſactions have the ſame authority as the Decrees of a Court[i].

[i] Non minorem authoritatem tranſactionum, quam rerum judicatarum eſſe, recta ratione placuit. *l.* 20. *C. de tranſact.*

VII.

7. *Intereſt of Marriage Portions.*

The Dowry given with a Woman in Marriage, ought of its own nature to produce Intereſt, without a Sentence of Condemnation; for it is given to the Huſband, to help him to bear the charges of the Marriage[l]. This however is not to be underſtood of the Debtor whoſe Bond ſhall be aſſigned over to the Huſband in payment of his Wife's Portion, for this Ceſſion will not change the nature of the Debtor's Obligation; but it muſt be underſtood of the perſon himſelf who makes the Settlement, ſuch as a Father, or a Mother, who endows their Daughter. But if the Marriage Settlement were conceived in ſuch terms as to make one judge, that the intention of the Contracters was, that the intereſt of the Sum promiſed ſhould not be due till after a certain time, it would be neceſſary to keep to that which appears to be their intention; whether the Dowry were promiſed by the Father, or Mother, or by other perſons.

[l] Si aliæ res præter immobiles, vel aurum fuerint in dotem datæ, ſive in argento, ſive in muliebribus ornamentis, ſive in veſte, ſive in aliis quibuſcumque, ſi quidem æſtimatæ fuerint, ſimili modo poſt biennium & earum uſuras ex tertia parte centeſimæ currere. *l. ult.* §. 2. *C. de jur. dot.* See the ſecond Article of the firſt Section of Dowries.

We have not put down in this Article the delay of two years, which is regulated by this Law for Intereſts of this kind, ſeeing our Uſage does not regulate it in this manner. But according to the circumſtances, the Judge may grant a reaſonable delay for the delivery of ſuch kinds of things, and direct Intereſt to be paid for them, if it appear reaſonable.

We have not ſet down here any Rule for the Intereſt which the Huſband owes, who does not reſtore the Dowry he had with his Wife in Moveables after the diſſolution of the Marriage, when there are no Children. For the Rule of the Roman *Law, which allowed a year to the Huſband without obliging him to pay Intereſt, is not in uſe with us.* V. l. un. §. 7. verſic. ſin autem Cod. de rei ux. act. *As to the Dowry conſiſting in Lands and Tenements, ſee the end of the Preamble to the Title of Dowries.*

VIII.

8. *Intereſt due from thoſe who turn to their own profit the Monies belonging to other perſons.*

Thoſe who retain in their hands Monies belonging to other perſons, and who divert them, and turn them to their own profit, without the conſent of thoſe perſons, are bound to pay Intereſt, altho' it be not demanded. For it is an injuſtice which they do to thoſe whoſe Money they keep: and this Intereſt is due as a ſatisfaction for the loſs which they may occaſion, and as a juſt puniſhment for their knaviſh dealing. Thus when a Partner happens to have in his hands Monies belonging to the Partnerſhip, which he has converted to his own uſe, and laid out upon his own particular concerns, he ought to pay Intereſt for the ſame, according to the Rule which has been explained in the Title of Partnerſhip[m]. Thus a Creditor who is overpaid his Debt, either by the ſale of a Pledge, or by the enjoyment of the Fruits of the Thing which he had in pawn, or otherwiſe, owes to his Debtor Intereſt for what he has received over and above his Debt, if he has converted the ſame to his own proper uſe[n].

[m] Socium, qui in eo quod ex ſocietate lucri faceret reddendo moram adhibuit, cùm eâ pecuniâ ipſe uſus ſit, uſuras quoque eum præſtare debere, Labeo ajt. *l. 60. ff. pro ſocio.*

Socius, ſi ideò condemnandus erit, quod pecuniam communem invaſerit, vel in ſuos uſus converterit, omnimodò etiam mora non interveniente, præſtabuntur uſuræ. *l. 1. §. 1. ff. de uſur.* See the fifth Article of the fourth Section of Partnerſhip.

[n] Si creditor pluris fundum pignoratum vendiderit, ſi id fœneret, uſuram ejus pecuniæ præſtare debet ei qui dederit pignus. Sed etſi ipſe uſus ſit eâ pecuniâ, uſuram præſtari oportet. *l. 6. §. 1. ff. de pign. act.* See the fourth Article of the fourth Section of Pawns and Mortgages.

IX.

9. The Debtor never owes Intereſt of Intereſt. Whatever delay there may be on the part of the Debtor, to pay the Intereſt, and whatever may be the cauſe of it, he is never bound to pay ſecond Intereſt for the Intereſt which he owes: and the Creditor cannot accumulate the Arrears of Intereſt with the principal Sum, in order to make the whole a Capital, which may produce Intereſt; but the ſame will be reduced to the amount of the Principal Sum which is capable of producing Intereſt[o].

[o] Ut nullo modo uſuræ uſurarum à debitoribus exigantur & veteribus quidem legibus conſtitutum fuerat, ſed non perfectiſſimè cautum. Si enim uſuras in ſortem redigere fuerat conceſſum, & totius ſummæ uſuras ſtipulari: quæ differentia erat debitoribus à quibus reverâ uſurarum uſuræ exigebantur? Hoc certè erat non rebus, ſed verbis tantummodò legem ponere. Quapropter hoc apertiſſima lege definimus, nullomodo licere cuiquam uſuras præteriti temporis vel futuri in ſortem redigere, & earum iterùm uſuras, ſtipulari. Sed etſi hoc fuerit ſubſecutum, uſuras quidem ſemper uſuras manere, & nullum uſurarum aliarum incrementum ſentire: ſorti autem antiquæ tantummodò incrementum uſurarum accedere. *l. 28. C. de uſur.*

X.

10. But he may owe Intereſt for other Revenues. We muſt take care in applying the preceding Rule, not to confound with the Intereſt of Money the Revenues of another nature, ſuch as the Rent of a Farm, of a Houſe, and others of the like kind. For theſe ſorts of Revenues differ from the Intereſt of Money; becauſe the Intereſt of Money is not a natural Revenue[p], and is only, on the part of the Debtor, a puniſhment which the Law inflicts on him for his delay of payment; and on the part of the Creditor, it is a compenſation for the loſs which he ſuffers by lying out of his Money; whereas the Price of the Fruits of the Ground, and of the Rents of a Houſe, is a natural Revenue, which on the part of the Debtor is the value of an Enjoyment which he has reaped the benefit of; and on the part of the Creditor, is a real Good, which in his hands makes a Capital, as his other Goods do. So that the Debtor of the Rent of a Farm, or of a Houſe, owes juſtly Intereſt for the ſame, from the time that it has been demanded[q].

[p] Uſura non natura pervenit. *l. 62. ff. de rei vind.* Uſura pecuniæ quam percipimus in fructu non eſt, quia non ex ipſo corpore, ſed ex alia cauſâ eſt, id eſt, nova obligatione *l. 121. ff. de verb. ſign.*

[q] Ex locato qui convenitur, niſi convenerit, *ut tardiùs pecunia illata uſuras deberet*, non niſi ex mora uſuras præſtare debet. *l. 17. §. 4. ff. de uſur.* Si in omnem cauſam conductionis etiam fidejuſſor ſe obligavit, eum quoque exemplo coloni tardiùs illatarum per moram coloni penſionum præſtare debere uſuras. *l. 54. ff. locat.*

Annuities are of another nature than the Rents of a Houſe, or of a Farm; for Annuities are not the Fruits of Houſes or Lands, and have for their Principal only a Sum of Money which was the price of the purchaſe of the Annuity, So that the Arrears of Annuities can never produce Intereſt, nor be accumulated with the Principal, in order to make a Capital for which the Debtor may be obliged to pay new Intereſt.

It is to be remarked on this Rule, that as we ought not to confound the Fruits of Lands and Houſes with the Intereſt of Money, of which we cannot make a Capital for producing new Intereſt, ſo neither ought we to confound with the Intereſt of Money, the Damages which are the ſubject matter of the following Section. For one may obtain a Sentence for the Intereſt of Sums of Money ariſing from Damages; as if a Seller has been condemned in Damages on account of an Eviction, or an Undertaker on the ſcore of a Building that is faulty, or other perſons, for cauſes of another nature. In all theſe caſes the Damages having been adjudged and liquidated, if the perſon to whom they are due does not receive payment of them, he may demand Intereſt for the ſame in a Court of Juſtice. For theſe Damages are a Capital, which is in the place of a real Subſtance, of which he to whom they are due has been deprived. See the fifth Article.

We ought to place in the ſame rank the Coſts adjudged by a Sentence, or Decree of a Court: and the party to whom they are due may demand Intereſt for them after they have been liquidated, if they are not paid at the time. For it is a Capital, which is in lieu of the Charges which have been laid out upon the Law-Suit. See the ſame fifth Article.

XI.

11. How we are to underſtand the prohibi- The prohibition of taking Intereſt of Intereſt, relates only to the Creditor who would take Intereſt for the Intereſt that *tion of taking Intereſt of Intereſt.*

that is ſtill owing by his Debtor; for the ſaid Intereſt can never be reckoned to him as a Principal Sum. But if a third perſon pays for a Debtor Intereſt to his Creditor, the ſame, with regard to this third perſon, is a Principal Sum, which he lends to the ſaid Debtor: and if he ſhould not receive payment of it at the term, he might demand in a Court of Juſtice, both the ſaid Principal, and the Intereſt thereof[r].

XII.

12. *A caſe where he who pays Intereſt for another, cannot demand Intereſt for that Sum.*

We muſt except from the preceding Rule the Creditor, who to ſecure his own Mortgage, acquits the Principal Sum and Intereſt owing by his Debtor to a Creditor who is prior to himſelf. For this ſecond Creditor cannot pretend from his Debtor, Intereſt for the Sum which he has paid to the firſt Creditor on the ſcore of Intereſt that was due to him; becauſe he paid the ſame as taking care of his own concerns, and not of the concerns of his Debtor; and ſeeing he paid for the Debtor only with this view of ſecuring his own, he could not make the Debtor's condition worſe[ſ].

XIII.

13. *A caſe where Intereſt of Intereſt is due.*

The Rule which prohibits the taking Intereſt of Intereſt, does not hinder a Minor from exacting lawfully from his Tutor or Guardian, not only Intereſt for the Sums ariſing from the Intereſt which the Minor's Debtors have paid to the Guardian, but alſo Intereſt of the Intereſt of Sums of Money which the ſaid Guardian may owe upon his own account to his Pupil. For all the ſaid Intereſts in the hands of Tutors and Guardians are Capitals, which their Office obliges them to lay out for the benefit of their Pupils. And if they have failed to do it, either thro' negligence, becauſe they have laid out the Money upon their own particular concerns, they are bound to pay Intereſt for it; that the ſame may be to the Minors inſtead of the Profit which they would have reaped from Lands, or Houſes, or Annuities, if their Money had been laid out in the purchaſe of ſuch things[t].

XIV.

14 *Four Cauſes from whence Intereſt ariſes.*

It follows from all the Rules which have been explained in this Section, that we may reduce to four ſorts of Cauſes, all thoſe which may give occaſion for paying Intereſt of Sums of Money. For the ſame may be due, either by the effect of an Agreement; as if it has been ſtipulated in a Tranſaction: Or by the nature of the Obligation, as the Intereſt of a Portion given with a Woman in Marriage, and that of the Price of Houſes or Lands that are ſold: Or by a Law, as that which Tutors and Guardians are bound to pay to their Pupils, for the Monies which they have neglected to lay out for their behoof: Or as a puniſhment of the Debtor who defers payment, after the Creditor has made his demand in a Court of Juſtice, both of his Principal, and of the Intereſt due for default of payment[u].

XV.

15. *Divers views by which we may judge whether Intereſt be due or not.*

We have reduced here to theſe few articles, the Rules concerning this matter of Intereſt of Money; for beſides that in every Engagement we have marked under their proper Titles thoſe in which Intereſt is due, it ſufficeth that we have remarked in general the ſeveral Rules which comprehend the principles on which the Deciſions of caſes of this nature depend, and that we have pointed out the uſe of them in ſome Examples. To all which we ſhall add, that in order to diſcern aright between the caſes where Intereſt is due, and thoſe where it is not due, it is neceſſary to conſider in every one what the Debt is, as if it is a Loan, a Sale, or other Contract, or what other kind of Engagement, and of what nature it is; the quality of the thing that is due, as if it is a Suit of Hangings, Silver Plate, or other things which yield no revenue except to ſuch as let them out to hire; or if they are things from which the Creditor might have drawn ſome profit, either from the thing it ſelf, or by ſelling it; that we may judge whether Intereſt be due for the value of the Thing, or whether any thing is due for Damages: the circumſtances of the delay of payment: thoſe of the fair or unfair dealing of the Debtor: and the other circumſtances which may help us to make a right judgment whether there be ground to condemn the Debtor to pay Intereſt, or to diſcharge him from it[a].

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[r] Nullo modo uſuræ uſurarum *à debitoribus* exigantur. *l.* 28. *Cod. de uſur.*

The Rule is only for the Creditor with reſpect to his Debtor; à debitoribus.

[ſ] Uſurarum quas creditori primo ſolvit (ſecundus creditor) uſuras non conſequitur: non enim negotium alterius geſſit, ſed magis ſuum, *l.* 12. §. 6. *ff. qui pot.*

See the ſixth Article of the ſixth Section of Mortgages.

[t] *See the twenty third, twenty fourth, and twenty fifth Articles of the third Section of Tutors; with the Remarks upon them.*

[u] *This Article is a conſequence of all the other Articles of this Section.*

[a] Videamus, an in omnibus rebus petitis, in fructus quoque condemnatur poſſeſſor. Quid enim, ſi argentum, aut veſtimentum, aliamve ſimilem rem: quid præterea, ſi uſumfructum, aut nudam proprietatem, cùm alienus uſusfructus ſit, petierit? Neque enim nudæ proprietatis, quod ad proprietatis nomen attinet, fructus ullus intelligi poteſt: neque uſusfructus rursùs fructus eleganter computabitur. Quid igitur, ſi nuda proprietas petita ſit? ex quo perdiderit fructuarius uſumfructum, æſtimabuntur in petitione fructus. Item, ſi uſusfructus petitus ſit, Proculus ait, in fructus perceptos condemnari. Præterea Gallus Ælius putat, ſi veſtimenta, aut ſcyphus petita ſint, in fructu hæc numeranda eſſe, quòd locata ea re, mercedis nomine capi potuerit. *l.* 19. *ff. de uſur.*

Cùm multa oriri poſſint, quæ pro bono ſunt æſtimanda. Ideoque hujuſmodi varietas viri boni arbitrio dirimenda eſt. *l.* 13. §. 1. *ff. de ann. legat.*

Altho' this laſt Text concerns another ſubject, yet it may be applied to this.

As to the Engagements in which Intereſt is due, ſee the Articles which follow.

Art. 4. *Sect.* 3. *of Covenants.*
Art. 5. *Sect.* 3. *of the Contract of Sale.*
Art. 3. *Sect.* 3. *of the Loan of Money.*
Art. 5. *and* 11. *Sect.* 4. *of Partnerſhip.*
Art. 4. *Sect.* 2. *of Proxies.*
Art. 23, 24, 25. *Section* 3. *of Tutors.*
Art. 5. *Sect.* 5. *of the ſame Title.*
Art. 5. *Sect.* 3. *of Curators.*
Art. 8. *Sect.* 1. *of thoſe who manage the Affairs of others,* &c.
Art. 5. *Sect.* 2. *of the ſame Title.*
Art. 4. *Sect.* 2. *of thoſe who chance to have any thing,* &c.
Art. 1. *Sect.* 3. *of thoſe who receive what is nöt due to them.*
Art. 1. *Sect.* 2. *of that which is done to defraud Creditors.*
Art. 2. *Sect.* 3. *of Cautions, or Sureties.*

SECT. II.

Of Damages.

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I.

1. *Definition of Damages.*

BY Damages, is meant here, the reparation, or ſatisfaction, which is due from thoſe who are anſwerable for ſome damage[a].

[a] Ut damneris mihi quanti intereſt mea. *l.* 5. §. 1. *ff. de præſcript. verb.* Quanti ea res erit. *l.* 29. §. 2. *ff. de ædil. edict.* Quanti res eſt, id eſt, quanti adverſarii interfuit, *l.* 68. *ff. de rei vindic.*

II.

2. *Two ſorts of queſtions in the matter of Damages. The firſt, whether any are due.*

All the Rules concerning the matter of Damages, reſpect either the Queſtion, whether any be due? or in what they do conſiſt? The queſtion whether any Damages be due, is always a queſtion of Law, which depends on knowing if the perſon to whom they are imputed ought to be anſwerable for them. Thus, for Example, the queſtion which ariſes upon the Caſe explained in the ſeventh Article of the fourth Section of the Title of Damages occaſiond by Faults, in relation to the perſon who cuts the Ropes of a Ship, in order to diſengage his own Veſſel, which a blaſt of Wind had thrown upon the other, is a queſtion of Law; in which it is neceſſary to judge whether this damage ought to be imputed to him, or whether thoſe who ſuffered it ought to bear it as an accident[b].

[b] *All Queſtions are either concerning matter of Fact, or Law,* de facto an de jure. *l. ult. ff. de jurej. We call thoſe Queſtions of Fact, where the matter is to know the truth of a Fact: if an Event has happened, or not; if the perſon whoſe Inheritance is controverted has*

made

III.

3. The ſecond queſtion is in what they do conſiſt. Example of this Queſtion.

This firſt queſtion, whether any Damages be due, being decided, then follows the ſecond queſtion, which is to know, in what they do conſiſt? that is, to diſcern in the whole extent of the Damage which has happened, what part thereof ought to be imputed to him who is obliged to indemnify, and what ought not to be imputed to him. For it often happens, as has been mentioned in the Preamble to this Title, that one bare Fact gives occaſion to ſeveral Damages, part whereof is not imputed to him who is ſaid to have been the cauſe of them. Thus, for example, if he who had ſold Corn, and promiſed to the Buyer to deliver it on a certain day, in a certain place, does not keep his word, and that the ſaid Buyer either be obliged to buy other Corn at a dearer rate, or finding none other to buy, he loſes the Sale thereof in another place, where he might have hoped to have made profit by it; or that for want of the ſaid Corn, which he deſigned for the ſubſiſtence of a great many Workmen, he by that diſappointment ſuffers the loſs of their days labour, and the interruption of a Work that is uſeful or neceſſary to him; theſe Events will give riſe to the Queſtion, whether this Seller ſhall be anſwerable either for all theſe conſequences, or a part of them; and what ſhall be the damage that he will be obliged to make good. And this queſtion, which is to fix and aſcertain what is the preciſe Damage that is to be repaired, is a ſecond queſtion of Law, of which we ſhall ſee another Example in the following Article[c].

IV.

4. Another example of the ſame Queſtion.

If the Proprietor of a Vineyard, or other perſon who had right to the Fruits thereof, having hired Carriages for gathering the Grapes thereof on a certain day, he who undertook to furniſh them fails in his promiſe, and the Owner of the Vineyard is obliged to hire other Carriages at a dearer price; or that finding none to hire, he is forced to defer his Vintage, and it happens that a ſhower of Hail comes and deſtroys all the Grapes; with the Produce of which the Owner had propoſed to pay off a Creditor, who being diſappointed of his payment, ſeizes on the Owners Goods, and expoſes them to Sale, the perſon who undertook to furniſh the Carriages, will without doubt be obliged, in the firſt caſe, to make good the Overplus, that the Owner of the Vineyard was forced to give for other Carriages. But in the ſecond caſe, of the loſs of the Vintage, and of the Seizure of the Owner's Goods by a Creditor, this will be a queſtion of Law, to know what this Event will oblige the Carrier to. And one clearly ſees that the Seizure and Sale of the Goods is a conſequence too remote from the deed of this Carrier, and that it proceeds likewiſe from another Cauſe, to wit, the diſorder in which the affairs of the Owner of the Vineyard were; for which reaſon this laſt loſs ought not to be imputed to him[d]. For his condition ought not to be worſe for having failed in his promiſe to a perſon who was under ſuch ſtraits and difficulties, than it would have been if he had diſappointed a perſon whoſe affairs were in a better ſtate. But as to the loſs of the Fruits, is the Carrier bound to make good the whole, or a part thereof, or nothing at all? Will it be ſaid, that this is an Event altogether unforeſeen, which ought not to be imputed to him[e]; or that it was natural to foreſee it, and that his non-performance of his Engagement deſerves ſome puniſhment; if not a Condemnation to make good the whole loſs of the Vintage, yet at leaſt a part of it? This queſtion ought to depend on the circumſtances, and it is neceſſary to conſider if the diſappointment of the Carriages was occaſioned by ſome accident that happened to the Carrier, or if he had preferred a greater gain in another place; or if ſome other cauſe had hindred him from performing his Engage-

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made a Teſtament, or if he has made none: if he who complains of Damage has really ſuſtained ſome Loſs, or if he has ſuſtained none.

We call theſe Queſtions of Law, wherein the matter is to know how we ought to judge, and where it is neceſſary to reaſon upon Principles and Rules, in order to form the Deciſion.

As to the difference between Queſtions of Law, and thoſe of Fact, ſee the firſt Section of the Vices of Covenants.

[c] Cum per venditorem ſteterit quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit, *quæ modò circa ipſam rem conſiſtit.* Neque enim ſi potuit, ex vino putà negotiari, & lucrum facere, id æſtimandum eſt, non magis quàm ſi triticum emerit, & ob eam rem quòd non ſit traditum, familia ejus fame laboraverit; nam pretium tritici, non cervorum fame necatorum conſequitur. Nec major fit obligatio quòd tardiùs agitur: quamvis creſcat ſi vinum hodie pluris ſit. Meritò, quia ſive datum eſſet, haberet emptor: ſive non, quoniam ſaltem hodie dandum eſt, quod jam oportuit. *l. 21. §. 3. ff. de act. empt. & vend.*

We have not put down in this Article the Example mentioned in the Law that is here cited, becauſe it is in the eighteenth Article of the ſecond Section of the Contract of Sale.

Engagement, if it was poſſible to hire other Carriages: and according to theſe circumſtances, and others of the like nature, the Judge will determine whether he ought to make ſome reparation of this damage, or none at all; and it would be juſt to acquit him of all damages, if he had been hindred from performing his Engagement, by an Accident which had happened without any fault of his.

[d] *This is a conſequence of the foregoing Article, and of the Remarks which have been made in the Preamble to this Title.*

[e] Ea quæ rarò accidunt non temerè in agendis negotiis computantur. *l. 64. ff. de reg. jur.*

V.

5. The third Queſtion, about the Eſtimate of Damages.

When the Queſtions of Law have been decided, and it is determined that Damages are due, and wherein they do conſiſt, there remains a third Queſtion, to know what they are to be eſtimated at; which is to be looked upon only as a Queſtion of Fact[f]. Thus, for Example, if he who had ſold Corn which he promiſed to deliver on a certain day, in a certain place, having failed in his promiſe, it be adjudged by the circumſtances, that no other Damages are due, except on account that the ſaid Buyer was obliged to buy other Corn in the ſame place at a dearer rate; there is nothing neceſſary for eſtimating this Damage, but to enquire how much dearer he has bought the other Corn[g]. Which is only a matter of Fact.

[f] Quatenùs cujus interſit in facto, non in jure conſiſtit. *l. 24. ff. de reg. jur.*

[g] Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum, tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die, quo dari debuit. Idemque juris in loco eſſe, ut æſtimatio ſumatur ejus loci quo dari debuit. *l. ult. ff. de cond. trit.*

Quoties in diem, vel ſub conditione oleum quis ſtipulatur, ejus æſtimationem eo tempore ſpectari oportet, quo dies obligationis venit. Tunc enim ab eo peti poteſt. *l. 59. ff. de verb. oblig.*

VI.

6. Two ſorts of Damages which ought to be diſtinguiſhed.

It appears from the Rules explained in the third and fourth Articles, that the Damages and Loſſes of which reparation may be demanded, are of two ſorts. One is of the Loſſes which are in ſuch a manner a conſequence of the deed of the perſon from whom reparation is demanded, that it is evident they ought to be imputed to him, as proceeding from no other cauſe. And the other ſort is of thoſe Loſſes which are only remote conſequences of the ſaid deed, and which proceed from other cauſes[h]. Thus in the caſe of the preceding Article, the Loſs is of this firſt kind[i]. Thus, for another Example of the ſame kind, if an Architect, either out of Ignorance, or thro' a defect in the Materials which he was obliged to furniſh, makes a Building faulty, the damages of the Owner of the Building conſiſting either in the charges of rebuilding what is neceſſary to be rebuilt, or in the Eſtimate which ſkilful perſons ſhall make of the defects of the Work, if it is to remain in the condition it is in; theſe damages are ſuch as have no other cauſe beſides the fault of the Architect, and therefore they ought to be imputed to him[l]. Thus, for the ſecond ſort of Loſſes, we ſee in the caſe of the fourth Article, that the Seizure of the Goods of the perſon whoſe Vintage was deſtroyed by a ſhower of Hail, is, 'tis true, a conſequence of the diſappointment of the Carriages which he had agreed for, but a conſequence ſo remote from that fact, and ſo viſibly owing to another cauſe, that it ought not to be imputed to the perſon who was to have furniſhed the Carriages[m].

[h] *See the Preamble to this Title.*

[i] Cùm per venditorem ſteterit, quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit, quæ modò *circa ipſam rem conſiſtit.* l. 21. §. 3. ff. de act. empt. & vend. Cauſa omnis reſtituenda. *l. 31. ff. de reb. cred.*

See the ſeventeenth Article of the ſecond Section of the Contract of Sale.

[l] Poterit ex locato cum eo agi qui vitioſum opus fecerit. *l. 51. §. 1. ff. locat.*

[m] *See the eighteenth Article of the ſecond Section of the Contract of Sale, and the Preamble to this Title.*

VII.

7. Damages either for a Loſs ſuſtained, or for having failed to make a Profit.

It is neceſſary likewiſe to diſtinguiſh Damages under another view, into two other kinds. One is of thoſe which conſiſt in an effective loſs, and a diminution that one ſuffers of his preſent Eſtate. And the other kind, is of thoſe which deprive one of ſome profit to be made. Thus, the Landlord of a Houſe, which is damaged, by the neglect of the Tenant to make the repairs which he was obliged to make, ſuffers a loſs and diminution of his preſent Subſtance. Thus, a Farmer, whoſe Leaſe is interrupted, is deprived of the profit which he might have made, had he been permitted to enjoy the Farm. In the damages of the firſt kind, the Eſtimate that is to be made thereof, being in relation to a loſs that has actually happened, it is eaſy to ſee wherein the ſaid loſs conſiſts, and to regulate the reparation that may be due for it, when it is the whole loſs that is to be made good. But in the Damages of the ſecond kind, where an Eſtimate is to be made of the loſs of a profit to come, and which depends on uncertain Events which might render it greater or leſſer, and which might alſo occaſion that there would be no profit at all, or that there would be only loſs; it is not poſſible to make an exact Eſtimate of ſuch a Loſs, and to regulate ſuch a Reparation of Damages as may do exact juſtice both to the Farmer, and to the perſon who is bound to make good his damage. But as for theſe ſorts of Reparations of Damages, it is neceſſary to adjuſt them according to the principles which have been explained in this Title, and from whence we have drawn what ſhall be ſaid relating thereto in the twelfth Article.

[*] Colonus ſi ei frui non liceat, totius quinquennii nomine ſtatim rectè aget. *l.* 24. §. 4. *ff. locati.* Et quantum per ſingulos annos compendii facturus erat, conſequetur. *d. l.* Si colonus tuus fundo frui à te, aut ab eo prohibetur quem tu prohibere ne id faciat poſſis, tantùm ei præſtabis, quanti ejus interfuit frui. In quo etiam lucrum ejus continebitur. *l.* 33. *in fin. ff. locati.* See the ſixth Article of the ſixth Section, and the fourth Article of the third Section of Letting and Hiring.

It is to be remarked on this Article, that in the Reparation of Damages to be made to this Farmer, we ought to diſtinguiſh between that which relates to the Eſtimate of the profit which he might have hoped to make, if his Leaſe had not been interrupted, and another ſort of Damage which he might ſuffer at the preſent; as if his having taken the Farm had obliged him to buy Cattle, or other things neceſſary, or to ſettle there, or put him to other charges of the like nature; the loſs of which would be a Damage of the firſt kind, which might be eſtimated at its juſt value, and ſeparately from the loſs which the Farmer ſuſtains by not enjoying the Farm.

VIII.

8. *Difference in Damages, according as the perſon who owes them has acted fairly, or unfairly.*

In all the caſes where Damages are due, it is neceſſary to conſider the quality of the Fact which has occaſioned them, and to diſtinguiſh between the Facts in which there is no fraud, or knaviſh dealing, and thoſe in which there is. For according to this difference, the Damages may be either greater or leſſer, although all the other circumſtances ſhould chance to be equal. Thus, for example, if the Purchaſer of a Houſe, or Lands, is turned out of poſſeſſion by an Eviction, after he has made not only neceſſary Repairs, and Improvements, which have augmented the Revenue, but alſo been at ſome charges for Imbelliſhments; theſe uſeleſs and ſuperfluous Expences will not be comprehended in the Damages for the Eviction, if the Seller has acted honeſtly and fairly, having had reaſon to look upon himſelf as the true Owner of the Houſe or Lands which he had ſold. For the Warranty ought not to be extended to ſuch conſequences, for Expences which the Seller could not well foreſee, and which the Purchaſer had laid out only for his pleaſure. But if the Seller knew well enough that he was not the right Owner of the Houſe or Lands which he ſold, and ſo ſold knaviſhly a Thing belonging to another perſon, this circumſtance of his knaviſh dealing would give a larger extent to the Warranty, and he would be bound to refund the ſuperfluous Expences, which the Purchaſer would not have laid out, if he had known any thing of the Seller's unfair dealing with him. Thus, for another Example, if a Thing that was ſold happens to have ſome defect in it, which occaſions ſome damage, as if it was Cattle infected with ſome contagious diſtemper, which cauſed not only the death of the Cattle that were bought, but alſo of thoſe which the Buyer had before; the Seller who knew nothing of this diſtemper, would be anſwerable only for the loſs of the Cattle which he had ſold; his Engagement not extending to this conſequence of the loſs of the other Cattle. But if the Seller knew of the diſtemper, he would be likewiſe liable to make good the loſs of the other Cattle which the Buyer had before, becauſe he ought to have warned him of the infection that was among the Cattle which he ſold him, and it is his knavery that has given occaſion to this other loſs which the Buyer ſuſtains by the death of his other Cattle. Thus, in general, Damages have a larger extent againſt thoſe whoſe knavery makes them anſwerable for them, than againſt thoſe who have acted honeſtly and fairly. For altho' that a Seller, for Example, who knaviſhly ſells what he knows to be another's, may be ignorant, as well as one who believes what he ſells to be his own, whether the Purchaſer will lay out any ſuperfluous Expences on the Thing that is ſold, yet he cannot but know, that his Knavery implies a will to do all the evil which may enſue upon the ſaid Sale. Thus, whereas the Eviction is, in regard to a Seller who has dealt fairly and honeſtly, an Accident which he could not foreſee: the ſaid Eviction, and the loſſes which follow upon it are, with reſpect to a Seller who has acted unfairly and knaviſhly, a natural conſequence of his Knavery, for which he ought to be accountable[*].

• De ſumptibus verò quos in erudiendum hominem emptor fecit, videndum eſt. Nam empti judicium ad eam quoque ſpeciem ſufficere exiſtimo: non enim pretium continet tantùm, ſed omne quod intereſt emptoris ſervum non evinci. Planè, ſi in tantum pretium excediſſe proponas, ut non ſit cogitatum à venditore de tanta ſumma, veluti ſi ponas agitatorem poſteà factum vel pantomimum, evictum eſſe eum qui minimo venit pretio, iniquum videtur in magnam quantitatem obligari venditorem. *l.* 43. *in f. ff. de act. empt. & vend.* In omnibus tamen his caſibus, ſi ſciens quis alienum vendiderit omnimodò teneri debet. *l.* 45. §. 1. *in f. eod.* See the eighteenth Article of the tenth Section of the Contract of Sale.

Julianus libro quinto decimo inter eum qui ſciens quid, aut ignorans vendidit differentiam facit in condemnatione ex empto. Ait enim, qui pecus morboſum, aut tignum vitioſum vendidit, ſi quidem ignorans fecit, id tantùm ex empto actione præſtaturum quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem: ſi verò ſciens reticuit, & emptorem decepit, omnia detrimenta quæ ex ea emptione emptor traxerit, præſtaturum ei. Sive igitur ædes vitio tigni corruerunt, ædium æſtimationem: ſive pecora contagione morboſi pecoris perierunt, quod interfuit idoneè veniſſe, erit præſtandum. *l.* 13. *ff. eod. V. d. l.* §. 1.

One may be able to judge by the Examples mentioned in this Article of the uſe of this Rule, for diſtinguiſhing in all ſorts of Caſes between the Damages which are due from thoſe who have given occaſion to them by any fraud or knavery, and thoſe which may be due even when there is no unfair dealing. See an Example of another nature in the nineteenth Law, §. 1. ff. locat. *where it is ſaid, that if a Paſture-Ground being farmed out, the Cattle who depaſture therein die by eating of venomous Herbs, the* Owner *of the Ground knowing nothing of this bad quality which it had, will not be accountable for the loſs of the Cattle; but he will be bound only to diſcharge the Farmer of his Rent: but if the Owner of the Ground knew of this bad quality, he will be obliged to make good the loſs of the Cattle which periſhed by feeding therein.*

Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod intereſt, nec ignorantia ejus erit excuſata. Et ita Caſſius ſcripſit. Aliter atque ſi ſaltum paſcuum locaſti: in quo herba mala naſcebatur: hic enim, ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt præſtabitur, ſi ſciſti: ſi ignoraſti, penſionem non petes. Et ità Servio, Labeoni, Sabino placuit. *l.* 19. §. 1. *ff. locat.*

See the ſixth and ſeventh Articles of the eleventh Section of the Contract of Sale, the eighth Article of the third Section, and the firſt and ſecond Articles of the eighth Section of Letting and Hiring.

It is obſervable, that in the Roman *Law they made this difference, as to Damages which might be due from thoſe who did not reſtore a Thing which they were bound to reſtore or deliver up, that if there was no knavery in the caſe, the Condemnation in Damages went no higher than the value of the effective Damage which the perſon ſuffered who had intereſt therein. But if the party was guilty of any fraud or Contumacy; that is, if it was a wilful delay, the party who was injured thereby was allowed to give in upon Oath an Eſtimate of the Loſs or Damage which he ſuſtained; and it was left to the diſcretion of the Judge to limit the Oath to a certain Sum, and even to mitigate the Condemnation after Oath had been made.* Interdùm quod interſit agentis ſolùm æſtimatur, veluti cùm culpa non reſtituentis, vel non exhibentis punitur: cùm verò dolus, aut contumacia non reſtituentis, vel non exhibentis, quanti in litem juraverit actor. *l.* 2. §. 1. *ff. de in lit. jur.* Sed judex poteſt præfinire certam ſummam, uſque ad quam juretur. *l.* 5. §. 1. *eod.* Item etſi juratum fuerit, licet judici vel abſolvere, vel minoris condemnare. *d. l.* §. 2. *V. tit. C. de in lit. jur.*

IX.

9. *Of the regard which ought to be had to the quality of the Fact which has cauſed the Damage.*

When there is neither any deſign to hurt, nor any knavery in the Fact which has cauſed the damage, it is neceſſary to enquire, in the next place, if the Damage has happened thro' any negligence, or any fault, or if there is nothing that can be imputed to the perſon who is pretended to be anſwerable for it. Thus, for Example, if he who has hired a Horſe, rides him in a dark night, in a ſtony way, full of bad ſteps, and the Horſe lames himſelf, or if, for want of care, he is ſtolen, theſe ſorts of faults may be imputed to the perſon who hired him. But if without his fault the Horſe is lamed, or if he is carried off by Robbers, at noon-day, in a highway, the Owner of the Horſe will bear the loſs. For theſe Loſſes are accidents which fall upon the Owner[p].

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[p] In judicio tam locati quàm conducti dolum & cuſtodiam, non etiam caſum cui reſiſti non poteſt, venire conſtat. *l.* 28. *C. de locato.*

X.

10. *Damages may be due, even altho' they have not been occaſioned by any fault.*

Altho' there be no fault on the part of the perſon from whom a Reparation of Damages is demanded, yet this is not always enough to diſcharge him of it. For there are caſes in which Damages are due, altho' they have not been occaſioned by any fault; but are due by the bare effect of an Engagement. Thus, he who had ſold honeſtly a Thing which he believed to be his own, is obliged to put a ſtop to the demand of the perſon who pretends to be Owner of it, and if he does not do it, he will be liable for the damages of the Eviction, altho' there be on his part no unfair dealing, nor any other kind of fault. Thus, he who fails to deliver what he has ſold, is accountable for the damages which are occaſioned by his failing to deliver it. And theſe Damages are bare conſequences of the Engagements which the Seller is under[q].

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[q] Evicta re, ex empto actio non ad pretium duntaxat recipiendum, ſed ad id quod intereſt, competit. *l.* 70. *ff. de evict. l.* 60. *eod.* See the tenth Section of the Contract of Sale.

Si res vendita non tradatur, in id quod intereſt agitur. Hoc eſt, quod rem habere intereſt emptoris. *l.* 1. *ff. de act. empt. & vend.*

Cauſa omnis reſtituenda. *l.* 31. *ff. de rebus cred.*

See the ſixteenth and ſeventeenth Articles of the ſecond Section of the Contract of Sale, and the fourth Article of the third Section of Covenants.

XI.

11. *Conſequences which ap-*

It hath been remarked in the ſixth Article, that we ought not to impute to *pear remote, and yet enter into the Estimate of Damages.*

to the perſon whoſe fact hath cauſed ſome damage, the conſequences that are remote, and which may proceed from other cauſes which ſome conjuncture hath joined with the ſaid fact; and that theſe ſorts of conſequences do not enter into the Eſtimate of Damages. But we muſt not reckon in the number of thoſe remote conſequences, the different loſſes which may be occaſioned by the ſame fact, if the ſaid loſſes have that fact for their only cauſe. Thus, for inſtance, if an Architect having undertaken to build a Houſe, and to perfect it by ſuch a time, for a Tenant who had hired it, does not finiſh it by the time appointed, or makes it ſo faulty, that a part of it falls to the ground, either by a defect in the foundation, or by ſome other cauſe for which the Architect is anſwerable; this event will cauſe three ſorts of Loſſes, that of the Expence for rebuilding the Houſe, the loſs of the Rent which the Landlord ought to have had, and that of the Damages which the Landlord will be liable for to the Tenant, for diſappointing him of his Houſe. And altho' this ſecond and third loſs be conſequences that appear remote from the deed of the Undertaker, yet ſeeing they have no other cauſe, and that his Contract implied the Obligation to put the Houſe in a condition to be inhabited; theſe loſſes may be imputed to him. And if this caſe had happened by the fault of an Architect who was able to make good all theſe loſſes, he would be bound to do it. But becauſe Undertakers have not always the means to make ſuch ample Reparations of Damages, and that Humanity obliges us on ſome occaſions to moderate the Rigour which a ſtrict Juſtice might demand, a temperament may be applied in eſtimating theſe ſorts of Damages, by conſidering that theſe are Events which happen to the moſt ſkilful and moſt careful perſons. Thus it depends always on the prudence of the Judge, and of the perſons imployed to make thoſe Eſtimates, to regulate them according to the circumſtances[r].

[r] Multa oriri poſſunt quæ pro bono ſunt æſtimanda. Ideoque hujuſmodi varietas viri boni arbitrio dirimenda eſt. *l.* 13. §. 1. *ff. de ann. leg.*

Altho' this Law relates to another ſubject, yet the Principles on which it depends may be applied here.

Bonus judex variè ex perſonis, cauſiſque conſtituet. *l.* 38. *ff. de evict.*

XII.

12. Damages for loſſes which depend on future events.

The ſame Equity which makes us often moderate the Damages of preſent Loſſes, by the motives explained in the preceding Article, does much more oblige us to mitigate them in caſes where the loſſes are not preſent, and where the Eſtimate thereof, depending on future events which cannot be known, cannot be regulated on any certain foot. Thus, in the caſe of the Farmer mentioned in the ſeventh Article, it is neceſſary to adjuſt his Damages by ſeveral views: And to conſider what is the cauſe which turns him out of poſſeſſion, as if the perſon who let him the Farm is turned out of poſſeſſion by a Recovery at Law, or if he has ſold it without obliging the Purchaſer to ſtand to the Leaſe: what have been the profits, or loſſes, which this Farmer hath already had: the number of years which his Leaſe had ſtill to run; the quality of the Fruits of his Farm; according as they were more or leſs obnoxious to the injuries of the weather, and to other loſſes; the uncertainty of the value of Proviſions; that of the Opportunities which the Farmer might have had, or not have had, during the time of his Leaſe, to ſell the ſaid Fruits; the uſual profits made by other Farmers of the like Revenues in the ſame places: and by all theſe views, and others of the like nature, we may balance both the profits which this Farmer might hope to make, and the loſſes which he had to fear; and may regulate by theſe conſiderations, ſuch a Reparation of Damages as may be agreeable to Equity[ſ].

[ſ] Colonus, ſi ei frui non liceat totius quinquennii nomine ſtatim rectè aget. *l.* 24. §. 4. *ff. locat.* Et quantum per ſingulos annos compendii facturus erat, conſequetur. *d. l.*

See the ſeventh Article.

XIII.

13. The Prudence of the Judge in eſtimating Damages.

It follows from all the preceding Rules, that as the queſtions relating to Damages ariſe always from Facts which vary according to the circumſtances, it is by the Prudence of the Judge that they are to be decided, he joining to the light which the Principles of Law and Equity may give him, a prudent diſcernment of the circumſtances, and of the regard that ought to be had to them: whether it be for leſſening the Damages that are to be adjudged, by cutting off pretenſions for diſtant loſſes, and upon other conſiderations, if there be ground for it, as in the caſes where no bad deſign, nor any fault, can be imputed to the perſon who is bound to make good the damage: or for increaſing the Damages which are to be given in conſideration of the intention to hurt, if there was any. Thus, for Example of the leſſening of the Damages, in the caſe where a Seller, who has ſold a Thing which he verily believed to be his own, is bound to warrant the Thing ſold againſt an Eviction, the Reparation of Damages will not be extended to the ſuperfluous Expences which the Purchaſer may have laid out barely for his own pleaſure: and much leſs will there be any regard had to the particular conſiderations which might render the ſaid Purchaſe more precious in the eye of the Purchaſer, whether it were becauſe it had been an ancient Patrimonial Eſtate belonging to his Family, or that he took delight therein becauſe he had been brought up in it. For the price of things is not regulated by affection, which may make them more valuable to ſome than to others; but only on the foot of what they may be worth to all perſons indifferently[t]. Thus, on the contrary, in the caſe where one had, by ſome treſpaſs, occaſioned the loſs of a thing which was of neceſſary uſe for the matching of others, which, for the want of that which periſhed, became uſeleſs, as it may happen on ſeveral occaſions; the perſon who had cauſed this damage would be accountable, not only for the value of the thing loſt, but alſo for the damage which the ſaid loſs had occaſioned beſides, by the want of the uſe of the other things[u]. For this damage which might have been conſidered as an Accident, if the loſs of the thing had happened only thro' ſome imprudence, might be imputed to him who had cauſed it, with an intention to do harm.

XIV.

14. Damages againſt litigious perſons. Among all the cauſes from whence Damages may ariſe, there is none more frequent than the injuſtice of thoſe perſons, who by proſecuting or defending unjuſt Law-Suits, cauſe to their adverſe parties not only charges, which are almoſt never made up by the Coſts of Suit which they are condemned in, but likewiſe other damages of which thoſe Law-Suits are the only cauſe; ſuch as the loſs of time, eſpecially in thoſe who live by their Labour, and many other conſequences of the injuſtice and cavilling humour of litigious perſons. Which makes it very juſt and reaſonable, that ſuch perſons ſhould be condemned in Damages, whenever the vexation is ſuch as may deſerve it. And altho' this Rule be ſo rarely obſerved, that it looks as if it were quite aboliſhed; yet ſeeing it is founded upon Equity, that it is agreeable to the Law of Nature, and that it has been revived by the Ordinances, it would be proper for the Judges to put it in execution, whenever the injuſtice, the cavilling and vexatious humour of the parties may deſerve it[x].

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[t] Pretia rerum non ex affectu, nec utilitate ſingulorum, ſed communiter funguntur. *l. 63. ff. ad leg. Falcid.*

Non affectiones æſtimandas, ſed quanti omnibus valeret. *l. 33. ff. ad leg. Aquil.*

Si dicat patronus rem quidem juſto pretio veniſſe, verumtamen hoc intereſſe ſua, non eſſe venundatam, inque hoc eſſe fraudem, quòd venierit poſſeſſio in quam habebat patronus affectionem, vel opportunitatis, vel vicinitatis, vel cœli, vel quòd illic educatus ſit, vel parentes ſepulti, an debeat audiri volens revocare? Sed nullo pacto erit audiendus. Fraus enim in damno accipitur pecuniario. *l. 1. §. 15. ff. ſi quid in fraud. patr. factum ſit.*

What is ſaid in this Law touching the fraud committed againſt the Rights of a Patron, may be applied to the caſe of an Eviction.

[u] Sed utrùm corpus ejus ſolum æſtimamus, quanti fuerit, cùm occideretur: an potiùs, quanti interfuit noſtra, non eſſe occiſum? Et hoc jure utimur, ut ejus quod intereſt, fiat æſtimatio. *l. 21. §. 2. ff. ad leg. Aquil.* Item cauſæ corpori cohærentes æſtimantur, ſi quis ex comœdiis, aut ſymphoniacis, aut gemellis, aut quadriga, aut ex pari mularum unum, vel unam occiderit. Non ſolùm enim perempti corporis æſtimatio facienda eſt: ſed & ejus ratio haberi debet, quo cætera corpora depretiata ſunt. *l. 22. §. 1. eod.*

[x] Improbus litigator & damnum, & impenſas litis inferre adverſario ſuo cogatur. §. 1. *in f. inſt. de pœna tem. litig. V. tit. C. de jurej. propt. cal. dand.*

In all matters Real, Perſonal, and Poſſeſſory, Civil and Criminal, there ſhall be Judgment for Damages ariſing from the Suit, and from the calumny and temerity of the perſon who loſes the Cauſe, which ſhall be taxed and moderated by the ſame Sentence or Judgment at a certain Sum, provided always that the ſaid Damages have been demanded by the Party who has gained the Cauſe, and of which the Parties may give in a Summary Account in the Proceedings of the Cauſe. Ordinance of *Francis* I. in *Auguſt* 1539. Art. 88.

Thoſe perſons who do not underſtand Latin, *muſt be here informed, that the word* Calumny *in the abovementioned Ordinance, as well as in the* Roman *Law, ſignifies the vexation and cavilling of thoſe who knowingly and wilfully proſecute or defend unjuſt Law-Suits.*

[*In* England *we have ſeveral Acts of Parliament which direct the Judges to give Coſts, in order to diſcourage litigious perſons from vexing their neighbours. As by* Stat. 23 H. VIII. cap. 15. *which directs, that if the Plaintiff be Nonſuit, or overthrown by lawful Trial in any Action, Bill, or Plaint, the Defendant ſhall in ſuch caſe have his Coſts, to be aſſeſſed by the Judge or Judges of the Court, and to be recovered as the Plaintiff might have recovered his in caſe Judgment had been given for him. Likewiſe by* Stat. 4 Jac. I. cap. 3. *it is enacted, that if the Demandant or Plaintiff be Nonſuit, or overthrown by lawful Trial, in any Action whatſoever, the Tenant or Defendant ſhall have Coſts.*

By Stat. 1 Gul. & Mar. Seſſ. 1. cap. 21. *it is ordained, that upon diſmiſſion of a Bill in Chancery, the Plaintiff ſhall pay full Coſts, to be taxed by a Maſter. And by* Stat. 8 & 9 W. III. cap. 11. *it is enacted, that in all Actions of Treſpaſs, where it ſhall appear at the Trial, and be certified by the Judge on the back of the Record, that the Treſpaſs was wilful and malicious, the*

the Plaintiff ſhall recover not only his Damages, but his full Coſts of Suit.]

XV.

15. Stipulation of a certain Sum in lieu of all Damages.

The difficulties in ſettling the value of the Damages which may enſue upon the non-performance of an Engagement, oblige ſometimes thoſe who contract together to agree on a certain Sum, which he who fails to perform what he has promiſed on his part, ſhall be bound to pay to the other, to be to him inſtead of a Reparation of Damages. But ſeeing theſe ſorts of Stipulations are not ſo much a juſt Eſtimate of the Damage, as a precaution for engaging the Contracter to a more exact fidelity, thro' fear of incurring the penalty of paying the Sum agreed on, it depends on the prudence of the Judge to moderate the ſaid Sum, if it exceeds the real damage. For he who has ſuffered the damage cannot reaſonably pretend to more than what may be lawfully due to him. And this Stipulation hath its juſt effect by a reaſonable Satisfaction for the loſs that is to be repaired. But if the Agreement is conceived in ſuch terms as ſhew that it was the intention of the Parties to limit the Reparation of Damages to a certain Sum in favour of the perſon who might be liable thereto, and to prevent his being obliged to any thing beyond that Sum, altho' the Damage ſhould chance to be greater; in this caſe the Damage could not be eſtimated at more than the Sum agreed on. For the perſons who have contracted in this manner, had power to mitigate the Reparation of Damages that might be due[y].

[y] In ejuſmodi ſtipulationibus quæ quanti res eſt promiſſionem habent, commodiùs eſt certam ſummam comprehendere: quoniam plerumque difficilis probatio eſt quanti cujuſque interſit: & ad exiguam ſummam deducitur. *l. ult. ff de ſtip. prator. §. ult. inſt. de verb. oblig.* See the eighteenth Article of the fourth Section of Covenants in general.

XVI.

16. All Damages are eſtimated in Money.

All Damages, of what nature ſoever they may be, are reduced to Sums of Money which thoſe perſons owe who are obliged to make any Reparation, whether it be for having failed to perform their Engagements, or for other cauſes. For Money is in place of all things that are capable of being eſtimated[z].

[z] Quia non facit quod promiſit, in pecuniam numeratam condemnatur: ſicut evenit in omnibus faciendi obligationibus. *l. 13. in f. ff. de re judic.*

XVII.

17. Loſſes which he who is the cauſe of them is not obliged to make good.

We muſt not reckon indifferently in the number of the caſes where Damages may be due, all the Events where one perſon may cauſe by his deed ſome loſs to another. For it often happens, that one is the cauſe of loſs without being bound to make it good. And when the facts which have been the occaſion of the loſs have been lawful, and that the loſs has been only a privation of ſome conveniency, and a conſequence of the fact of a perſon who did nothing but uſe his own Right, he will not be bound to repair it. Thus, for example, he who digging in his own Grounds, finds there a Spring which he turns to his own uſe, will not be bound to make good the loſs which his neighbour will ſuffer by being deprived of the ſaid Spring, which will by this means ceaſe to riſe any more in his Ground, unleſs the ſaid change had been made with no other view but to do harm. Thus, he who not being ſubject to a Service, raiſes his Building higher, and by that means takes away the Light, or Proſpect, from his Neighbour's Houſe, cannot be hindred from doing it. But if the change made by a perſon in his own Ground deſtroys, or damages a thing belonging to his Neighbour, as if one digging in his own Ground, weakens thereby the foundations of his Neighbour's Wall, and puts it in danger of falling, he will be anſwerable for it; for the facts which hurt in this manner ceaſe to be lawful; and one cannot dig in his own Ground near the confines of his Neighbour, nor make other Works, unleſs he obſerves the diſtances, and uſes the other precautions preſcribed by the Uſage and Cuſtom of the places[a].

[a] Proculus ait, cùm quis jure quid in ſuo faceret, quamvis promiſiſſet damni infecti vicino, non tamen eum teneri ea ſtipulatione. Veluti ſi juxta mea ædificia habeas ædificia, eáque jure tuo altius tollas: aut ſi in vicino tuo agro, cuniculo vel foſſa aquam meam avoces. Quamvis enim & hîc aquam mihi abducas, & illîc luminibus officias, tamen ex ea ſtipulatione actionem non mihi competere: ſcilicet quia non debeat videri is damnum facere, qui eo veluti lucro, quo adhuc utebatur, prohibetur: multúmque intereſſe utrum damnum quis faciat, an lucro quod adhuc faciebat uti prohibeatur. Mihi videtur vera Proculi ſententia. *l. 26. ff. de damno inf.* Denique Marcellus ſcribit, cum eo qui in ſuo fodiens, vicini fontem avertit, nihil poſſe agi: nec de dolo actionem. Et ſanè non debet habere, ſi non animo vicino nocendi, ſed ſuum agrum meliorem faciendi id fecit. *l. 1. §. 12. ff. de aqua & aq. pluv. arc.* Si tam altè fodiam in meo, ut paries tuus ſtare non poſſit, damni infecti ſtipulatio committitur. *l. 24. §. 12. ff. de damn. inf.* See the eighth and ninth Articles of the ſecond Section of

Services; and the ninth and tenth Articles of the third Section of Damages occaſioned by Faults.

XVIII.

18. A general Remark on the Queſtions relating to Damages. As we have remarked in the matter touching the Intereſt of Money, the ſeveral views by which we may judge if any Intereſt be due, or not [b]; ſo we ought alſo to diſcern in Queſtions that ariſe about Damages, whether any be due, or not. And this depends on the quality of the Fact which may have given occaſion to the Damage; if it is an accident, a ſlight fault, an imprudence, a crime, an involuntary non-performance of an Engagement, or ſome other cauſe. And then Enquiry is made, in the next place, what the Damages may conſiſt in; giving them either the extent, or bounds, which Equity may demand, according to the different cauſes of the Damages, the diverſity of the Events, and the circumſtances, obſerving therein the Rules which have been explained [c].

[b] *See the fifteenth Article of the firſt Section.*

[c] *This is a conſequence of the preceding Articles.* Hoc quod revera inducitur damnum, & non ex quibuſdam machinationibus, & immodicis perverſionibus in circuitus inextricabiles redigatur. *l. un. C. de ſent. quæ pro eo quod int. prof.*

SECT. III.

Of the Reſtitution of Fruits.

The CONTENTS.

1. *The Reſtitution of Fruits is a Reparation of Damages.*
2. *The extent of this Reſtitution.*
3. *The word* Fruits *is underſtood of all ſorts of Revenues.*
4. *The unjuſt Poſſeſſor is bound to reſtore all the Fruits which he has enjoyed.*
5. *The Poſſeſſor who verily believed himſelf to be the right Owner, does not reſtore the Fruits which he has enjoyed during this belief.*
6. *The upright Poſſeſſor reſtores the Fruits after a Legal Demand.*
7. *The Fruits that are cut down belong to the upright Poſſeſſor, altho' they be ſtill lying on the Ground.*
8. *Of Revenues which come in ſucceſſively.*
9. *A caſe where the Poſſeſſor, who believes himſelf to be the true Owner, reſtores the Fruits.*
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11. *We muſt deduct from the value of the Fruits to be reſtored, the Expences laid out upon them.*
12. *The Fruits belong to the Maſter of the Ground, and not to him who ſows it.*
13. *The unjuſt Poſſeſſor is bound to make Reſtitution of the Fruits which have been gathered from the Ground.*
14. *The Heir or Executor of an unjuſt Poſſeſſor ſucceeds to his Engagement.*
15. *Eſtimate of Fruits and other Revenues.*
16. *Reſtitution of the Revenues of Moveable Things.*
17. *There is no Intereſt due for the Fruits, till after a Demand.*

I.

1. The Reſtitution of Fruits is a Reparation of Damages. THE Reſtitution of Fruits is a kind of Reparation of Damages, which is due from him who hath unjuſtly enjoyed the Revenue of another. For this Reſtitution repairs the loſs of the perſon who ought to have enjoyed the Revenue [a].

[a] *As Intereſt is the Reparation of Damages which is due from Debtors who owe Sums of Money, and are behind hand in payment; ſo the Reſtitution of Fruits is a Reparation of Damages due from thoſe who have unjuſtly enjoyed the Revenues belonging to other perſons.*

II.

2. The extent of this Reſtitution. This word Reſtitution of Fruits, comprehends not only the obligation to reſtore thoſe which are in being; but altho' the enjoyment has been for ſeveral years, and that the Fruits of thoſe years be conſumed; yet ſeeing it is the value of the ſaid Fruits which ought to be reſtored, and that their value is inſtead of the Fruits themſelves, the Reſtitution of the Fruits is to be underſtood both of ſuch Fruits as are ſtill extant, and alſo of thoſe which are conſumed [b].

[b] *This is a conſequence of the foregoing Article.*

III.

3. The word Fruits *is underſtood of all ſorts of Revenues.* We muſt not in this place limit the word *Fruits*, to the ordinary ſenſe of the Fruits which the Earth produces; but this word ſignifies here, all the different ſorts of Revenues, of what nature ſoever they may be. And they may be diſtinguiſhed into two kinds; one is of thoſe which the Earth produces, whether it be of it ſelf, and without being cultivated, ſuch as Hay, the Fruits of Trees, Coppice Wood, the Minerals dug out of Mines, the Stones of Quarries,

ries, and others of the like nature: or by culture, ſuch as Corn, and other Grain[c]. The other kind is of Revenues which are not the Fruits of the Earth, nor things which it produces either of it ſelf, or by culture, but which are reaped by induſtry and care, either from ſome Tenement, or Animals, or from ſome Right eſtabliſhed by Law. Thus one gathers Rent from a Houſe, or other Building[d]: Thus one draws from a Ferry-Boat, or a Ship, a Revenue for the carriage of Perſons and Goods[e]: Thus Mills and Pigeon Houſes have their Revenues: And the ſeveral ſorts of Animals which are for our uſe, have alſo their Revenues[f]: Thus one has Rights of Fiſhing and Hunting, Tolls, and divers other Rights of ſeveral natures. And all theſe different Revenues of theſe two kinds, which come in yearly, or daily, are ſo many ſorts of Goods, the enjoyment whereof may be the ſubject matter of the Reſtitution ſpoken of here.

[c] Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *ff. de uſufr. l.* 59. §. 1. *eod.*

[d] Prædiorum urbanorum penſiones pro fructibus accipiuntur. *l.* 36. *ff. de uſufr.*

[e] Item vecturæ navium. *l.* 29. *in f. ff. de hæred. pet. l.* 62. *ff. de rei vind.*

[f] In pecudum fructu etiam fœtus eſt, ſicut lac, & pilus, & lana. Itaque agni & hœdi & vituli ſtatim pleno jure ſunt bonæ fidei poſſeſſoris. *l.* 28. *ff. de uſur.*

IV.

4. The unjuſt Poſſeſſor is bound to reſtore all the Fruits which he has enjoyed.

All thoſe who enjoy a Revenue which they know they have no right to, are bound to reſtore to the perſon whom they have deprived of it, the value of all that they have reaped from it, altho' they have not been diſturbed in their enjoyment, by any demand. For they were ſenſible of the injuſtice which they were doing to the perſon who had a right to enjoy[g].

[g] Certum eſt malæ fidei poſſeſſores, omnes fructus ſolere cum ipſa re præſtare. *l.* 22. *C. de rei vind. l.* 17. *eod. l.* 3. *C. de condict. ex leg.*

V.

5. The Poſſeſſor who verily believed himſelf to be the right Owner, does not reſtore the Fruits which he has enjoyed during this belief.

Thoſe who are honeſtly in poſſeſſion of an Eſtate, which they believe to be their own, when it is not, are not bound to any Reſtitution of what they have enjoyed, during the time that they were fully perſuaded of their right and title to the ſaid Eſtate. For the integrity of a Poſſeſſor hath this effect, that he may look upon himſelf as Maſter of the thing which he poſſeſſes; and this upright perſuaſion of his, which he has reaſon to take for truth, ought to put him in the ſame condition as if he were really Maſter[h]. Thus, the loſs which the right Owner ſuſtains, by not enjoying, is, in regard to him, an accident which he cannot impute to this Poſſeſſor.

[h] Bonæ fidei poſſeſſor in percipiendis fructibus id juris habet, quod dominis prædiorum tributum eſt. *l.* 25. §. 1. *de uſur.*

Bonæ fidei emptor non dubiè percipiendo fructus, etiam ex aliena re, ſuos interim facit: non tantùm eos qui diligentiâ & opera ejus provenerunt, ſed omnes. Quia quòd ad fructus attinet, loco domini penè eſt. *l.* 48. *ff. de acq. rer. dom.*

Bona fides tantumdem poſſidenti præſtat, quantùm veritas, quoties lex impedimento non eſt. *l.* 136. *ff. de reg. jur.* See the fifth Article of the third Section of Poſſeſſion. See concerning the caſes where the upright Poſſeſſor reſtores the Fruits which have been reaped before the demand, the ninth and tenth Articles of this Section.

We call him an upright Poſſeſſor, who has juſt cauſe to believe himſelf to be Maſter of the Thing, as if he has purchaſed an Eſtate which he thought did belong to the perſon of whom he bought it, if it has deſcended to him by Inheritance, if it has been given him, or if he has acquired it by ſome other juſt Title, being ignorant of the right of the true Owner.

VI.

6. The upright Poſſeſſor reſtores the Fruits, after a legal Demand.

The integrity of the Poſſeſſor, which gives him the right to enjoy the Eſtate, ceaſes at the ſame time that his poſſeſſion is called in queſtion, by a demand made by the right Owner. For having once known the right of the true Owner of the Eſtate, he cannot any longer deprive him of the enjoyment thereof. And altho' he may pretend that the Demand is ill founded, and may think that his defences againſt it are juſt; yet if afterwards he is condemned to reſtore the Eſtate, his upright perſuaſion of his own Right and Title, when he defended himſelf, will be of no avail to him; and he will be obliged to make Reſtitution of the Fruits, from the time of the Demand[i]. For this belief of his own Right, let it be never ſo upright and ſincere, cannot have the effect of hurting the true Owner, who has known his Right, and demanded his Eſtate, or of counter-balancing the Authority of a Thing that is adjudged.

[i] Litigator victus, qui poſt conventionem rei incumbit alienæ, non in ſola rei redhibitione teneatur, nec tantùm fructuum præſtationem eorum quos ipſe percepit, agnoſcat: ſed etiam eos quos percipere potuiſſet, non quos eum redigiſſe conſtat, exolvat, ex eo tempore ex quo re in judicium deducta, ſcientiam malæ fidei poſſeſſionis accepit. *l.* 2. *C. de fructib. & lit. exp.* Ut omne habeat petitor, quod habiturus foret, ſi eo tempore quo judicium accipiebatur, reſtitutus illi homo fuiſſet. *l.* 20. *ff. de rei vind.* See the thirteenth Article.

VII.

7. The Fruits that are cut down belong to the upright Poſſeſſor, altho' they be ſtill lying on the Ground.

If a Poſſeſſor, who is verily perſuaded of his own right, is ſummoned juſt before Harveſt time by the Maſter of the Ground, to deliver up the poſſeſſion, and to reſtore the Fruits, and that in the event of the Law-Suit he is condemned, he will be obliged to reſtore the Fruits of that Crop. For ſeeing they were not cut down at the time of the demand, they made a part of the Ground, and the demand interrupted the right which the Poſſeſſor had to enjoy them. But if the Fruits were ſeparated from the Ground before the demand, altho' they were not yet carried away, but lay ſtill in the Field, they will belong to this Poſſeſſor[l]. For he having gathered and ſeparated them from the Ground, they belonged to him: and one cannot afterwards take away his property in them, nor hinder him to carry off what is his own.

[l] Bonæ fidei poſſeſſoris (fructus) fiunt mox cùm à ſolo ſeparati ſint. *l. 13. ff. quib. mod. uſuſfruct. vel uſ. amit.*

Etiam priuſquam percipiat, ſtatim ubi à ſolo ſeparati ſunt, bonæ fidei emptoris fiunt. *l. 48. ff. de acq. rer. dom.*

Perceptionem fructus accipere debemus, non ſi perfectè collecti, ſed etiam cœpit ita percipi, ut terra continere ſe fructus deſierint. Veluti ſi olivæ, uvæ lectæ, nondum autem vinum, oleum ab aliquo factum ſit. Statim enim ipſe accepiſſe fructum exiſtimandus eſt. *l. 78. in fin. ff. de rei vind.*

VIII.

8. Of Revenues which come in ſucceſſively.

If the Revenues of a Tenement which is poſſeſſed by one who ſincerely believes himſelf to be the true Owner thereof, come in ſucceſſively, and day after day, as the Rents of a Houſe, the Revenue of a Mill, of a Ferry-Boat, of a Toll, and others of the like nature, and the ſaid Tenement be recovered by Law, from the Poſſeſſor; he ſhall have whatever fell due before the demand, and muſt reſtore the reſt[m].

[m] *See the ſixth Article of the firſt Section of Uſufruct.*

IX.

9. A caſe where the Poſſeſſor who believes himſelf to be the true Owner, reſtores the Fruits.

There are caſes where the Poſſeſſor who takes himſelf to be the right Owner, is obliged to make reſtitution of the Fruits which he has enjoyed. Thus, for inſtance, if two Brothers being Coheirs to their Father, one of them being abſent, the other has enjoyed all the Goods and Effects of the Inheritance, believing that his Brother was already dead, he will be obliged to reſtore to him when he returns, all his ſhare of the Inheritance, with the Fruits which it has yielded. And it is the ſame thing, with reſpect to all other Co-heirs, whether they ſucceed by Teſtament, or without Teſtament, when one of them has enjoyed the portion belonging to the other[n]. For the Title of Heir gives him only right to his own portion; and the portion of his Coheir is increaſed by the Fruits which proceed from it. Thus the integrity of the Heir who enjoys all the Goods of the Succeſſion, implies the condition, that in caſe it ſhall be found that he has a Co-heir, he will do him juſtice as to his portion. And this diſtinguiſhes the condition of this Heir, from that of another Poſſeſſor who takes himſelf to be the true Owner, and who has no reaſon to think that any body beſides himſelf has a right in what he poſſeſſes.

[n] Non eſt ambiguum, cùm familiæ erciſcundæ titulus inter bonæ fidei judicia numeretur, portionem hæreditatis, ſi qua ad te pertinet, incremento fructuum augeri. *l. 9. C. famul. erciſc.*

Cohæredibus diviſionem inter ſe facientibus juri abſentis & ignorantis minimè derogari, ac pro diviſo portionem eam quæ initio ipſius fuit in omnibus communibus rebus, eum retinere certiſſimum eſt. Unde portionem tuam cum reditibus arbitrio familiæ erciſcundæ percipere potes: ex facta inter cohæredes diviſione nullum præjudicium timens. *l. 17. C. eod. l. 44. ff. eod.*

Fructus omnes augent hæreditatem, ſive ante aditam, ſive poſt aditam hæreditatem acceſſerint. *l. 20. §. 3. in f. ff. de hæred. petit.* Fructibus augetur hæreditas, cum ab eo poſſidetur à quo peti poteſt. *l. 2. C. de petit. hæred.*

If the perſon who ſucceeded alone to an Inheritance, which was not then claimed by any other Heirs, having enjoyed it, for ſeveral years, there ſtarted up another Heir, in the ſame degree with him, but whoſe Relation was till then unknown: and if the Heir who had enjoyed the whole Inheritance during this long time, was not able to reſtore the Fruits of the Portion belonging to his Co-Heir without being ruined, or very much incommoded thereby, it would be equitable to moderate the ſaid Reſtitution by ſome temperament according to the circumſtances.

X.

10. Another caſe of the like nature.

If one Co-Partner has enjoyed alone a Houſe, or Lands belonging in common to the whole Partnerſhip, altho' he thought that he had the ſole right to it, and altho' his enjoyment thereof was honeſt, and with an upright intention, yet he will nevertheleſs be obliged to make reſtitution of the Fruits for the ſhares of his Co-Partners[o]. Thus, for Example, if in the caſe of an univerſal Partnerſhip of all Goods without diſtinction, one of the Partners, to whom a Relation or Friend had deviſed by Will, or given by Deed of Gift, an Eſtate, had enjoyed the ſame apart by himſelf, believing, thro' an Error in Law, that his Co-Partners had no ſhare therein, he will be bound notwithſtanding his upright intention, to reſtore to them their portions of the Fruits of that Eſtate [p], becauſe their Partnerſhip making the ſaid Eſtate common to them all, the right of that Partner was reſtrained to his own portion: and his upright intention, which had for its foundation only an Error in Law, did not give him a title to enjoy the portions of the other Partners [q].

[o] In ſocietatibus fructus communicandi ſunt. *l. 32. §. 2. ff. de uſur.* Si tecum ſocietas mihi ſit, & res ex ſocietate communes, quos fructus ex his rebus ceperis, me conſecuturum, Proculus ait. *l. 38. §. 1. ff. pro ſocio.*

[p] *See the fourth Article of the third Section, and the firſt Article of the fourth Section of Partnerſhip. See in the fourteenth Article of this Section, another Caſe where a Poſſeſſor who believes himſelf to be the right Owner reſtores the Fruits. See the third Article of the third Section of thoſe who receive what is not their due, and the Remark on the ſaid Article.*

[q] *See the ſixteenth Article of the firſt Section of the Vices of Covenants.*

XI.

11. We muſt deduct from the Value of the Fruits to be reſtored, the Expences laid out upon them.

The Reſtitution of the Fruits does not extend to their full value, but we muſt deduct from the value the Expences that were neceſſary for the enjoyment thereof: Such are the Expences for tilling the Ground, for the Seed, and thoſe which are neceſſary for gathering in the Fruits, and preſerving them. And this deduction is allowed even to Poſſeſſors who knew what they enjoyed not to be their own [r]; for theſe Expences being neceſſary, they diminiſh the effective value of the Revenues, which conſiſts only in what remains after all charges are deducted.

[r] Hoc fructuum nomine continetur, quod juſtis ſumptibus deductis ſupereſt. *l. 1. C. de fruct. & lit. exp.* Fructus eos eſſe conſtat, qui deducta impenſa ſupererunt. *l. 7. ff. ſolut. matr.* Fructus intelliguntur deductis impenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt. Quod non ſolùm in bonæ fidei poſſeſſoribus naturalis ratio expoſtulat, verùm etiam in prædonibus. *l. 36. §. ult. ff. de hæred. pet.*

This deduction of the Expences that are neceſſary for enjoying the Fruits, is grounded on the ſame Equity as the Reſtitution that is due to a Poſſeſſor of all uſeful and neceſſary Expences, which have been laid out for improving the Thing which he had in his poſſeſſion, or for preſerving it: and which is allowed even to unjuſt Poſſeſſors, when they are turned out of their Poſſeſſion. Benignius eſt in hujus quoque perſona (prædonis) haberi rationem impenſarum (neceſſariarum & utilium;) non enim debet petitor ex aliena jactura lucrum facere. *l. 38. ff. de hæred. pet.*

See the ſixteenth Article of the tenth Section of the Contract of Sale, and the fourth Section of thoſe who receive what is not their due.

XII.

12. The Fruits belong to the Maſter of the Ground, and not to him who tills and ſows it.

Altho' in many ſorts of Revenues, the induſtry of the perſon who has enjoyed them may have had the greateſt ſhare therein, yet they belong to him who is Maſter of the Ground which has produced them: and the Reſtitution of ſuch Fruits is not the leſs due to him, becauſe the induſtry of another perſon has been inſtrumental in producing them. For the culture, the ſeed, and all the induſtry that is neceſſary for reaping Fruits, or other Revenues, do preſuppoſe the Ground which is to produce them. Thus, it is to the Right of Property which one has to the Ground, that the Right of Enjoyment is annexed; and the Revenue which may be drawn from the Ground belongs to him who is Maſter of it, deducting from the value of the Revenue the Expences neceſſary for enjoying it [ſ].

[ſ] Omnis fructus non jure ſeminis, ſed jure ſoli percipitur. *l. 25. ff. de uſur.*

In percipiendis fructibus magis corporis jus ex quo percipiuntur, quàm ſeminis ex quo oriuntur, aſpicitur. Et ideò nemo unquam dubitavit, quin ſi in meo fundo frumentum tuum ſeverim, ſegetem & quod ex meſſibus collectum fuerit, meum fieret. *d. l. 25. §. 1.*

XIII.

13. The unjuſt Poſſeſſor is bound to make Reſtitution of the Fruits which might have been gathered from the Ground.

The Poſſeſſor who knows what he poſſeſſes not to be his own, is not only bound to make reſtitution of the Fruits which he has reaped; but if by his abſence, or thro' negligence, and for the want of cultivating, he has not reaped any Fruits from the Ground which he was in poſſeſſion of, or if he has reaped only a part of what the Ground might have yielded if it had been cultivated; he will be accountable for the Fruits which a good Huſband might have reaped. For the Maſter of the Ground might have enjoyed it in this manner. But with regard to a fair Poſſeſſor, who takes himſelf to be the right Owner, and who is notwithſtanding obliged to reſtore the Fruits, the Reſtitution may be regulated differently, according to the circumſtances. Thus, a fair Poſſeſſor, who believed himſelf to be the right Owner, having been ſued by the Maſter of the Thing which he is in poſſeſſion of, may afterwards be compared to an unjuſt Poſſeſſor, and condemned to the ſame Reſtitution with him, if after the demand made by the right Owner, he has neglected the enjoyment thereof, or if he has diminiſhed the Revenue, by not making the neceſſary Repairs; and he will be anſwerable for it, as having done it in fraud of the Reſtitution which he had reaſon to be afraid of. But he who is obliged to make Reſtitution of Fruits which he had honeſtly and fairly reaped before any demand was made, as in the caſes mentioned in the ninth and tenth Articles, might be excuſed, if for want of Repairs, or by reaſon of any other neglect, he had not drawn from a Ground, which he thought he might neglect with impunity, believing it to be his own, that profit which another perſon might have made of it with greater care[u].

[t] Fructus non modò percepti, ſed & qui percipi honeſtè potuerunt, æſtimandi ſunt. *l. 33. ff. de rei vindic.* See the ſixth Article of the third Section of Poſſeſſion.

See the Texts cited on the ſixth Article.

[u] *Altho' the Text quoted on this Article makes no diſtinction between Poſſeſſors who believe themſelves to be the right Owners of what they poſſeſs, and thoſe who know that they poſſeſs what is another's, yet it ſeems to be juſt to diſtinguiſh them in the manner they are diſtinguiſhed in this Article.*

XIV.

14. *The Heir or Executor of an unjuſt Poſſeſſor ſucceeds to his Engagement.*

The Heirs or Executors of unjuſt Poſſeſſors, are bound to the ſame Reſtitution as they are to whom they ſucceed, for they come in their place. And as they have the Goods and Rights belonging to the ſaid perſons, ſo they bear likewiſe their burdens: and they enter into the ſame Engagements which they were under; and altho' they may happen to be altogether ignorant of any unfair or diſingenuous dealing, yet their integrity will not hinder the effect of the unjuſt poſſeſſion of thoſe whom they repreſent[x].

[x] Hæredis quoque ſuccedentis in vitium, par habenda fortuna eſt. *l. 2. in f. C. de fruct. lit. & exp.*

XV.

15. *Eſtimate of Fruits and other Revenues year by year.*

In the Reſtitution of Revenues, the value whereof may riſe or fall from one year to another, whether they conſiſt in Money, as the Rents of a Houſe, the Farm of a Mill, of a Toll, and others of the like nature; or whether they be the Fruits of the Ground, or Rent paid in Corn, and other kinds; the Arrears thereof are eſtimated on the foot of what the Houſe or Lands may have produced, and of the value of the Kinds, according as the differences of the times may alter their price: or this liquidation is made according to the Leaſes, if there be any that are not liable to ſuſpicion.

[y] Quanti fuiſſet eo die quo dari debuit. *l. ult. ff. de condict. tritic.* See the ſeventeenth Article of the ſecond Section of the Contract of Sale.

In France, *this Eſtimate is made in the manner as is preſcribed by the Ordinances, of which theſe are the words:*

In Cauſes or Actions, Real and Perſonal, which are commenced for Lands and Things Immoveable, if there is Reſtitution of Fruits decreed, they ſhall be adjudged not only from the time of Conteſtation of Suit, but alſo from the time that the Party who is caſt has been in delay, and has had knowledge of his unjuſt poſſeſſion before the Conteſtation of Suit; nevertheleſs, according to the common way of making ſuch Eſtimates, which ſhall be ſettled according to the Extract taken out of the Regiſters of the ordinary Juriſdictions. Ordinance of 1539. Art. 94. *In all our ordinary Courts of Judicature, whether general or particular, report ſhall be made every week of the Value and common Eſtimate of all kinds of great Fruits, ſuch as Corn, Wine, Hay, and others of the like kind,* &c. Art. 102 and 103. *And by the Extract taken out of the Regiſters of the ſaid Courts, and no otherwiſe, ſhall be proved for the future the Value and Eſtimate of the ſaid Fruits, as well in Execution of Decrees or Sentences, as in other matters, in which Appraiſements are neceſſary.* Art. 104. *If there is a Sentence, or Decree for Reſtitution of Fruits, thoſe of the laſt year ſhall be delivered in kind: And as to thoſe of the preceding years, in liquidating them regard ſhall be had to the four Seaſons, and the common price of every year, unleſs it ſhall have been otherwiſe directed by the Judge, or agreed on between the Parties.* Ordinance of 1667 Tit. 30. Art. 1. See the other Articles of the ſaid thirtieth Title.

XVI.

16. *Reſtitution of the Revenues of Moveable Things.*

Altho' the Reſtitution of Fruits be commonly underſtood only of the Revenues of Immoveable Things, yet ſeeing there are Moveable Things which produce Revenues, we may apply to them the ſame Rules, according as they are applicable thereto: as for Example, to the Revenues which ariſe from Animals, and to the profit which may be made of Things which are let to Hire by thoſe who make a trade of it, ſuch as an Upholſterer who lets out a Suit of Hangings[z].

[z] Si veſtimenta, aut ſcyphus petita ſint, in fructu hæc numeranda eſſe, quòd locata ea re, mercedis nomine capi potuerit. *l. 19. ff. de uſur.*

XVII.

17. *There is no Intereſt due for the Fruits, till after a Demand.*

Whatever number of years the enjoyment, for which Reſtitution is to be made, may have laſted, altho' the Poſſeſſor may have known that what he poſſeſſed was not his own, yet there is due only the bare Eſtimate of that enjoyment, without any intereſt for the Value of the Fruits of each year. But if a legal Demand has been made of the ſaid Intereſt, the ſame will be due from the time of the Demand. For the Value of the ſaid Fruits, which are a real Subſtance, is in lieu of a Capital[a].

[a] Neque eorum fructuum qui poſt litem conteſtatam, officio judicis, reſtituendi ſunt, uſuras præſtari oportere: neque eorum qui priùs percepti, quaſi malæ fidei poſſeſſori condicuntur. *l. 15. ff. de uſur.* Fructuum poſt hæreditatem petitam perceptorum uſuræ non præſtantur. Diverſa ratio eſt eorum qui ante actionem hæreditatis illatam percepti, hæreditatem auxerunt. *l. 51. §. 1. ff. de hæred. petit.* Paulus reſpondit, ſi in omnem cauſam, conductionis etiam fidejuſſor ſe obligavit, eum quoque, exemplo coloni, tardiùs illatarum per moram coloni penſionum præſtare debere uſuras. *l. 54. ff. locat.*

TITLE VI.

Of PROOFS *and* PRESUMPTIONS, *and of an* OATH.

What is a Proof.

WE call that a Proof which convinces the Mind of a Truth: and as there are Truths of diverſe ſorts, ſo likewiſe there are different kinds of Proofs. There are Truths which are independent on the deed of Man, and on all ſorts of Events, which are immutable and always the ſame. Thus, without meddling with the Divine Truths of Religion, which are above all certainty, becauſe of the Authority of God who reveals them to us, and who makes us to feel and to love them, and alſo by reaſon of other different Proofs of an infinite force, which it is not our buſineſs to treat of here. We have in Sciences the knowledge of a great number of Truths which are certain and unchangeable; but there are others which are called Truths of Fact, that is, of what has been done, of what has happened; as, for Example, that one has committed a Robbery or a Murder, that a Teſtament is forged, that in a Fire, a thing which was ſaved out of it was depoſited in the hands of a neighbour, who denies the Depoſit, that a Poſſeſſor of a Houſe or Lands has enjoyed it for the ſpace of ten, twenty, or thirty years, and an infinite number of other Facts of ſeveral natures.

What Truth is.

Different ſorts of Proofs.

There is this which is common to all the different ſorts of Truths, that *Truth is nothing elſe but that which is in reality*: and to know a Truth, is barely to know if a Thing is, or is not, if it is ſuch as is ſaid, or if it is different. But the Proofs which lead us to the knowledge of the Truth in matters of Fact, are very different from thoſe which eſtabliſh the Truths that are taught in Sciences. For in Sciences, all the Truths which may be known in them have their nature fixed and immoveable, and are always the ſame neceſſarily, without any dependance on the deed of Man, or on any ſort of change. Thus, the Proofs of theſe Truths are drawn from their own nature; and they are known either by their ſelf-evidence, if they are firſt Principles, and Truths which are clear in themſelves: or if they depend on other Truths, their Proofs conſiſt in the connexion that links them together, and which makes them to be known the one by the other, according as they are neceſſary conſequences one of another. But in Facts which might happen, or not happen, as depending on Cauſes whereof the Effects are uncertain, it is not by Principles which are certain and unchangeable, on which depended that which has happened, that we can know it: but we muſt have recourſe to Proofs of another kind; and it is by other ways that we muſt diſcover this ſort of Truths. Thus, for Example, if a man has been killed on the high way, being alone in the night time; the truth of the cauſe of this Murder, and the queſtion to know who it is that has killed this man, will not depend on Principles that are certain, and of which the Evidence will lead us to the preciſe knowledge of the Author of this Crime, with a certainty like to that which Demonſtrations in Sciences do produce. And it may likewiſe ſo fall out that it may be impoſſible to know it. But if it is diſcovered, it will be only by Proofs that may be drawn from circumſtances which ſhall happen to be linked together with this Crime, and which will depend on Events that have happened by accident, ſuch as the caſual rencounter of ſome Witneſſes, and ſuch ſigns and tokens as there may happen to be, conjectures, and preſumptions. And even altho' there ſhould chance to be two Witneſſes, beyond all manner of Exception, who ſhould ſay that they had ſeen the Murderer, whom they knew, actually ſtabbing the ſaid man, yet the certainty of ſuch a Proof is of another kind than that of the Truth of a Propoſition clearly proved in a Science, and has not the character of a Demonſtration; becauſe it is not impoſſible that two Witneſſes may be deceived, or even that they may have a mind to deceive. But the force of this Proof conſiſts in this, that it is preſumed from their good ſenſe, that they are not deceived themſelves, and from their probity, that they do not intend to deceive others. So that this Proof ſeems in effect to be grounded only on Preſumptions. However, theſe Preſumptions of Truth, which ariſe from the teſtimony of two Witneſſes are ſuch, that the Laws both of God and Man have appointed them to be held as a ſure Proof, when the Depoſitions agree with one another, and when the Witneſſes are perſons againſt whom there lies no Exception. And altho' it be true that this kind of Proof has not the character of the certainty of a Demonſtration, becauſe it is of quite another kind; yet nevertheleſs it has another ſort of certainty which perſuades fully, when the fidelity of the Witneſſes is well known; becauſe this Proof hath its foundation in the certainty of a Truth which is a ſure Principle, and which is drawn from the very Nature of Man, and from the Cauſes which govern his Actions. According to this Principle, it is certain that two perſons who have Reaſon, and who are not byaſſed by ſome impreſſion of Hatred, Revenge, Intereſt, or ſome other Paſſion, can never agree to bear falſe witneſs together in a Court of Juſtice, and that upon Oath. And we may conclude certainly from the natural Principles of our Actions, that Witneſſes who ſwear that they will ſay nothing but the Truth, do really tell it, if nothing changes in them the Natural Order. And altho' it be true, that the Judges cannot always be ſure that the Witneſſes are ſincere, and that they give their Evidence without intereſt, and without paſſion, and that there are often even falſe Witneſſes; yet it would be unjuſt, as well as abſurd, to give credit to no Witneſs at all, becauſe we cannot be certain of all Witneſſes that they do not lie. And it is a ſufficient juſtification of the Rule, which declares the teſtimony of two Witneſſes to be a ſufficient Proof, that it be true in general, that it is the Natural Order for Men to tell the truth which they know, when they cannot do otherwiſe without involving themſelves in the guilt of Perjury: and in particular, if in the Evidence that is given there appear no reaſon which may make us doubt of the fidelity of thoſe who are produced as Witneſſes; for by that one judges, that it is the Truth which they have declared.

This ſame Principle of the conſequences that may be drawn from the Natural Cauſes which govern our Actions, furniſhes us likewiſe with other different proofs of Facts, by the connexion that is between the ſaid Cauſes and their Effects. Thus *Solomon* founded his Judgment between the two Women, upon the diſcovery which he made of the true Mother, by the commotion and trouble which he foreſaw the Maternal Affection would produce in her, at the ſight of the danger to which he feigned to expoſe the Child.

It may be remarked on the nature of the Proofs of Facts in this Example, and that of Proofs by two Witneſſes, and we ſhall find it the ſame likewiſe in all the other kinds of Proofs of Facts, that although they be different from thoſe which we may have of a Truth in a Science, yet there is ſtill this common to all kinds of Proofs in general, that their force conſiſts in the certain conſequence which we may draw from ſome Truth that is known, to conclude from thence the Truth of which we ſearch the proof; whether it be that we draw a conſequence from a Cauſe to its Effect, or from an Effect to its Cauſe, or from the connexion of one Thing with another.

We have made here theſe Remarks, to ſhew by theſe Principles of Proofs, that in all the Queſtions where the matter is to know if a Fact is proved, or if it is not, it is neceſſary to judge thereof by the certainty of the Foundation on which the Proof is built, and by the connexion which the Fact that is to be proved may have with that Foundation. And as it happens very often, either that the Foundation is not very ſure, or that the Fact in queſtion is not neceſſarily linked with it, we find then, inſtead of Proofs, only Conjectures, which are not ſufficient to eſtabliſh a certain proof of the Truth. Thus, for Example, if ſome days after a quarrel happening between two perſons, one of them is found killed, and that there is againſt the other no manner of proof beſides the bare circumſtance of that quarrel, we cannot from thence conclude with certainty, that it was that perſon who committed the murder. For beſides that Enmities and Quarrels are but ſeldom carried to ſuch extremities, this Murder may have had many other cauſes. So that as there is no neceſſary connexion between this death and that quarrel, this circumſtance alone will not be ſufficient to ground a Sentence of Condemnation upon, and it can only form a Conjecture.

Two ſorts of Preſumptions.

It may be gathered from theſe Remarks, that there are two ſorts of Preſumptions: Some of which are drawn by a neceſſary conſequence from a Principle that is certain; and when theſe ſorts of Preſumptions are ſo ſtrong, that one may gather from them the certainty of the Fact that is to be proved, without leaving any room for doubt, we give them the name of Proofs, becauſe they have the ſame effect, and do eſtabliſh the truth of the Fact which was in diſpute. The other Preſumptions are all thoſe which form only Conjectures, without certainty; whether it be that they are drawn only from an uncertain Foundation, or that the conſequence which is drawn from a certain Truth is not very ſure.

It is becauſe of the difference between theſe two ſorts of Preſumptions, that the Laws have appointed ſome of them to have the force of Proofs, and have not left the Judges at liberty to conſider them only as bare Conjectures, becauſe in effect theſe ſorts of Preſumptions are ſuch, that one ſees in them a neceſſary connexion between the truth of the Fact that is to be proved, and the certainty of the Facts from whence it follows. Thus, for inſtance, in *France* it is enacted, by an Edict of *Henry* II. that if a Woman has concealed her being with Child, and is brought to bed privately, without any witneſs, and it be found that the Child never was chriſtened, nor had any publick Burying, ſhe ſhall be reputed to have murdered her Child, and be puniſhed with death[a]. And there are other ſorts of Preſumptions which the Law directs to be held as certain Proofs; ſo that we ought to take good heed not to diſtinguiſh the ſenſe of the word *Preſumptions* from that of *Proofs*, in ſuch a manner as never to take Preſumptions to be Proofs, ſeeing there are ſuch Preſumptions as are ſufficient to eſtabliſh the Proof of a Fact. But whereas the word *Proof* is taken for a full conviction, the word *Preſumption* is extended to all the conſequences which may be drawn from the ſeveral arguments that may ſerve to prove a Fact, whether it be that thoſe conſequences amount to the Evidence which may make a full Proof, or that they leave ſome doubt.

We have thought it neceſſary to make here theſe Reflexions upon the nature of Proofs and Preſumptions, in order to eſtabliſh the Principles of the Rules concerning this matter, and to diſcover the natural cauſes of that which may eſtabliſh the certainty of the truth of matters of Fact. For it is by theſe Principles that we are enabled to judge of the ſtrength or weakneſs of the arguments which the parties bring to prove a Fact. There remains only that we ſhould diſtinguiſh the different manners in which Facts are proved, and they may be reduced to five Kinds; *viz.* Writing, Witneſſes, Preſumptions, Confeſſion of the Parties, and an Oath. Theſe five Kinds ſhall be the ſubject matter of ſo many Sections. And becauſe there are Rules common to all the ſorts of Proofs, we ſhall explain in the firſt Section thoſe Rules which are common to them all.

We ſhall not ſet down among theſe Rules, ſuch as regard only the Proceedings obſerved in Courts of Juſtice in the matter of Proofs; ſuch as the formalities neceſſary to be obſerved for the proof of private Writings; in examining and interrogating Witneſſes, in ſwearing them, taking down in writing their Depoſitions, and receiving the Objections that may be made againſt the Witneſſes, by thoſe againſt whom they are produced: the form of interrogating the Parties upon Facts, of taking the Oath of the Party, when the Adverſary is willing to have the matter in diſpute decided by it; and the other different Proceedings, whether it be in Civil or Criminal Matters. For all theſe things relate to the Order of Judicial Proceedings, and therefore do not belong to this place, and are regulated by the Ordinances, for the moſt part otherwiſe than they were by the *Roman* Law. And here we ſhall explain only the eſſential Rules which relate to the Nature and Uſe of the ſeveral ſorts of Proofs and Preſumptions.

SECT. I.

Of Proofs in general.

The CONTENTS.

1. *Definition of Proofs.*
2. *Proofs are of two ſorts.*
3. *Facts which have no need of proof.*
4. *He who advances a Fact, ought to prove it.*
5. *The Defendant ought to prove the facts on which he grounds his defence.*
6. *Each party may on his part prove the contrary of the facts alledged by the adverſe party.*
7. *The parties have mutual liberty to alledge facts, and to prove them.*
8. *Provided the facts have relation to the affair in hand.*

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[a] *See the Edict of* Henry II. *of the year* 1556, *touching Women who have concealed their big bellies.* V. l. 34. ad leg. Jul. de adult.

9. *A thing adjudged holds the place of Truth.*
10. *The effect of the Proofs depends on the prudence of the Judge.*
11. *In proofs it is neceſſary to examine, 1ſt. If they are according to form.*
12. 2dly. *If they are concluding.*

I.

1. Definition of Proofs. BY Judicial Proofs, is meant the ways which the Law has preſcribed for diſcovering, and for eſtabliſhing with certainty the truth of a matter of Fact that is conteſted[a].

[a] Ut quod actum eſt facilius probari poſſit. *l.* 4. *ff. de fid. inſtr.* Ad fidem rei geſtæ faciendam. *l.* 11. *ff. de teſtib.*

II.

2. Proofs are of two ſorts. There are two ſorts of Proofs; thoſe which the Law appoints to be held as certain, and thoſe whereof the effect is left to the diſcretion of the Judge. Thus the Law will have the uniform Depoſitions of Witneſſes that are unexceptionable, and who are in the number required by Law, to be received as a certain proof of a Crime, or other Fact. Thus the Law eſtabliſhes it for a ſure proof of an Agreement, if the Contract is ſigned by the parties, or if they have not been able, or could not write, if it is ſigned either by a Notary and two Witneſſes, or by two Notaries without any Witneſs, according to the different Uſages of the places. But when there is nothing elſe but preſumptions, tokens, conjectures, imperfect evidence, or other ſorts of Proofs which the Law has not directed to be held for certain, it leaves it to the diſcretion of the Judge, to diſcern what may be received as Proofs, and what ought not to have that effect[b].

[b] *See the fifth Article of the fourth Section.*

III.

3. Facts which have no need of proof. The uſe of Proofs does not concern Facts that are naturally certain, and whereof the Truth is always preſumed, if the contrary is not proved. But it reſpects only Facts which are uncertain, and of which the truth is not preſumed unleſs it be proved. Thus, for Example, he who demands a Succeſſion, or a Legacy, by virtue of a Teſtament, has no occaſion to prove that the Teſtator was in his right Senſes when he made the Teſtament, in order to eſtabliſh from thence the validity of the Teſtament. For it is naturally preſumed, that every one has the uſe of his Reaſon. But the Heir of blood, or next of kin, who in order to annul the ſaid Teſtament, alledges the inſanity of the Teſtator, ought to prove that Fact. Thus he who demands to be relieved from an Obligation becauſe of his Minority, ought to prove his Age[c]. Thus he who pretends to be Proprietor of a Houſe or Lands which are in the poſſeſſion of another perſon, ought to make proof of it[d].

[c] Cùm te minorem viginti quinque annis eſſe proponas; adire præſidem provinciæ debes, & de ea ætate probare. *l.* 9. *C. de probat.*

[d] Poſſeſſiones, quas ad te pertinere dicis, more judiciorum proſequere. Non enim poſſeſſori incumbit neceſſitas probandi eas ad ſe pertinere, cùm te in probatione ceſſante, dominium apud eum remaneat. *l.* 2. *C. de probat.*

See the ſeventh Article of the fourth Section.

IV.

4. He who advances a Fact, ought to prove it. It follows from the preceding Rule, that in all the caſes of a Fact that is conteſted, if it is ſuch that it be neceſſary to make proof of it, it lies always on the perſon who advances it, to prove it. Thus all thoſe who make any demands that are founded upon ſome matter of fact, ought to prove the truth of the fact, if it is conteſted. Thus, he who demands a Legacy bequeathed by a Codicil, ought to prove the Codicil to be true. This is the reaſon why it is commonly ſaid, that it is incumbent on the Plaintiff to prove his fact[e].

[e] Semper neceſſitas probandi incumbit illi qui agit. *l.* 21. *ff. de probat.*

Ei incumbit probatio qui dicit, non qui negat. *l.* 2. *eod.*

Actore non probante, qui convenitur, etſi nihil ipſe præſtat, obtinebit. *l.* 4. *in f. C. de edendo.*

See the ſeventh Article of the fourth Section.

V.

5. The Defendant ought to prove the facts on which he grounds his defence. As the Plaintiffs are obliged to prove the facts on which they ground their demands, ſo likewiſe if the Defendants on their part alledge facts which they make uſe of as a foundation of their defences, they ought to prove them. Thus, a Debtor who confeſſing the debt, alledges for his defence that he has paid it, ought to make proof of the payment. And altho' he be Defendant in the Suit, yet he is conſidered in regard of this fact as Plaintiff[f].

[f] In exceptionibus dicendum eſt, reum partibus actoris fungi oportere. Ipſumque exceptionem, velut intentionem implere: ut putà ſi pacti conventi exceptione utatur, docere debet pactum conventum factum eſſe. *l.* 19. *ff. de probat.*

Nam reus in exceptione actor eſt. *l.* 1. *ff. de except. præſc. & præjud.* Ut creditor qui pecuniam petit numeratam, implere cogitur, ita rurſum debitor qui ſolutam affirmat, ejus rei probationem præſtare debet. *l.* 1. *C. de probat.*

VI.

6. Each party may on his part prove the contrary of the facts alledged by the adverse party.

Altho' the perſon againſt whom one alledges a fact which it is neceſſary to prove, be not obliged on his part to prove the contrary[g]; yet he may nevertheleſs, if he pleaſes, the better to eſtabliſh his Right, prove the truth of the oppoſite fact[h].

[g] Fruſtrà veremini ne ab eo qui lite pulſatur, probatio exigatur. *l. 8. C. de probat.*

[h] Si quis fiducia ingenuitatis ſuæ ultrò in ſe ſuſcipiat probationes —— non ab re eſſe opinor, morem ei geri probandi ſe ingenuum. *l. 14. ff. de probat.*

VII.

7. The Parties have mutual liberty to alledge facts, and to prove them.

It is equally free both for the Plaintiff and Defendant, to alledge the facts which may ſerve as a foundation to build their Right upon. And each of them is admitted, both to prove the facts which he himſelf alledges, and alſo to prove the contrary of the facts alledged by his adverſary[i].

[i] *This is a conſequence of the preceding Articles.* See the following Article.

VIII.

8. Provided the facts have relation to the affair in hand.

The liberty of alledging and proving of facts, does not extend to all ſorts of facts indifferently; but the Judge ought to receive the proof only of thoſe that are called pertinent, or relevant; that is, from which one may draw the conſequences which may ſerve to eſtabliſh the Right of the perſon who alledges the ſaid facts: and he ought on the contrary to reject thoſe facts of which the proof, if they were true, would be uſeleſs. Thus, for inſtance, he who ſhould pretend to evict a Houſe or Land from the perſon who had purchaſed it, believing himſelf to be Proprietor thereof, becauſe he had lent the Money for the purchaſe, would demand to no purpoſe to be admitted to prove this fact; and this proof would be of no manner of uſe to his pretention, ſeeing the property of the Houſe or Land does not belong to him who advanced the Money to the purchaſer[l].

[l] Jure competenti prædiorum, quæ in queſtionem veniunt, dominium ad te oſtende pertinere. Nam res vindicantem ab emptore, ſuos numeratos nummos aſſeverantem erga probationem laborare non convenit: ſiquidem hujuſmodi licet probetur factum, tamen intentioni nullum præbet adminiculum. *l. 21. C. de probat.* See the fourth Article of the fifth Section.

IX.

9. A thing adjudged holds the place of Truth.

Things that are adjudged hold the place of Truth with regard to thoſe between whom they are adjudged, if they have not appealed, or if there lies no Appeal from the Sentence. Thus, for Example, if in the caſe of two Brothers claiming each of them their ſhare in their Father's Inheritance, one of them has been by Sentence declared to be a Profeſſed Monk, this fact will be held for true, and well proved: and he will be incapable of having a ſhare in the Inheritance[m]. But the facts which have been formerly adjudged between other perſons than thoſe who conteſt them at preſent, are undecided with reſpect to theſe, and muſt be proved; for they might have reaſons to offer, which had not been urged by the others[n].

[m] Res judicata pro veritate accipitur. *l. 207. ff. de reg. jur.*

[n] Sæpe conſtitutum eſt res inter alios judicatas, aliis non præjudicare. *l. 63. ff. de re jud. tot. tit. C. quib. res jud. non noc. & tit. C. inter al. act. vel jud. al. n. noc.*

X.

10. The effect of the Proofs depends on the prudence of the Judge.

In all the kinds of Proofs, whether by Witneſſes, or by Writing, or by other ways, the queſtion whether a Fact is proved, or is not, depends always on the prudence of the Judge, who ought to diſcern whether the Depoſitions of the Witneſſes, or the other ſorts of Proofs, be ſufficient, or not[o]. And this implies two ſorts of diſcuſſion, which ſhall be explained in the two following Articles.

[o] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. *l. 3. §. 2. ff. de teſtib.* Hoc ergò ſolum tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem, cognitionem ſtatim alligari debere, ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parum probatum tibi opinaris. *d. §. in fine.*

XI.

11. In proofs it is neceſſary to examine, 1st. If they are according to form.

The firſt enquiry that a Judge ought to make, in order to know what ought to be the effect of a Proof, and what regard ought to be had to it, is concerning the Formalities thereof; that is, if the Proof be according to the Order preſcribed by Law. Thus in the caſes where Proofs by Witneſſes may be received, it is neceſſary to enquire if they are in the number which the Law demands, if they have given their teſtimony by word of mouth, if there be no cauſe which may render their Evidence ſuſpected, if they have been ſummoned, if they have been ſworn; and, in a word, if their Depoſitions have been accompanied with all the Formalities which the Law requires[p]. Thus when it is by a Writing that one pretends to prove a Fact, it is neceſſary to examine if it be an Original, or a

Copy: if it is an Act made in preſence of a Publick Notary, and of which the date is certain; or if it is only a private Writing, ſigned only by the Parties, and to which they may have put what date they pleaſed: and if the Act has the Formalities required to make it Authentick, and if it be ſuch as ought to be received for a Proof[q].

[p] Si teſtes omnes ejuſdem honeſtatis, & exiſtimationis ſint. *l.* 21. §. 3. *ff. de teſtib.* *v.l.* 3. *eod.*

Divus Hadrianus Junio Rufino Proconſuli Macedoniæ reſcripſit, teſtibus ſe, non teſtimoniis crediturum. *l.* 3. §. 3. *ff. de teſtib.* See the third Section.

[q] Non ex indice & exemplo alicujus ſcripturæ, ſed ex authentico. *l.* 2. *ff. de fide inſtr.* See the ſecond Section.

XII.

2dly. If they are concluding. The ſecond examination of the Proofs, conſiſts in diſcerning that which reſults from them for eſtabliſhing the truth of the Facts which were to be proved, whether it be by Witneſſes, or by Writing, or otherwiſe. Thus, as for the Depoſitions of Witneſſes, the Judge examines if the Facts to which they depoſe are the ſame which ought to have been proved, or if they are other Facts from which one may be able to draw certain conſequences of the truth of the Facts in diſpute: If the Depoſitions agree one with the other, or in caſe they differ, whether the difference can be reconciled ſo as to make a Proof, or whether it leaves the thing uncertain: If the multitude of Witneſſes leaves no manner of doubt: If among ſeveral Witneſſes who depoſe differently, the probity and authority of ſome of them gives more weight to their teſtimony: If there is no variation in a Depoſition: If the facts are notoriouſly evident, and confirmed by publick fame, in the caſes where theſe circumſtances may be conſidered: If ſome of the Witneſſes be ſuſpected of partiality, by reaſon of favour or hatred to one of the parties. Thus in Proofs by Writing, and in all the other kinds of Proofs, it depends on the prudence of the Judge to diſcern that which may ſuffice for eſtabliſhing the truth of a Fact, and that which leaves it doubtful: to conſider the relation and connexion which the Facts reſulting from the Proofs may have with thoſe which are to be proved: to examine if the Proofs are concluding, or if they are only conjectures, ſigns, and preſumptions, and what regard ought to be had to them: and in a word, to judge of the effect of the Proofs by all the different views which one may have from the knowledge of the Rules, and from the Reflections on the facts and circumſtances[r].

[r] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. Sicut non ſemper, ita ſæpè, ſine publicis monumentis cujuſque rei veritas deprehenditur, aliàs numerus teſtium, aliàs dignitas & autoritas, aliàs veluti conſentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergò ſolum tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem, cognitionem ſtatim alligari debere, ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parum probatum tibi opinaris. *l.* 3. §. 2. *ff. de teſtib.*

In teſtimoniis dignitas, fides, mores, gravitas examinanda eſt, & ideo teſtes qui adverſus fidem ſuam teſtationis vacillant, audiendi non ſunt. *l.* 2. *ff. de teſtib.* Si teſtes omnes ejuſdem honeſtatis & exiſtimationis ſint, negotii qualitas, ac judicis motus cum his concurrit, ſequenda ſunt omnia teſtimonia. Si verò ex his quidam eorum aliud dixerint, licet impari numero, credendum eſt. Sed quod naturæ negotii convenit, & quod inimicitiæ, aut gratiæ ſuſpicione caret. Confirmabitque judex motum animi ſui, ex argumentis & teſtimoniis, & quæ rei aptiora, & vero proximiora eſſe compererit. Non enim ad multitudinem reſpici oportet, ſed ad ſinceram teſtimoniorum fidem, & teſtimonia quibus potiùs lux veritatis aſſiſtit. *l.* 21. §. 3. *ff. de teſtib.*

Indicia certa, quæ jure non reſpuuntur, non minorem probationis, quàm inſtrumenta, continent fidem. *l.* 19. *C. de rei vindic.*

SECT. II.

Of Proofs by Writing.

THE force of Proofs by Writing conſiſts in this, that men have agreed to preſerve by Writing the remembrance of things that have been tranſacted, and to perpetuate the memory of them to poſterity, whether it be that they may ſerve as Rules to the parties themſelves, or as a perpetual proof of what is written. Thus Covenants are put down in writing, in order to preſerve the memory of what the contracting parties have bound themſelves to, and to make to themſelves thereby a fixed and unchangeable Law, as to what has been agreed on. Thus Teſtaments are written, that a remembrance may be kept of what has been ordered by the Teſtator, who had a right to diſpoſe of his Goods, and that it may ſerve as a Rule to his Executor, and to the perſons to whom he has left Legacies. Thus it is thought fit to write Sentences and Decrees of Courts, Edicts, Ordinances, and every thing which is to ſerve as a Title, or a Law. Thus it is cuſtomary to write down in publick Regiſters, Marriages, Chriſtenings, and other Acts which ought to be recorded; and other the like Regiſters are kept as a publick and perpetual Repoſitory of the truth of the Acts which are there recorded.

The written Contract therefore is a proof of the Engagements of thoſe who have contracted, and the written Teſtament is a proof of the will of him who has made it. And theſe Proofs are in the place of Truths to the perſons whom they concern. Thus, a written Contract ſerves as a proof againſt the Contracters, againſt their Heirs, and againſt all thoſe who repreſent them, and who ſucceed to their Engagements. Thus, a Teſtament proves the truth of the diſpoſitions made by the Teſtator, and obliges the Executors and Legatees to execute them.

It is eaſy to comprehend how neceſſary the uſe of Writing has been, for preſerving the memory of Agreements, of Teſtaments, and of other Acts of all kinds; and that there can be no better proof of them, ſeeing the Writing preſerves without change or alteration, whatever is ſet down therein, and expreſſes the intention of the perſons by their own proper teſtimony and Evidence. But ſeeing all perſons cannot write, it has been thought fit, for the conveniency of thoſe who cannot write, to eſtabliſh publick Officers, who are called Notaries Publick, and whoſe Function is ſuch, that the Acts ſigned either by two Notaries, without any witneſs, or by one Notary and Witneſſes, according to the different uſages of places, make a legal proof of the truth of that which is written between the perſons who cannot either write or read. And as to perſons who can write, their Sign Manual, without the preſence of a Notary, makes likewiſe a proof of the truth of that which is written: but with this difference between Acts written without the preſence of Notaries, which are called private Writings, and thoſe which are ſigned by Notaries; that theſe are received as a proof in Courts of Juſtice, and prove two facts. One is, that the Act has been ſped between the perſons who are named in it, at the time, and in the place there ſpecified: And the other is, that the intentions of the Parties concerned are there explained. And the authority of this Proof is founded on the publick Function of Notaries, who are eſtabliſhed for this very purpoſe, to render the Acts which they ſign, authentick. But private Writings do not even prove by whom they are written, and it is neceſſary to verify them; that is, to prove by whom they are ſigned.

The great facility there is of writing Covenants, and the infinite number of inconveniences that attend the admiſſion of the proof of unwritten Covenants, in the manner that it was received by the *Roman* Law, have been the motives which induced the Kings of *France* to make the Ordinances, whereby it is prohibited to receive other proofs than writing for Covenants, where the Sum exceeds One Hundred Livres, as has been remarked in another place[a]. And it is for the ſame reaſon that the Ordinances have directed that there ſhould be kept publick Regiſters of Chriſtenings, Marriages, Deaths and Burials, Ordinations, Admiſſions into any Religious Order, to the end that people may eaſily come at the certain proof of theſe ſorts of Facts[b]. Which does not hinder but that in caſe the ſaid Regiſters ſhould happen to be loſt or deſtroyed, one may be allowed to make uſe of the other kinds of proofs[c].

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[a] *See the Remark on the twelfth Article of the firſt Section of Covenants in general. It is neceſſary to obſerve, with reſpect to this Prohibition by the Ordinances of* France *againſt receiving the proof of Covenants by Witneſſes, that it does not extend to things depoſited in a caſe of neceſſity, nor to the other caſes explained in the third and fourth Articles of the twentieth Title of the Ordinance of the month of* April 1667.

[b] *Ordinance of* 1539, *Art.* 50. *and* 51. *Of* Blois, *Art.* 181. *Of* Moulins, *Art.* 55. *Declaration in* July 1566. *Art.* 11. *Ordinance of* 1667. *Tit.* 20. *Art.* 7. 8. *and* 15.

[c] *Ordinance of* 1667. *Tit.* 20. *Art.* 14. Ætas probatur aut ex nativitatis ſcriptura, aut aliis demonſtrationibus legitimis. *l.* 2. §. 1. *ff. de excuſ.*

[*It has been already obſerved, in relation to the Uſage obſerved in* England *in the matter of unwritten Contracts, that by Statute* 29 Car. II. cap. 3. §. 17. *it is enacted, That no Contract for the Sale of any Goods, Wares and Merchandizes, for the price of Ten Pounds Sterling, or upwards, ſhall be allowed to be good, except the Buyer ſhall accept part of the Goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the Bargain, or in part of payment, or that ſome Note, or Memorandum in writing, of the ſaid Bargain be made and ſigned by the parties to be charged by ſuch a Contract, or their Agents thereunto lawfully authorized.*]

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I.

1. What are written Proofs. Proofs by Writing are thoſe which are drawn from ſome written Act, ſuch as a Contract, a Teſtament, or other Writing, which contains the truth of the fact in queſtion[a].

II.

2. Uſe of theſe Proofs. People put down in writing, Contracts, Teſtaments, and other Acts, in order to preſerve the proof of what has been done, by the teſtimony of the perſons themſelves who expreſs therein their intentions[b].

III.

3. Written Proofs are the ſtrongeſt. Seeing the force and validity of Proofs by Writing conſiſts in this, that they are a teſtimony which the perſons who are parties to the ſaid Acts give againſt themſelves, and a teſtimony which is unchangeable; there can be no better proof of what has paſt between them, than what they themſelves have expreſſed of the matter[c].

IV.

4. No Proofs are received againſt Writing. This ſtrength of written Proofs, is the reaſon why we do not receive contrary proofs by Witneſſes[d]. Thus, he who would call in queſtion a Teſtament that is made according to form, pretending to prove by witneſſes, either that the Teſtator had altered his will, or that his intention was otherwiſe, would not be admitted to make ſuch a proof; nor he who ſhould offer to prove by witneſſes, that he had not received a Sum of Money for which he had given an Acquittance.

V.

5. Unleſs it be pretended that the Writing is forged. We muſt not extend the Rule explained in the preceding Article, to the caſes where the truth of an Act is called in queſtion; as if it be pretended that it is forged, or that it has been made through the impreſſion of fear and violence, which render it null. For the proof which is drawn from a written Act, hath for its foundation the fidelity of the teſtimony which the Writing gives of the truth of what it contains, and when this fidelity is called in queſtion, the Writing loſeth its force. Thus, he who pretends to prove that his hand has been counterfeited in a Writing that appears to be ſigned by him, ought to be received to prove this fact[e]. Thus, he who pretends that an Obligation has been extorted from him by force and violence, may make proof of it[f]. And it would be the ſame thing in all the caſes where the written Act ſhould be oppoſed on the head of ſome vice which might annul it, as on the account of ſome fraud, or ſome error which might have this effect[g]. Or if it were an Act counterfeited in order to colour ſome fraud, ſuch as a Diſpoſition made to a third perſon, whoſe name is made uſe of for tranſmitting ſome Liberality to another perſon, who by Law is incapable of receiving it directly in his own name, or for acquiring to the ſaid perſon a Thing whereof the Commerce was prohibited to him[h].

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[a] Quibus cauſa inſtrui poteſt. *l. 1. ff. de fide inſtr.*

[b] Fiunt ſcripturæ, ut quod actum eſt, per eas faciliùs probari poſſit. *l. 4. ff. de fide inſt. l. 4. ff. de pignor.*

Written Acts are of ſeveral ſorts, and they may be reduced to four kinds: Private Writings, Acts made in the preſence of Publick Notaries, thoſe which are made in Courts of Juſtice, ſuch as the naming of a Tutor, or Guardian, and thoſe which are made before other publick perſons, as Matrimony in the preſence of a Clergyman, the Promotion to Holy Orders, and other Acts of which publick Regiſters are kept.

[c] Generaliter ſancimus, ut ſi quid ſcriptis cautum fuerit pro quibuſcunque pecuniis ex antecedente cauſa deſcendentibus, eamque cauſam ſpecialiter promiſſor edixerit: non jam ei licentia ſit cauſæ probationem ſtipulatorem exigere: cùm ſuis confeſſionibus acquieſcere debeat. *l. 13. C. de non. num. pecu.*

[d] Contra ſcriptum teſtimonium, non ſcriptum teſtimonium non fertur. *l. 1. C. de teſtib.*

Cenſus & monumenta publica potiora teſtibus eſſe, ſenatus cenſuit. *l. 10. ff. de probat.* See the thirteenth Article of this Section, and the Remarks at the end of the Preamble to this Section.

[e] Quid ſit falſum quæritur & videtur id eſſe, ſi quis alienum chirographum imitetur. *l. 23. ff. ad leg. Corn. de falſ.*

[f] Si quis vi compulſus aliquid fecit, per hoc edictum reſtituitur. *l. 3. ff. quod metus cauſa.*

[g] *See the Title of the Vices of Covenants.*

[k] Acta ſimulata velut non ipſe, ſed ejus uxor comparaverit, veritatis ſubſtantiam mutare non poſſunt. Quæſtio itaque facti per judicem, vel præſidem provinciæ examinabitur. *l. 2. C. plus val. quod agitur.* Nec per interpoſitam perſonam aliquid eorum ſine periculo poſſit perpetrari. *l. un. §. 3. C. de contr. jud. V. l. 46. ff. de contr. empt. V. l. 10. ff. de his q. ut ind. l. 1. l. 3. l. 40. ff. de jure fiſci.* See the nineteenth and twentieth Articles of the firſt Section of the Rules of Law, the Preamble to the eighth Section of the Contract of Sale, and the firſt Article of the ſame Section.

VI.

6. Written Acts are not received as proof, unleſs they be in due form.

Written Acts have not the force of Proofs, except they have all the formalities which the Law preſcribes. For theſe formalities are neceſſary precautions for qualifying them to ſerve as Proofs, and are marks by which the Law points out to us what written Acts it receives as Proofs, and what it rejects. Thus, for Example, in the Provinces where it is neceſſary to have ſeven Witneſſes to a Teſtament, it would be to no purpoſe to produce a Teſtament which had only ſix Witneſſes, altho' they were perſons of never ſo great integrity[i]. For beſides that it is neceſſary to obſerve the preſcription of the Law, the practice of authorizing a Teſtament, barely in conſideration of the probity of the witneſſes, would be opening a door to a thouſand inconveniences. Thus, for another Example, a Contract which the parties intended to execute in the preſence of a Publick Notary, and Witneſſes, would be without effect, if it were not ſigned, both by the Parties themſelves, and by the Witneſſes who could write their names, and by the Notary. Thus, a private Writing which is only written, but not ſigned by the party, would make no proof[l].

[i] Septem teſtibus adhibitis. §. 3. *inſt. de teſtamentis ordin.*

[l] Non aliter vires habere ſancimus (contractus quos in ſcriptis fieri placuit) niſi inſtrumenta in mundum recepta, ſubſcriptionibuſque partium confirmata, &, ſi per tabellionem conſcribantur, etiam ab ipſo completa, & poſtremò à partibus abſoluta ſint. *l. 17. C. de fide inſtr.* See the fifteenth Article of the firſt Section of Covenants.

VII.

7. The Witneſſes to a written Act will not be received to prove the contrary.

When the written Acts are according to form, not only are contrary proofs not received, but even not ſo much as a hearing is granted to one of the Parties who ſhould deſire to have the Witneſſes to an Act examined Judicially, in order to make ſome change in the Act, or to explain it. For beſides the danger of ſome infidelity on the part of the Witneſſes, the Act having been committed to writing, only with deſign that it might remain unchangeable, its force conſiſts in remaining always the ſame as it was made at firſt[m].

[m] Contra ſcriptum teſtimonium, non ſcriptum teſtimonium non fertur. *l. 1. C. de teſtib.* See the fourth and fifth Articles.

VIII.

8. Written Acts prove only againſt thoſe who are parties to them.

The authority of Proofs which are drawn from written Acts, hath its effect againſt the Perſons whoſe conſent is therein expreſt, as being Parties thereto, and againſt their Succeſſors, and thoſe who have their Rights, or who repreſent them; and theſe Acts ſerve as a Rule and a Proof againſt the ſaid Perſons[n]. But they can be of no prejudice to third perſons, whoſe intereſt may be thereby injured[o]. And if it were ſaid, for Example, in a Teſtament, that a Land or Tenement deviſed by the Teſtator did belong to him, this declaration would be of no manner of prejudice to the perſon who ſhould pretend to be Owner of the ſaid Land or Tenement.

[n] Cum ſuis confeſſionibus acquieſcere debeat. *l. 13. C. de non num. pecu.* See the third Article.

[o] Non debet alii nocere quod inter alios actum eſt. *l. 10. ff. de jurej.* See the following Article.

IX.

9. No man can by himſelf make a Title to himſelf.

No body can acquire to himſelf a Right, nor make himſelf Creditor to another, by Acts which he himſelf may make at his pleaſure. Thus, for inſtance, a Judge will not pronounce Sentence, upon the bare Authority of a Journal or Day-book of any perſon, which mentions a Sum of Money to be owing to him by another, that the ſaid Sum is due, if there be no other proof of it, with what exactneſs ſoever the Book may be kept, and how great ſoever may be the integrity of the perſon who wrote it[p].

[p] Rationes defuncti, quæ in bonis ejus inveniuntur, ad probationem ſibi debitæ quantitatis ſolas ſufficere non poſſe, ſæpè reſcriptum eſt. Ejuſdem juris eſt, & ſi in ultima voluntate defunctus, certam pecuniæ quantitatem, aut etiam res certas ſibi deberi, ſignificaverit. *l. 6. C. de probat.*

Exemplo pernicioſum eſt ut ei ſcripturæ credatur, qua unuſquiſque ſibi adnotatione propriâ debitorem conſtituit. Unde neque fiſcum, neque alium quemlibet in ſuis ſubnotationibus debiti probationem præbere poſſe oportet. *l. 7. C. eod. Nov. 48. c. 1. §. 1. l. 5. C. de conv. fiſc. debit.*

X.

10. It is by the Original Acts that we ought to examine the proofs.

The truth of written Acts is made out by the Acts themſelves; that is, by a ſight of the Originals. And if the perſon againſt whom a Copy only is produced, demands a ſight of the Original,

ginal, it cannot be refuſed him, whatever quality the perſon may be of who makes uſe only of a Copy[q].

[q] Quicumque à fiſco convenitur, non ex indice & exemplo alicujus ſcripturæ, ſed ex authentico conveniendus eſt. *l. 2. ff. de fide inſtr.*

The ingroſſed Copies of Contracts, Teſtaments, and other Acts, of which the Minutes, which are the true Originals, have been depoſited in the hands of Publick Notaries, are in the place of Originals, and are not called Copies; for they are ſigned by the Notaries themſelves. But if there were any Accuſation of Forgery, or if it were neceſſary to amend ſome error in the ingroſſed Copy, it would be neceſſary in that caſe that the Minute it ſelf ſhould be produced.

XI.

11. *Caſes where the Copies of Deeds, and other Proofs, may ſerve, when the Originals cannot be had.*

If the Original Deed or Inſtrument is loſt, as if it has periſhed by fire, or other accident, one may in that caſe prove the contents of the Deed, either by Copies thereof duly collated, or by other proofs, if there be any ſuch, which the Judge in his diſcretion may think fit to be received[r]. Thus, for Example, mention being made of a Bond, in the Inventory of the Goods of a perſon deceaſed, the Guardian of the Heir who is under Age might make uſe of the ſaid Inventory, to prove the truth of the ſaid Bond, if it ſhould happen to be loſt thro' ſome accident[s]. Thus, when a Creditor receives from his Debtor payment of a Rent, if he takes from him a Copy of the Acquittance which he gives him, and if the ſaid Copy, which is called a Duplicate of the Acquittance, be ſigned by his Debtor, it may ſerve as a proof of his Title to the Rent, if the Title chances to be loſt. For it is the Debtor himſelf who acknowledges the truth of the Creditor's Title, by this Act which he ſigns[t].

[r] Sicut iniquum eſt inſtrumentis vi ignis conſumptis debitores quantitatum debitarum retinere ſolutionem: ita non ſtatim caſum conquerentibus facilè credendum eſt. Intelligere itaque debetis, non exiſtentibus inſtrumentis, vel aliis argumentis, probare debere fidem precibus veſtris adeſſe. *l. 5. C. de fide inſtrum.*

Si aliis evidentibus probationibus veritas oſtendi poteſt. *l. 7. C. eod.*

Emancipatione factâ, etſi actorum tenor non exiſtat, ſi tamen aliis indubiis probationibus, vel ex perſonis, vel ex inſtrumentorum incorruptâ fide, factam eſſe emancipationem probari poſſit, actorum interitu veritas convelli non ſolet. *l. 11. C. eod.*

[s] Chirographis debitorum incendio exuſtis, cùm ex inventario tutores convenire eos poſſent ad ſolvendam pecuniam, &c. *l. 57. ff. de adm. & per tut.*

[t] Si voluerit is qui apocham conſcripſit, vel exemplar cum ſubſcriptione ejus qui apocham ſuſcepit ab eo accipere, vel antapocham ſuſcipere, omnis ei licentia hoc facere concedatur, neceſſitate imponenda apochæ ſuſceptori antapocham reddere. *l. 19. C. de fide inſtr.*

XII.

12. *When mention is made of one Deed in another.*

It is not ground enough for demanding a Debt, or claiming any other Right, that the Title thereof be ſet forth in ſome other Deed which makes mention of it. For this bare mention of it makes no proof, if the Title it ſelf does not appear; unleſs the perſon againſt whom one would make uſe of ſuch a declaration, had been a party to the Deed which contains the ſaid declaration; or that becauſe of other conſiderations it ſhould appear to be equitable, and conformable to the intention of the Law, that ſuch a declaration ſhould be received as a proof; as in the caſe of the preceding Article[u].

[u] Et hoc inſuper jubemus, ut ſi quis in aliquo documento alterius faciat mentionem documenti, nullam ex hac memoria fieri exactionem: niſi aliud documentum, cujus memoria in ſecundo facta eſt proferatur: aut alia ſecundùm leges probatio exhibeatur, quia & quantitas, cujus memoria facta eſt, pro veritate debetur. Hoc enim etiam in veteribus legibus invenitur. *Nov. 119. c. 3. V. l. 37. §. 5. ff. de legat. 3. l. ult. ff. de probat.*

XIII.

13. *Deeds that contradict one another.*

If one and the ſame perſon makes uſe of two written Deeds, or Titles, whereof the one contradicts the other, they deſtroy one another mutually, by the oppoſite conſequences which will be drawn equally from the one and the other[x].

[x] Scripturæ diverſæ fidem ſibi invicem derogantes, ab una eademque parte prolatæ, nihil firmitatis habere poterunt. *l. 14. C. de fid. inſtr.* See the following Article.

XIV.

14. *Counter-Letters.*

We muſt not comprehend under the Rule explained in the preceding Article, the Acts of which there are Counter-Letters that are contrary thereto, or which make ſome change therein. For the Counter-Letters are Acts which thoſe who treat together ſeparate from their Contracts, when they have no mind to comprehend in them what they reſerve to explain apart in theſe Counter-Letters. So that the contrariety between a Contract and a Counter-Letter does not deſtroy the former, but only reſtrains it, and makes therein ſuch other changes and alterations, as the parties had a mind to make. Thus, for Example, if in a Contract of Sale, the Seller obliges himſelf to Warranty againſt all manner of Evictions, and the Buyer declares in a Counter-Letter that he conſents that the Seller ſhall be bound only to warrant againſt his own proper act and deed, the contrariety of theſe two Covenants will not have the effect to annul either the one or the other. For one ſees that the intention of the Parties is, that the Contract ſhould ſubſiſt with the condition regulated by the Counter-Letter. Thus, he who obliging himſelf for a Sum of Money, takes a declaration from the Creditor whereby he conſents that the Obligation ſhall have its effect only for half the Sum, will owe no more than what ſhall have been agreed on by this laſt Writing. And altho' the Counter-Letters be of the ſame date with the Acts which are explained therein, and which are changed thereby, yet they are conſidered as a ſecond will, which revokes the former, or derogates from it[y].

XV.

15. Counter-Letters cannot prejudice third perſons.

The Rule explained in the foregoing Article is not to be underſtood indifferently of all ſorts of Counter-Letters, but it is reſtrained to ſuch as may have their effect among the contracting Parties, without prejudice to the intereſt of any other third perſon. And Counter-Letters, and all ſecret Acts which derogate from Contracts, or which make any change in them, have no manner of effect, with regard to third perſons, whoſe intereſt may be prejudiced thereby[z]. Thus, for Example, if a Father, in marrying his Son, had given him, as a Marriage-Settlement, either a Sum of Money, or an Eſtate in Land, or an Office, taking from him a Counter-Letter, declaring that the Gift ſhould be valid only for a leſſer Sum, or that the Son ſhould give back out of the Land, or out of the Office, a Sum of Money, ſuch as they had agreed upon among themſelves; this Counter-Letter would have no effect with regard to the Wife, and the Children that ſhould be born of the ſaid Marriage, nor with regard to other third perſons, who might be any ways intereſted therein, ſuch as the Creditors of this Son. For this Agreement would be an infidelity contrary to Good Manners, and would deſtroy the fidelity and ſincerity that is due not only to the Wife and her Parents, who would not have conſented to the Marriage on the conditions of this Counter-Letter, but to all the perſons whom this fraud may any way concern. And it is for the Publick Intereſt, to reſtrain the bad uſe which private perſons may make of the facility they have in their Families, to collude together in order to deceive others by ſuch like clandeſtine Acts[a].

SECT. III.

Of Proofs by Witneſſes.

The ſubject matter of this Section

We do not ſpeak here of the proof which Witneſſes make in Contracts, in Teſtaments, and in the other Acts where the Law requires the preſence of ſome Witneſſes to confirm the truth of what is there tranſacted; for this kind of Proof is comprehended in the Proofs by Writing, of which we have treated in the foregoing Section. And in this Section we mean to ſpeak only of the Proof that is made by the Depoſitions of Witneſſes who are Judicially examined, that the Judge may learn from their mouths, the truth of Facts for which no written proofs can be produced, or where the proofs which may be alledged, are not ſufficient. Thus, for Example, if a fair and honeſt Poſſeſſor of an Eſtate, who knows of no better right to it than his own, and yet has no Title to produce, but has poſſeſſed it during the time neceſſary for Preſcription, is diſturbed in his poſſeſſion, and has no Writings to prove it, or has only wherewithal to prove his poſſeſſion for part of the time which he has enjoyed it; as if he has Leaſes of ſome years, or ſome Acquittances for Quit-Rents which he has paid as Poſſeſſor, he may produce Witneſſes to declare what they know of the ſaid poſſeſſion, and of its duration: and his adverſe party may likewiſe on his part prove the contrary. Thus one proves by Witneſſes all the other Facts which it may be juſt and neceſſary to prove, ſuch as Accuſations in Crimes, and Facts conteſted in Civil Matters, except ſuch as the Law does not allow to be proved by Witneſſes, as has been remarked at the end of the Preamble to the foregoing Section.

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[y] Si cum viginti deberes pepigerim ne decem petam, efficeretur per exceptionem mihi opponendam, ut tantùm reliqua decem exigere debeam. *l. 27. §. 5. ff. de pact.* See the following Article.

[z] Non debet alii nocere quod inter alios actum eſt. *l. 10. ff. de jurej.* Non debet alteri per alterum iniqua conditio inferri. *l. 74. ff. de reg. jur.*

Acta ſimulata, velut non ipſe, ſed ejus uxor comparaverit, veritatis ſubſtantiam mutare non poſſunt. Quæſtio itaque facti per judicem vel præſidem provinciæ examinabitur. *l. 2. C. plus val. quod ag. quàm quod ſim. conc.*

Si quis geſtum à ſe, alium egiſſe ſcribi fecerit, plus actum quam ſcriptum valet. *l. 4. eod.*

[a] Si quidem clandeſtinis ac domeſticis fraudibus facilè quidvis pro negotii opportunitate confingi poteſt, vel id quod verè geſtum eſt aboleri. *l. 27. C. de donation.*

Altho' theſe words be taken out of a Law which has no relation to Counter-Letters, yet they may be applied to them.

There is this difference between the Proof by Witneſſes, which is the ſubject matter of this Section, and the Proofs which Witneſſes make in written Deeds; that in the ſaid Deeds the Witneſſes are perſons which one has the liberty to chuſe to be preſent at them, and they ought to be in the number regulated by Law, and of the quality which it preſcribes; whereas in the Proofs which are to be treated of in this Section, the Witneſſes are perſons who happen by chance to have knowledge of the Facts which one would prove, without having been choſen and called upon to ſee what paſſes, and to remember it. And this is the reaſon why in Informations in Criminal Proſecutions, and in Trials concerning Civil Matters, the Judges admit the Depoſitions of Witneſſes who would not be allowed of as proper Witneſſes to Deeds. Thus, for Example, Women, who cannot be Witneſſes in a Teſtament, or in a Contract, are admitted to give Evidence in Criminal Proſecutions, and Trials in Civil Cauſes.

Examination of Witneſſes ad futuram rei memoriam *aboliſhed in* France.

We ſhall put down nothing in the Articles of this Section, touching that kind of Proof by Witneſſes which was called Examination of Witneſſes *ad futuram rei memoriam*, which was in uſe under the *Roman* Law, and which was likewiſe obſerved in *France*, before the Ordinance of 1667, which aboliſhed the uſe thereof[a]. But this Remark is made here, only to give the Reader an Idea of that ſort of Examination of Witneſſes which ſerved to preſerve their Evidence to poſterity, and to inform him that the ſame is aboliſhed in *France*.

This Examination of Witneſſes, in order to preſerve their teſtimony to futurity, was uſed in the caſes where any one foreſeeing that he might have occaſion for a proof by Witneſſes, and fearing leſt they ſhould die, or that other changes ſhould happen which might deprive him of his Proof, before his Law-Suit were ſo far advanced as that he might be admitted to make his Proof, or that the Judge could examine his Witneſſes, he demanded leave of the Judge to have them examined before the time, that their Evidence might be thereby perpetuated to futurity[b]. But this precaution, which is attended with many inconveniences, has been judged uſeleſs likewiſe for other reaſons. For thoſe who may be in haſte to make their Proofs, may take their meaſures accordingly; may make their Demands, and alledge their Facts, in order to have the proof of them decreed, if it be neceſſary, without having recourſe to an Uſage that is inconvenient and full of uncertainty.

The general Inqueſt about Cuſtoms, aboliſhed in France.

It may not be amiſs to obſerve here by the by, that the ſame Ordinance of 1667 hath alſo aboliſhed in *France* another kind of Examination of Witneſſes, which was called *Enquête par Turbes*[c], or a General Inqueſt, and which was uſed in Queſtions relating to the Interpretation of ſome Cuſtom. The uſage of theſe Inqueſts was founded on this, that the particular diſpoſitions of Cuſtoms were conſidered as Facts[d]. So that they received proof by Witneſſes of the uſage and interpretation of ſome article of a Cuſtom. They called theſe Inqueſts, *par Turbes*, becauſe ten Witneſſes were only reckoned as one: and theſe Witneſſes were choſen from among the Officers of the Places, and the Advocates, who were the likelieſt perſons to know what was the Uſage and Practice as to the Diſpoſitions of their Cuſtoms. But theſe Inqueſts were attended with an infinite number of inconveniences, as may eaſily be perceived; and the Superior Judges have better ways to find out the ſenſe and meaning of Cuſtoms, and to interpret that which may require an explanation.

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[a] *Ordinance of* 1667. *Tit.* 13.

[b] Si deletum chirographum mihi eſſe dicam, in quo ſub conditione mihi pecunia debita fuerit, & interim teſtibus quoque id probare poſſim, qui teſtes poſſunt non eſſe eo tempore quo conditio extiterit. *l.* 40. *ff. ad leg. Aquil.*

Finge eſſe teſtes quoſdam qui dilata controverſia aut mutabunt conſilium, aut decedent, aut propter temporis intervallum non eandem fidem habebunt. *l.* 3. §. 5. *ff. de Carbon. Ed.*

[c] *Ordinance of* 1667. *Title* 13.

[d] *See the eleventh Chapter of the Treatiſe of Laws, Numb.* 20. *towards the end.*

[*This Uſage of the* Roman *Law, in relation to the Examination of Witneſſes* in perpetuam rei memoriam, *is obſerved in the Court of Chancery in* England. *And the method is, firſt to exhibit a Bill, and ſhew a Title to the Thing, and that the Witneſſes to prove it are old, and not like to live long, whereby the Party is in danger to loſe it; and then to pray a Commiſſion into the Country to examine them, and a* Subpœna *to the Parties intereſſed, to ſhew cauſe, if they can, to the contrary. But the Depoſitions are not to be made uſe of, or given in Evidence, againſt any other but the Defendants, who were warned to defend it, or thoſe who claim under them.* Praxis Almæ Curiæ Cancellariæ, *p.* 37.]

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I.

1. Witneſſes, and their Evidences. WItneſſes are perſons who are ſummoned to appear in Judgment, in order to declare what they know of the truth of the Facts conteſted between the Parties. And the declaration which they make of the matter, is their Evidence[a].

[a] Ad fidem rei geſtæ faciendam. *l.* 11. *ff. de teſtib.*

II.

2. Uſe of Witneſſes in all matters. The uſe of Evidences is infinite, according to the infinite number of events which may render the proof of a Fact neceſſary, whether it be in Civil Matters, or in Criminal[b].

[b] Teſtimoniorum uſus frequens, ac neceſſarius eſt. *l.* 1. *ff. de teſtib.* Adhiberi quoque teſtes poſſunt non ſolùm in criminalibus cauſis, ſed etiam in pecuniariis litibus, ſicuti res poſtulat. *d. l.* §. 1.

III.

3. Who may be a Witneſs. All perſons of both Sexes may be Witneſſes, if there be no exception againſt them regulated by ſome Law[c]. Thus, for Example, Children and Madmen cannot be admitted as Witneſſes, nor perſons whoſe Reputation has received ſome blemiſh, either by a Sentence of Condemnation in a Court of Juſtice, unleſs they be reſtored again to their good Name, or by the Infamy of their Profeſſion; nor thoſe whom other Cauſes may render incapable of giving Evidence[d], as ſhall be ſhewn in the ſequel of this Section.

[c] Mulier teſtimonium dicere in teſtamento quidem non poterit: aliàs autem poſſe teſtem eſſe mulierem, argumento eſt Lex Julia de adulteris quæ adulterii damnatam teſtem produci, vel dicere teſtimonium vetat. *l.* 20. §. 6. *ff. qui teſt. fac. poſſ. l.* 18. *ff. de teſtib.*

[d] Hi quibus non interdicitur teſtimonium. *l.* 1. §. 1. *ff. de teſtib.* Quidam propter lubricum conſilii ſui, alii verò propter notam & infamiam vitæ ſuæ admittendi non ſunt ad teſtimonii fidem. *l.* 3. §. 5. *in f. ff. de teſtib.* Quive impuberes erunt: quique judicio publico damnatus erit: qui eorum in integrum reſtitutus non erit: quive in vinculis, cuſtodiave publica erit: quæve palam quæſtum faciet, feceritve. *d.* §. 5. Qui judicio publico reus erit. *l.* 20. *eod.*

IV.

4. Two qualities in Witneſſes. The proofs which are drawn from Evidences, depend chiefly on two qualities that are neceſſary in the Witneſſes. Probity[e], which engages them to ſay nothing but the truth; and a ſteddineſs in relating the circumſtances of the Fact, which may ſhew the Witneſſes to have been careful and exact in obſerving and retaining them[f]. And it is for want of one or the other of theſe qualities that Evidences are ſuſpected, and rejected. And this depends on the Rules which follow.

[e] Fides, mores. *l.* 2. *ff. de teſtib.* Eos teſtes ad veritatem jurandam adhiberi oportet, qui omni gratiæ, & potentatui fidem religioni judiciariæ debitam poſſint præponere. *l.* 5. *C. de teſtib.*

[f] Quorum fides non vacillat. *l.* 1. *ff. de teſtib.*

V.

5. Witneſſes who are ſuſpected. Whatever proves the want of probity in a Witneſs, is ſufficient to make his Evidence to be rejected. Thus, we do not receive the evidence of a Perſon condemned by a Court of Juſtice for Calumny, or Forgery, or for having born falſe witneſs, or for writing a Defamatory Libel, or for other Crimes[g]. For theſe Condemnations caſt a blemiſh on the Honour of the perſon, and make him forfeit the reputation of Probity. And it would be the ſame thing, and that with much more reaſon, if it were proved that the Witneſs had received Money to give his Evidence[h].

[g] Quæſitum ſcio, an in publicis judiciis calumniæ damnati teſtimonium judicio publico perhibere poſſunt? Sed neque lege Remmia prohibentur, & Julia lex de vi, & repetundarum, & peculatus, eos homines teſtimonium dicere non vetuerunt: verumtamen, quod legibus omiſſum eſt, non omittetur religione judicantium. *l.* 13. *ff. de teſtib.*

Lege Juliâ de vi cavetur ne hac lege in reum teſtimonium dicere liceret, qui judicio publico damnatus erit. *l.* 3. §. 5. *eod.*

Repetundarum damnatus nec ad teſtamentum, nec ad teſtimonium adhiberi poteſt. *l.* 15. *eod.*

Ob carmen famoſum damnatus, inteſtabilis fit. *l.* 21. *eod.*

[h] Qui ob teſtimonium dicendum, vel non dicendum, pecuniam accepiſſe judicatus, vel convictus erit. *l.* 3. §. 5. *eod.*

VI.

6. Witneſſes who are intereſted.

If the Witneſs has any intereſt in the Fact concerning which he is deſired to give evidence, he will be rejected[i]. For one cannot be ſure that he will make a declaration contrary to his own intereſt.

[i] Nullus idoneus teſtis in re ſua intelligitur. *l.* 10. *ff. de teſtib.* Omnibus in re propria dicendi teſtimonii facultatem jura ſubmoverunt. *l.* 10. *C. eod.*

VII.

7. Witneſſes engaged in the ſame intereſt with the Party.

The ſame reaſon which ſerves for rejecting the teſtimony of perſons intereſted in the Facts that are to be proved, makes the teſtimony likewiſe of the Father in the Cauſe of the Son to be rejected, as alſo that of the Son in the Cauſe of the Father. For the intereſt of the one touches the other, as his own proper intereſt. And altho' the Father ſhould offer to give evidence againſt his Son, or the Son againſt his Father, they would not be admitted to do it. For this affectation and forwardneſs would render them ſuſpected of having an intention either to favour, or to hurt[l].

[l] Teſtis idoneus pater filio, aut filius patri non eſt. *l.* 9. *ff. de teſtib.* Parentes & liberi invicem adverſus ſe, nec volentes ad teſtimonium admittendi ſunt. *l.* 6. *C. de teſtib.*

VIII.

8. Witneſſes who are Relations, or Allies.

As we reject the teſtimony of perſons who are intereſted in the Facts which are to be proved, or who take part in the intereſt of thoſe whom the ſaid Facts concern, ſo neither do we receive the evidence of thoſe who are related by Conſanguinity, or by Affinity, to the perſons intereſted in the ſaid Facts. And if there ſhould be any enmity between thoſe perſons and the Witneſſes who are their Relations or Allies, ſuch Witneſſes ought to be rejected with greater reaſon. And they may on their part refuſe to give their Evidence, eſpecially in Criminal Proſecutions. We may reckon in the number of Allies, with reſpect to the uſe of this Rule, thoſe who are only ſo by Spouſals, the Marriage not being as yet accompliſhed[m]. And we muſt underſtand Conſanguinity and Affinity in the extent of the degrees regulated by Law[n].

[m] Lege Julia judiciorum publicorum cavetur, ne invito denuntietur ut teſtimonium litis dicat adverſus ſocerum, generum, vitricum, privignum, ſobrinum, ſobrinam, ſobrino natum, eoſve qui priore gradu ſunt. *l.* 4. *ff. de teſtib.*

In legibus quibus excipitur ne gener, aut ſocer invitus teſtimonium dicere cogeretur, generi appellatione ſponſum quoque filiæ contineri placet: item ſoceri, ſponſæ patrem. *l.* 5. *eod.*

[n] *In* France, *by the Ordinance of* 1667, *Tit.* 22. *Art.* 11. *the Teſtimony of Relations, and Allies of the Parties, even down to the Children of ſecond Couſins incluſively, is rejected in Civil Matters, whether it be for, or againſt them.*

IX.

9. Witneſſes who are Friends.

The ties made by ſtrict Friendſhips, or engagements of Familiarity, may likewiſe render ſuſpect the teſtimony of a Friend in the Cauſe of his Friend[o]. And this depends on the prudence of the Judge, according to the quality of the tie of Friendſhip, and that of the facts and circumſtances.

[o] An amicus ei ſit pro quo teſtimonium dat. *l.* 3. *ff. de teſtib.*

Amicos appellare debemus, non levi notitiâ conjunctos: ſed, quibus fuerint jura cum patrefamilias honeſtis familiaritatis quæſita rationibus. *l.* 223. §. 1. *ff. de verb. ſign.*

X.

10. Witneſſes who are Enemies.

The Enmities that are between Witneſſes and the perſons againſt whom they depoſe, are juſt cauſes for doubting of the fidelity of their teſtimony. For we ought to miſtruſt that their paſſion may lead them to make a declaration prejudicial to the intereſt of their Enemy. And unleſs their Evidence were accompanied with ſome other proof, it would be ſuſpicious. So that we ought to judge by the circumſtances of the quality of the perſons, of the cauſes and conſequences of the Enmity, and of what reſults from the other proofs, what regard ought to be had to the fact of Enmity[p].

[p] An inimicus ei ſit adverſus quem teſtimonium fert. *l.* 3. *ff. de teſtib.*

Facilè mentiuntur inimici. Causâ cognitâ habenda fides, aut non habenda. *l.* 1. §. 24. & 25. *ff. de quæſt.* *V. Nov.* 90. *c.* 7. *l.* 17. *C. de teſt.*

XI.

11. Witneſſes who are Domeſticks, and depend on the party. The perſons who have a dependance on the party who would make uſe of their teſtimony, ſuch as Menial Servants, being ſuſpected to favour the intereſt of their Maſter, and to declare only what he deſires, their Evidence ought to be rejected[q].

[q] Idonei non videntur eſſe teſtes, quibus imperari poteſt ut teſtes fiant. *l. 6. ff. de teſtib.*

Teſtes eos quos accuſator de domo produxerit, interrogari non placuit. *l. 24. eod.*

Etiam jure civili domeſtici teſtimonii fides improbatur. *l. 3. C. eod.*

XII.

12. Witneſſes who waver in their depoſitions. It is not enough to eſtabliſh an Evidence beyond all exception, that the probity of the Witneſs be not called in queſtion; it is moreover neceſſary, that his declaration be ſteddy and firm. For if he varies in his account, depoſing circumſtances and facts that are different, or even contrary; or if he waver in his depoſition, and be himſelf in doubt of the fact which he relates; this uncertainty, and theſe variations rendring his Evidence uncertain, they will cauſe it to be rejected[r].

[r] Ab his præcipuè exigendus (teſtimoniorum uſus) quorum fides non vacillat. *l. 1. ff. de teſtib.*

Teſtes qui adverſus fidem ſuam teſtationis vacillant, audiendi non ſunt. *l. 2. ff. de teſtib.*

XIII.

13. There muſt be two Witneſſes to make a proof. In all the caſes where Proof by Witneſſes may be received, it is neceſſary that there be two of them at leaſt; and that number may ſuffice, except in caſes where the Law demands a greater. But one ſingle Witneſs, of what quality ſoever he may be, makes no proof[ſ].

[ſ] Ubi numerus teſtium non adjicitur, etiam duo ſufficient. Pluralis enim elocutio duorum numero contenta eſt. *l. 12. ff. de teſtib.*

Simili modo ſanximus, ut unius teſtimonium nemo Judicum, in quacumque cauſa facilè patiatur admitti. Et nunc manifeſtè ſancimus, ut unius omnimodò teſtis reſponſio non audiatur, etiamſi præclaræ Curiæ honore fulgeat. *l. 9. §. 1. C. de teſtib.*

XIV.

14. One may produce many Witneſſes. Altho' two Witneſſes be ſufficient to prove a Fact, yet ſeeing this proof conſiſts in the conformity of their Depoſitions, and that it often happens that the declarations of two Witneſſes do not agree in all points, or that ſome eſſential circumſtances are known only to one of the Witneſſes, the other being ignorant of them, and that likewiſe it may ſo fall out that there may be ſome juſt objection againſt one of the Witneſſes, or even againſt them both; for theſe reaſons a greater number of Witneſſes may be examined, and even ſeveral out of one and the ſame Houſe, ſuch as the Father and Children, that the Evidence of the one may make up what is defective in the teſtimony of the others, and that all of them together may make up an entire proof of the truth. But the liberty of producing many Witneſſes ought to be reſtrained by the prudence of the Judge, if the Law has ſet no bounds to it.

[t] Quamquàm quibuſdam legibus ampliſſimus numerus teſtium definitus ſit, tamen ex conſtitutionibus Principum hæc licentia ad ſufficientem numerum teſtium coarctatur, ut judices moderentur: & eum ſolum numerum teſtium quem neceſſarium eſſe putaverint, evocari patiantur: ne ex re nata poteſtate ad vexandos homines ſuperflua multitudo teſtium protrahatur. *l. 1. §. 2. ff. de teſtib.*

Pater & filius qui in poteſtate ejus eſt, item duo fratres qui in ejuſdem patris poteſtate ſunt, teſtes utrique in eodem teſtamento, vel eodem negotio fieri poſſunt. Quoniam nihil nocet ex una domo plures teſtes alieno negotio adhiberi. *l. 17. eod.*

By the Ordinances of France, *it is prohibited to examine more than ten Witneſſes to each Fact in Civil Matters. Ordinance of* 1446. *Art.* 32. *of* 1498. *Art.* 13. *of* 1535. *Chap.* 7. *Art.* 4. *Ordinance of* 1667. *Title* 22. *Art.* 21.

XV.

15. Several views by which we are to judge of proofs by Witneſſes. It is neceſſary to add to all theſe Rules, in relation to Proofs by Witneſſes, that we ought to conſider their condition, their manners, their eſtate, their conduct, their integrity, their reputation: If their honour has received any blemiſh by a Condemnation in a Court of Judicature: If they are in a condition to tell the truth without regard to the perſons intereſted, or if it is to be feared that they are under ſome engagement, or have ſome inclination to favour one of the parties, as if they are friends, or enemies to one or other of them: If their poverty, or wants, expoſe them to the temptation of giving ſuch teſtimony as may be agreeable to one of the Parties, according as they have any thing to fear or hope for from him: If their teſtimony appears to be ſincere, without affectation: If the depoſitions are conformable to one another, and not concerted: If the number of the Witneſſes, the conformity of their Depoſitions, common Fame, and the probability of the circumſtances, confirm their Evidence: If their variations, their diſagreement, their contradictions, render them ſuſpected: If the conſequence of the Facts be ſuch as may require a more exact conſideration of what may render the Witneſſes ſuſpected, as in Criminal

Proſecutions; or if the Facts be ſo ſlight that it is not neceſſary to be ſo exact in the Enquiry, as if the matter were only a bare Action of Slander or Defamation, in a quarrel between perſons of a mean condition. Thus the right judgment that is to be made of the regard which ought to be had to the Depoſitions of Witneſſes under all theſe views depends on the Rules which have been explained, and on the prudence of the Judges, to make a right application of them, according to the quality of the Facts, and the circumſtances[u].

XVI.

Witneſ- ainſt there ex- ion, may miſtak- It is not ground enough to be aſſured of the truth of the Depoſitions of Witneſſes, that their integrity is well known; and therefore ſeeing it may happen that the moſt intelligent and moſt ſincere perſons may have been deceived by others, or they themſelves miſtaken, either in the knowledge of the perſons, or in ſome circumſtances, or even in the Facts; it is always prudent for the Judge to conſider well the Depoſitions of all the Witneſſes, even of thoſe who are moſt to be credited, and to ſee whether they agree with the other clear and certain proofs that may be had of the truth of the Facts, and circumſtances. And in order to give to the Evidence its juſt effect, it is neceſſary to gather the truth out of all that appears to be certain in all the proofs together[x].

XVII.

17. *Witneſſes may be compelled to give evidence.* The perſons who are ſummoned to give evidence, are obliged to come and declare what they know of the matter. For the conſequence of diſcovering the truth of Facts neceſſary for the Adminiſtration of Juſtice, is what the Publick has an intereſt in. So that the Judge may compel thoſe who refuſe to come and give their evidence, whether it be in Civil Matters, or in Criminal[y].

XVIII.

18. *The Witneſſes ought to be examined by the Judge.* It is not enough to give to the declaration of a Witneſs the effect which it ought to have in Juſtice, that the Witneſs himſelf writes, or cauſes another to write his Evidence, and that he gives it or ſends it to the Judge; but it is neceſſary that he appear before the Judge, and that the Judge himſelf interrogate him, and put down his declaration in writing[z].

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[u] In teſtimoniis dignitas, fides, mores, gravitas examinanda eſt. *l. 2. ff. de teſtib.*

Teſtium fides diligenter examinanda eſt. Ideòque in perſona eorum exploranda erunt imprimis conditio cujuſque: utrùm quis decurio, an plebeius ſit: & an honeſtæ & inculpatæ vitæ, an vero notatus quis, & reprehenſibilis: an locuples, vel egens ſit, ut lucri causâ quid facilè admittat: vel an inimicus ei ſit adversùs quem teſtimonium fert: vel amicus ei ſit, pro quo teſtimonium dat. Nam ſi careat ſuſpicione teſtimonium, vel propter perſonam à qua fertur, quod honeſta ſit, vel propter cauſam, quod neque lucri, neque gratiæ, neque inimicitiæ cauſa ſit, admittendus eſt. Ideòque Divus Hadrianus Vivio Varo legato provinciæ Ciliciæ reſcripſit, eum qui judicat magis poſſe ſcire, quanta fides habenda ſit teſtibus. Verba epiſtolæ hæc ſunt. Tu magis ſcire potes quanta fides habenda ſit teſtibus: qui, & cujus dignitatis & cujus æſtimationis ſint: & qui ſimpliciter viſi ſint dicere, utrùm unum eundemque meditatum ſermonem attulerint, an ad ea quæ interrogaveras, ex tempore veriſimilia reſponderint. Ejuſdem quoque principis extat reſcriptum ad Valerium Verum, de excutienda fide teſtium, in hæc verba: Quæ argumenta, ad quem modum probandæ cuique rei ſufficiant; nullo certo modo ſatis definiri poteſt. Sicut non ſemper, ita ſæpè ſine publicis monumentis cujuſque rei veritas deprehenditur. Aliàs numerus teſtium, aliàs dignitas & auctoritas, aliàs veluti conſentiens fama confirmat rei, de qua quæritur fidem. Hoc ergò ſolùm tibi reſcribere poſſum ſummatim, non utique ad unam probationis ſpeciem cognitionem ſtatim alligari debere: ſed ex ſententia animi tui te æſtimare oportere, quid aut credas, aut parùm probatum tibi opinaris. *l. 3. d. l. §. 1. & 2. ff. de teſtib.* Si teſtes omnes ejuſdem honeſtatis, & exiſtimationis ſint, negotii qualitas, ac judicis motus cum his concurrit: ſequenda ſunt omnia teſtimonia. Si verò ex his quidam (eorum) aliud dixerint, licet impari numero, credendum eſt. Sed quod naturæ negotii convenit, & quod inimicitiæ, aut gratiæ ſuſpicione caret: confirmabitque judex motum animi ſui ex argumentis, & teſtimoniis, & quæ rei aptiora, & vero proximiora eſſe compererit. Non enim ad multitudinem reſpici oportet: ſed ad ſinceram teſtimoniorum fidem, & teſtimonia quibus potiùs lux veritatis aſſiſtit. *l. 21. §. 3. ff. de teſtib.*

[x] Ad (judicantium) officium pertinet ejus quoque teſtimonii fidem, quod integræ frontis homo dixerit, perpendere. *l. 13. in f. ff. de teſtib.*

[y] Non eſt dubitandum quin evocandi ſint (teſtes) quos neceſſarios in ipſa cognitione deprehenderit qui judicat. *l. 3. in f. ff. de teſtib.*

Conſtitutio jubet non ſolùm in criminalibus judiciis, ſed etiam in pecuniariis, unumquemque cogi teſtimonium perhibere de his quæ novit. *l. 16. C. de teſtib.*

If the Witneſs does not appear on the Summons with which he is ſerved, the Judge condemns him in a Fine, for which his Goods may be attached and ſold, and even his Perſon may be impriſoned, in caſe he does not obey the Summons. See the eighth Article of the twenty ſecond Title of the Ordinance of 1667.

[z] Divus Hadrianus Junio Rufino Proconſuli Macedoniæ reſcripſit, *teſtibus ſe, non teſtimoniis crediturum.* Verba epiſtolæ ad hanc partem pertinentia, hæc ſunt. Quod crimina objecerit apud me Alexander Apro, & quia non probat, nec teſtes producebat, ſed teſtimoniis uti volebat, quibus apud me locus non eſt: nam ipſos interrogare ſoleo: quem remiſi ad provinciæ præſidem, ut is de fide teſtium quæreret, & niſi impleſſet quod intenderat, relegaretur. *l. 3. §. 3. ff. de teſtib.*

Gabinio quoque Maximo idem princeps in hæc verba reſcripſit, alia eſt auctoritas præſentium teſtium, alia teſtimoniorum quæ recitari ſolent. *d. l. 3. §. 4.*

XIX.

19. And ought to be firſt ſworn.

Seeing it is to the Judge, and even to Juſtice it ſelf, that the Witneſs gives his evidence, his declaration ought to be preceded by an Oath, that he will ſpeak the truth; that the reſpect which he owes to Religion may engage him to give his teſtimony with all the fidelity, and all the exactneſs that Juſtice and Truth may require. And if he has no knowledge of the Facts about which he is interrogated, he muſt even ſwear, that thoſe Facts are unknown to him[a].

[a] Jurisjurandi religione teſtes, priuſquàm perhibeant teſtimonium, jamdudum arctari præcepimus. *l. 9. C. de teſtib.*

Cum Sacramenti præſtatione. *l. 16. eod.*

Vel jurare ſe nihil compertum habere. *d. l. 16.*

See the ninth Article of the twenty ſecond Title of the Ordinance of 1667.

XX.

20. Excuſes of Witneſſes, which are called Eſſoins.

If the Witneſſes have excuſes which hinder them from coming to give their evidence, they may be diſcharged from coming. Thus thoſe perſons whom ſickneſs, or abſence, or any lawful impediment diſables from appearing before the Judge, their appearance is diſpenſed with[b]. But if their Depoſitions be neceſſary, the Judge may go himſelf, and examine them in perſon, or may give Commiſſion for that purpoſe to another, according as the quality of the Fact may require, and the Laws and Uſage allow of it.

[b] Inviti teſtimonium dicere non coguntur ſenes, valetudinarii, vel milites, vel qui cum Magiſtratu Reipublicæ cauſa abſunt, vel quibus venire non licet. *l.* 8. *ff. de teſtib.*

Lege à dicendo teſtimonio excuſantur. *l.* 1. §. 1. *ff. eod.* See the following Article.

XXI.

21. Witneſſes who are excuſed by reaſon of their Dignity.

There are ſome perſons whom their Dignity exempts from appearing before the Judge to give Evidence; but in the caſes where the teſtimony of ſuch perſons may be neceſſary, the Judge muſt give proper directions therein, according to the different Uſages of Places, or application muſt be made to the Prince, if the quality of the Fact, and that of the Witneſs may deſerve it[c].

[c] Exceptis tamen perſonis quæ legibus prohibentur ad teſtimonium cogi, & etiam illuſtribus, & his qui ſupra illuſtres ſunt, niſi ſacra forma interveniat. *l.* 16. *C. de teſtib.* Illud quoque incunctabile eſt, ut, ſi res exigat, non tantùm privati, ſed etiam magiſtratus, ſi in præſenti ſunt, teſtimonium dicant. *l.* 21. §. 1. *ff. de teſtib.*

Item ſenatus cenſuit prætorem, teſtimonium dare debere in judicio adulterii causâ. *d.* §. 1. *in fine.* Ad perſonas egregias, eoſque qui valetudine impediuntur, domum mitti oportet ad jurandum. *l.* 15. *ff. de jurejur.* See the preceding Article.

XXII.

22. Letters of Requeſt for the examination of a Witneſs who lives out of the Juriſdiction of the Court.

If it happen in a Civil Cauſe, that a Witneſs has his abode without the Juriſdiction of the Judge who ought to take his Depoſition, and that by reaſon of the too great diſtance, or of the indiſpoſition of the Witneſs, or for other cauſes, he cannot be examined but on the place where he lives; the Judge who has cognizance of the Cauſe may, if it is neceſſary, requeſt the Judge of the place where the Witneſs reſides to examine the ſaid Witneſs, and may give him a Commiſſion for that effect. But in Criminal Proſecutions, the Witneſſes can be examined only by the Judge who takes Cognizance of the Crime[d].

[d] Et quoniam ſcimus dudùm factam legem, ut ſi quis hic litem exerceat, oporteat autem in provinciæ parte aliqua approbari, &c. *Nov.* 90. *c.* 5. *l.* 18. *C. de fide inſtr.* Hæc omnia in pecuniarriis quæſtionibus intelligentes: in criminalibus enim in quibus de magnis eſt periculum, omnibus modis apud judices præſentari teſtes, & quæ ſunt eis cognita docere. *d. Nov. c.* 5. *in f.*

The Judge who takes Cognizance of the Cauſe, requeſts the Judge of the place where the Witneſs lives, to take his Depoſition, and gives him a power to do it by a Commiſſion for that end. V. Nov. 134. c. 5.

Beſides the conſequence that is taken notice of in the laſt Text, when the matter relates to the proof of a Crime, the neceſſity of confronting the Witneſs with the Criminal, is another juſt motive why the Witneſs ought to be examined by the Judge before whom the Trial is had.

XXIII.

23. The Advocate of the Party cannot be a Witneſs.

Whoever have been imployed as Advocates in a Cauſe, cannot be Witneſſes in it. For their teſtimony would be either ſuſpected, if it were in favour of the perſon whoſe Cauſe they had defended, or both uncivil and ſuſpected, if it were againſt their Client. And it is the ſame thing as to Proctors and Attorneys, and other perſons who ſhould happen to be under the ſame engagements[e].

[e] Mandatis cavetur, ut præſides attendant, ne patroni in cauſa cui patrocinium præſtiterunt, teſtimonium dicant. Quod & in executoribus negotiorum obſervandum eſt. *l. ult. ff. de teſtib.*

XXIV.

24. The expences of the Witneſſes paid by the Party who ſummons them.

The Expences which the Witneſſes are at for their Journey, and for their attendance to give their teſtimony, are repaid them by the Party at whoſe inſtance they have been cited; and that by vertue of an Order of the Judge, and according as he ſhall tax them[f].

[f] Talis debet eſſe cautio judicantis, ut venturis (teſtibus) ad judicium, per accuſatorem, vel ab his

per quos fuerint poſtulati, ſumptus competentes dari præcipiat. *l.* 11. *C. de teſtib.* 16. *in f. eod.*

XXV.

25. A falſe Witneſs is puniſhed. If it happens that a Witneſs can be convicted of having given falſe evidence, or of being guilty of ſome other miſdemeanor, as if he has divulged the tenor of his Depoſition to the Party accuſed, he may be puniſhed for it according to the quality of the fact, and the circumſtances[g].

[g] Qui falſò vel variè teſtimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur. *l.* 16. *ff. de teſtib.*

SECT. IV.

Of Preſumptions.

The CONTENTS.

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I.

1. Definition of Preſumptions. PReſumptions are conſequences drawn from a fact that is known, to ſerve for the diſcovery of the truth of a fact that is uncertain, and which one ſeeks to prove. Thus, for Example, in a Civil Concern, if there is a conteſt between the Poſſeſſor of a Land or Tenement, and another who pretends to be Proprietor thereof, it is a Preſumption that the ſaid Land or Tenement belongs to the Poſſeſſor: and he will be maintained in it, if the other does not prove his right; for it is uſual and natural that no body takes poſſeſſion of a Thing without having a Right to it, and that the Proprietor does not patiently ſuffer himſelf to be turned out of his poſſeſſion[a]. Thus in a Criminal Affair, if a Man has been killed, and it is not known by whom, and if it be diſcovered that he had a little while before a quarrel with another perſon, who had threatened to kill him, one draws from this known fact of the quarrel and threatning, a Preſumption that he who had thus threatned him, may have been the Author of the Murder.

[a] Poſſeſſiones quas ad te pertinere dicis more judiciorum perſequere. Non enim poſſeſſori incumbit neceſſitas probandi, eas ad ſe pertinere. Cum te in probatione ceſſante, dominium apud eum remaneat. *l.* 2. *C. de probat.* In pari cauſa poſſeſſor potior haberi debet. *l.* 128. *ff. de reg. jur.* Cogi poſſeſſorem, ab eo qui expetit, titulum ſuæ poſſeſſionis dicere, incivile eſt. *l.* 11. *C. de petit. hæred. l. ult. C. de rei vindic.* See concerning the Preſumption in favour of the Poſſeſſor, that which is ſaid of it in the Preamble to the fourth Section of Poſſeſſion. See the fourth Article of this Section, and the thirteenth Article of the firſt Section of Poſſeſſion.

II.

2. Preſumptions ſtrong, or weak. Preſumptions are of two kinds, ſome of them are ſo ſtrong, that they amount to a certainty, and are held as Proofs, even in Criminal Matters[b]. And others are only Conjectures which leave ſome doubt.

[b] Indicia certa, quæ jure non reſpuuntur, non minorem probationis, quàm inſtrumenta continent fidem. *l.* 19. *C. de rei vindic.* Sciant cuncti accuſatores eam ſe rem deferre in publicam notionem debere, quæ munita ſit idoneis teſtibus, vel inſtructa apertiſſimis documentis, vel indiciis ad probationem indubitatis, & luce clarioribus expedita. *l. ult. C. de probat.* See at the end of the Preamble to this Title, the remark touching the Edict of *Henry* the Second of *France*, concerning Women who have concealed their being with child.

III.

3. The foundation of Preſumptions. The certainty, or uncertainty of Preſumptions, and the effect which they may have to ſerve as Proofs, depends on the certainty, or uncertainty of the Facts from which the Preſumptions are gathered, and on the juſtneſs of the conſequences which are drawn from thoſe Facts, to prove the Facts which are in diſpute. And this depends on the connexion that may be between the known Facts, and thoſe which are to be proved. Thus one draws conſequences from Cauſes to their

Effects, or from Effects to their Cauſes: Thus we conclude the truth of a thing by its connection with another to which it is joined: Thus, when one thing is ſignified by another, we preſume the truth of that which is ſignified, by the certainty of that which ſignifies it. And it is out of theſe different Principles that Signs, Conjectures, and Preſumptions are formed. Concerning which there can be no certain Rules laid down; but in every caſe it will depend on the prudence of the Judge, to diſcern whether the Preſumption be well or ill grounded, and what effect it may have to ſerve as a Proof[c].

[c] Quæ argumenta ad quem modum probandæ cuique rei ſufficiant, nullo certo modo ſatis definiri poteſt. *l.* 3. §. 2. *ff. de teſtib.*

Ex ſententia animi tui te æſtimare oportet, quid aut credas, aut parùm probatum tibi opinaris. *d. l.* 3. §. 2. *in f.*

IV.

4. Preſumptions are either concluding, or uncertain.

There are Preſumptions of ſuch a nature, that what is preſumed paſſes for truth, without any neceſſity of being corroborated by ſtronger proofs, if the contrary is not proved: and there are Preſumptions which have no other effect, if they are alone, than that they form a bare Conjecture, and do not make that which is preſumed to paſs for truth. Thus, in the caſe of a Poſſeſſor which has been mentioned in the firſt Article, his poſſeſſion makes it to be preſumed that he is the true Owner, and without other proofs he is accounted as ſuch, and will be maintained in his poſſeſſion until he who diſturbs him therein eſtabliſhes his Right clearly. Thus on the contrary, in the caſe of him who had threatened another with death, of which likewiſe mention has been made in the ſame Article, the threatning which preceded the death of the perſon who was menaced makes againſt the perſon who threatened only a Conjecture, and altho' he ſhould not prove his innocence, if there were no other proof againſt him, this Preſumption would not be ſufficient to convict him of being the Author of the Crime[d].

[d] Indiciis ad probationem indubitatis, & luce clarioribus. *l. ult. de probat.* Argumentis liquidis. *l.* 2. *in f. C. de in lit. jur.* See the preceding Articles, and thoſe which follow, as alſo the Preamble of this Title.

V.

5. Two ſorts of Preſumptions.

This difference between Preſumptions which have the effect of Proofs, and thoſe which leave ſome doubt, is the foundation of another diſtinction of two ſorts of Preſumptions: One is of thoſe which are authorized by the Law, and which are appointed to be held as Proofs; and the other is of thoſe of which the Law leaves the effect to the Prudence of the Judge, who ought to diſcern what may, or may not ſuffice to give to a Preſumption the force of a Proof. Thus, in the ſame caſe of a Poſſeſſor, the Law will have him to be held for the true Owner, if it is not proved that he is not[e]. Thus, the Laws ordain a Thing that is adjudged to be held for Truth[f]. Thus, they enact, that he who is born of a married Woman, and conceived during the time of Wedlock, ſhall be reputed the Son of the Huſband[g]. Thus, they have regulated that if a married Woman be found to have any Goods, or Effects, which it is uncertain by what Title ſhe has acquired them, they ſhall be accounted to be her Huſband's Goods[h]. But on the contrary, there is an infinite number of Preſumptions which the Laws leave doubtful, and which may be eaſily gueſſed at without any Example.

[e] *See the firſt Article.*

[f] Res judicata pro veritate accipitur. *l.* 207. *ff. de reg. jur.*

[g] Pater is eſt quem nuptiæ demonſtrant. *l.* 5. *ff. de in jus voc. l.* 6. *ff. de his qui ſui vel al. jur. ſunt.*

[h] *See the ſeventh Article of the fourth Section of Dowries.*

VI.

6. Proofs, without Witneſſes, and without Writing, by the force of Preſumptions.

It follows from all the Rules explained in the foregoing Articles, that it often happens not only in Civil, but alſo in Criminal Matters, that certain Proofs may be had without Writing, and without Witneſſes, by the force of Preſumptions, when they are ſuch, that upon certain and known Facts we may found neceſſary conſequences of the truth of thoſe which are to be proved[i]. Whether it be that we judge of Cauſes by their Effects, or of Effects by their Cauſes, or that we diſcover the truth by other Principles. Thus, in the Judgment of *Solomon* between the two Women, it appears that he foreſaw the commotions which would be produced in the heart of the Mother by the fear of the death of her Child; and knowing the Cauſe by its effect, he judged of the one by the tenderneſs ſhe expreſſed, which was the neceſſary effect of her Maternal Love, that ſhe was the true Mother of the Child; and by the indifference and inſenſibility of the other, that the Child was to her a Stranger.

[i] Sæpè ſine publicis monumentis cujuſque rei veritas deprehenditur. *l.* 3. §. 2. *ff. de teſtib.* Sine

(ſcripturis) valet quod actum eſt, ſi habeat probationem. *l. 4. ff. de fide inſtrum. l. 5. eod. l. 4. C. de prob.* Quod licet ſcriptura non probetur, aliis tamen rationibus doceri nihil impedit. *l. 5. C. fam. erciſc.* See the Example of the Edict of 1556, at the end of the Preamble to this Title.

VII.

7. *Facts that are held as true. Facts that muſt be proved.*

When the queſtion is concerning the regard which ought to be had for Preſumptions, it is neceſſary to diſtinguiſh two ſorts of Facts. Some Facts are ſuch, that they are always reputed to be true, till the contrary has been proved; and there are others which are always reputed contrary to truth, unleſs they are proved. Thus, every thing that happens naturally and commonly, is held for true; as on the contrary, what is neither common nor natural, will not paſs for truth, if it is not proved. It is upon this principle that the Preſumptions are grounded, that a Father loves his Children; that every one takes care of his own concerns; that he who pays, was indebted; that perſons act according to their principles and their cuſtom; that every one uſually governs himſelf by Reaſon, and conſequently acquits himſelf of his engagements, and of his duty: And we ought never to judge without proof, nor preſume, that a Father hates his Children, that any perſon abandons his own Intereſt, that a wiſe man has committed an Action unworthy of his uſual Conduct, nor that one has failed in any point of his duty. Thus in general, all Facts which are contrary to that which ought to happen naturally, are never preſumed, unleſs they be proved[l].

[l] Rogo filia, bona tua quandoque diſtribuas liberis tuis, ut quiſque de te meruerit —— ſufficiet, ſi non offenderint —— eos ſolos non admitti qui offenderunt. *l. 77. §. 25. ff. de legat. 2. It muſt be proved, that they have failed in their duty.*

Si bonus miles anteà æſtimatus fuit, prope eſt ut affirmationi ejus credatur. *l. 5. 8. 6. ff. de re milit.* Plerùmque credendum eſt, eum qui partis dominus eſt, jure potiùs ſuo re uti, quàm furti conſilium inire. *l. 51. ff. pro ſocio.*

Præſumptionem pro eo eſſe qui accepit, nemo dubitat. Qui enim ſolvit, numquàm ita reſupinus eſt ut facile ſuas pecunias jactet & indebitas effundat. *l. 25. ff. de probat.*

VIII.

8. *It depends on the prudence of the Judge to diſcern the effect of Preſumptions.*

It is by all theſe Rules which have been juſt now explained, that we are to judge of the uſe and effect of Preſumptions; that we are to diſtinguiſh in every caſe the quality of the Facts controverted, in order to judge which of them ought to be held as true, and which of them muſt be proved; and that we ought to diſtinguiſh thoſe Preſumptions which ought to be held as Proofs, from thoſe which ought not to have that effect. And it is on the prudence of the Judge, that the uſe and application of all theſe Rules does depend, according to the quality of the Facts, and the circumſtances[m], as will appear by the Examples explained in the Articles which follow.

[m] Ex ſententia animi tui te æſtimare oportet, quid aut credas, aut parùm probatum tibi opinaris. *l. 3. §. 2. in f. ff. de teſtib.* See the third Article.

IX.

9. *Example of a Fact which it is neceſſary to prove.*

If the Relation between a perſon deceaſed, and him who pretends to be his Heir at Law, or next of kin, were called in queſtion, this Relation would not be preſumed without proof. For it depends on Facts which are naturally unknown, if they are not proved. Thus, he whoſe Relation is not owned, ought to prove it[n].

[n] Quoties quæreretur genus vel gentem quis haberet, necne, eum probare oportet. *l. 1. ff. de probat.*

X.

10. *Example of a Preſumption well grounded, that what has been paid was due.*

If any perſon having made a payment to another, pretends that it is thro' miſtake that he has paid a thing which was not due, and that he who has received the payment maintains that what he has received was juſtly owing to him; it lies upon the perſon who has made the payment, to prove that he has paid a thing that was not due. For it is preſumed, that he has not been ſo imprudent as to pay what he did not owe. But if the perſon to whom the payment was made denied it, and aſſerted that he had received nothing, and it ſhould be proved that payment had been made to him; it would in that caſe lie upon him to prove that what he had received was juſtly owing to him. For his knavery in denying the payment, would render him ſuſpected of having received a thing that was not due to him[o].

[o] Cùm de indebito quæritur, quis probare debet, non fuiſſe debitum, res ità temperanda eſt, ut ſi quidem is qui accepiſſe dicitur rem, vel pecuniam indebitam, hoc negaverit, & ipſe qui debet legitimis probationibus ſolutionem approbaverit, ſine ulla diſtinctione ipſum qui negavit ſeſe pecuniam accepiſſe, ſi vult audiri, compellendum eſſe ad probationes præſtandas, quod pecuniam debitam accepit. Perenim abſurdum eſt, eum qui ab initio negavit pecuniam ſuſcepiſſe poſtquam fuerit convictus eam accepiſſe, probationem non debiti ab adverſario exigere. Sin verò ab initio confiteatur quidem ſuſcepiſſe pecunias, dicat autem non indebitas ei fuiſſe ſolutas, præſumptionem videlicet pro eo eſſe qui accepit, nemo dubitat. Qui enim ſolvit numquam reſupinus ita eſt, ut facilè ſuas pecunias jactet, & indebitas effundat. Et maximè, ſi ipſe qui indebitas

dediſſe dicit homo diligens eſt, & ſtudioſus paterfamilias, cujus perſonam incredibile eſt in aliquo facile erráſſe. Et ideò eum qui dicit indebitas ſolviſſe, compelli ad probationem quòd per dolum accipientis, vel aliquam juſtam ignorantiæ cauſam, indebitum ab eo ſolutum eſt, & niſi hoc oſtenderit, nullam eum repetitionem habere. *l. 25. ff. de probat.*

XI.

11. Another Example of many Accounts between two perſons.

If two perſons having had many affairs together, have often made up their Accounts of what they might be reciprocally indebted the one to the other, and one of them after the death of the other, demands from the Heirs or Executors of the deceaſed, a Sum which he pretends to have advanced before all thoſe Accounts, and which he had never demanded, nor ſo much as taken any Note or Obligation for it, nor made any reſervation thereof in his Accounts; it will be preſumed, either that this Sum has never been due, or that it has been paid, or that the Creditor had remitted it. For if he had really been, or pretended to have been a Creditor, he would have reckoned that Sum in his Accounts, as well as other Debts; or he would have reſerved it, and would not have put off the demanding it, till after the death of the pretended Debtor, who might have been able to ſhew that he owed him nothing. And it would be the ſame thing if we ſuppoſe, inſtead of a Sum of Money, that the queſtion is concerning any other ſort of pretenſion, of which he had never made any demand, nor any reſervation; unleſs it were ſome Right, of ſuch a nature and ſo well grounded, as that the circumſtances ſhould make it appear that thoſe Accounts, and the delay of making the demand till after the death of the Debtor, ought to be of no prejudice thereto. Such as would be the Warranty againſt an Eviction, the caſe whereof did not fall out till after making up all thoſe Accounts, or ſome other Right of the like nature[p].

[p] Procula magnæ quantitatis fideicommiſſum à fratre ſibi debitum, poſt mortem ejus in ratione cum hæredibus compenſare vellet, ex diverſo autem allegaretur, numquam id à fratre, quamdiu vixit, deſideratum, cum variis ex cauſis, ſæpe in rationem fratris pecunias ratio Proculæ ſolviſſet. Divus Commodus, cùm ſuper eo negotio cognoſceret, non admiſit compenſationem: quaſi tacitè fratri fideicommiſſum fuiſſet remiſſum. *l. 26. ff. de probat.*

XII.

12. Another Example, a Bond croſſed, or torn.

If a Promiſory Note, or Bond, ſhould chance to be found in the hands of the Debtor, or if it had been croſſed, raſed, or torn in pieces, it would be a preſumption that it had been acquitted, or annulled, unleſs he who ſhould pretend to make uſe of it, had clear proofs that the debt was ſtill owing, and that the ſaid Note or Bond had been raſed, croſſed, or torn in pieces[q], or had fallen into the hands of the Debtor[r], only by ſome violence, or ſome accident, or other event which would deſtroy the preſumption that the debt was paid.

[q] Si chirographum cancellatum fuerit, licet præſumptione debitor liberatus eſſe videtur, in eam tamen quantitatem, quam manifeſtis probationibus creditor ſibi deberi adhuc oſtenderit, rectè debitor convenitur. *l. 24. ff. de probat.*

[r] Quod debitori tuo chirographum redditum contra voluntatem tuam aſſeveras, nihil de jure tuo deminutum eſt. Quibuſcunque itaque argumentis jure proditis, hanc obligationem tibi probanti, eum pro hujuſmodi facto liberationem minimè conſecutum, judex ad ſolutionem debiti jure compellet. *l. 15. C. de ſolut. & liberat. V. l. 1. C. de fide inſt.*

XIII.

13. Example of a Preſumption that proves nothing.

If a Tutor who had no Eſtate of his own, nor by his Wife, before he entred upon the Adminiſtration of his Tutorſhip, is found to have enriched himſelf during the Tutorſhip, the Minor cannot for that pretend that thoſe Goods are his, nor infer from thence that the Tutor has been unfaithful in his Adminiſtration, if otherwiſe he gives him in a true and juſt Account. For it may happen that the Tutor may have acquired thoſe Goods either by his labour and induſtry, or by other ways[ſ].

[ſ] Si defunctus tutelam veſtram adminiſtravit, non rerum ejus dominium vindicare, vel tenere potes: ſed tutelæ contra ejus ſucceſſores tibi competit actio. Debitum autem aliis indiciis comprobari oportet. Nam quòd neque ipſe, neque uxor ejus quicquam ante adminiſtrationem habuerunt, non idoneum hujus continet indicium. Nec enim pauperibus induſtria, vel augmentum patrimonii quod laboribus & multis caſibus quæritur, interdicendum eſt. l. 10. *C. arbitr. tutel.*

XIV.

14. Example of a Preſumption in an antient Fact.

When the queſtion is to prove an ancient Fact, of which there are no written Proofs, nor living Witneſſes, if the Fact be ſuch that it ought to be admitted to proof; as for inſtance, if the matter be to know how long an Eſtate has been in a Family, at what time a Work was made, or other Facts of the like nature; we receive the declarations which Witneſſes are able to make of what they have heard concerning the ſaid Facts, from other perſons who were then alive: and the proof which is drawn from thoſe declarations, is founded on this Preſumption, that the perſons whom the Witneſſes heard give an account of thoſe Facts, as notorious in their time, being dead before the proof of the Facts was neceſſary, and nothing having obliged them to ſay any thing but the truth, the account therefore which they had given of the ſaid Facts is preſumed to be true[t].

XV.

15. A Preſumption of another nature than thoſe which ſerve for Proofs. All the Rules which have been explained in the preceding Articles, concern Facts which are ſuch, as that either the truth of them may be proved, or that in default of proofs one may know preciſely by thoſe Rules what judgment to make of them. Thus, for Example, we ſee by theſe Principles, that there are Facts which paſs for true, altho' there be no proof of them, if the contrary Facts are not proved: That there are others which paſs for falſe, unleſs they are proved: That among Proofs and Preſumptions, ſome of them are certain, others uncertain: And that therefore in theſe ſorts of Facts Reaſon may always determine it ſelf to take one ſide, and to judge if we ought to hold a Fact for doubtful or for certain, for falſe, or for true. But there is another ſort of Facts, which are ſuch, that it is impoſſible to know the truth of the matter, and where nevertheleſs it is neceſſary to reſolve on taking one of the oppoſite Facts for true, altho' there be nothing but uncertainty both in the one and the other Fact, and that it may likewiſe very readily fall out that we take the falſe for the true. Thus, for Example, if a Father and his Son happen to be killed in a battle, or if both one and the other periſh in the ſame Shipwrack, ſo that there be no way to know if they both died at the ſame inſtant, or if one of them ſurvived the other, and which of the two: And that the Widow of the Father pretends that he died firſt, in order to make the Father's Inheritance to paſs to the Son, and ſo from the Son to her ſelf; the Collateral Relations, Heirs to the Father, pretending on the contrary, that the Father ſurvived the Son, or that they both died at the ſame inſtant of time, and that therefore ſeeing the Son could not ſucceed to the Father, they ſucceed to him: This queſtion cannot be decided, without ſuppoſing, either that the Father died firſt, and that the Son having ſucceeded to him, has tranſmitted to his Mother the Eſtate of his Father; or that the Son died firſt, and has tranſmitted to his Mother no part of his Father's Eſtate; or that they both died at the ſame inſtant of time, and that the Son not having ſurvived the Father, did not ſucceed to him; and that therefore the Inheritance of the Father goes to his Heirs. But ſeeing there is no way for determining which of theſe Events is the true one, the Law has directed that in ſuch a caſe, where it is neceſſary to take one ſide or other, and impoſſible to know the truth of the Fact on which the deciſion depends, it ſhall be preſumed, that the Father died firſt, and that the Son having ſucceeded to him, the Mother reaps the Inheritance of the Father in that of the Son[u]. And this Preſumption is founded, on one part, on the inclination to favour the Mother, and on the other part, on the Natural Order; according to which, the Son ought to out-live his Father. Thus, in this Event, where it remains uncertain what Nature has done, the Law ſuppoſes that Nature has done what it ſeems Reaſon would have deſired.

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[t] Idem Labeo ait, cùm quæritur an memoria extet facto opere, non diem & conſulem ad liquidum exquirendum, ſed ſufficere ſi quis ſciat factum: hoc eſt, ſi factum eſſe non ambigatur. Nec utique neceſſe eſt, ſupereſſe qui meminerint, verùm etiam, ſi qui audierunt eos, qui memoria tenuerint. *l.* 2. §. 8. *ff. de aqua. & aq. pluv. arc. l.* 28. *ff. de probat.*

[u] Cum bello pater cum filio periſſet: materque filii, quaſi poſteà mortui, bona vindicaret, agnati verò patris, quaſi filius anteà periſſet: Divus Hadrianus credidit patrem prius mortuum. *l.* 9. §. 1. *ff. de reb. dub.*

The Queſtion concerning the Succeſſion of this Father and Son, is to be underſtood according to the written Law of the Romans, *or according to the Right which the* Ordinances *and Cuſtoms give to Mothers, in the Succeſſions of their Children.*

Altho' it be natural to preſume, in the caſe of this Article, and in others of the like nature, that the Son ſurvived his Father, and that in general the Children and Deſcendants outlive their Fathers and Mothers, and other Aſcendants; yet we find a contrary Preſumption in another Law, where it is ſaid; That if it had been agreed between a Father in Law and Son in Law, that if the Son in Law ſhould outlive his Wife, and ſhe leave behind her a Child of a year old, the Huſband ſhould have the Wife's whole Marriage Portion; and that if on the contrary the Child ſhould chance to die before the Mother, the Huſband ſhould only retain a part of the ſaid Portion: and it had happened that the Mother and Child of a year old periſhed in a Shipwrack, it would be probable that the Child died firſt, and ſo the Huſband would have only that ſhare of his Wife's Dowry which had been agreed on. Inter ſocerum & generum convenit: *ut, ſi filia mortua ſuperſtitem anniculum filium habuiſſet, dos ad virum pertineret: Quod ſi vivente matre filius obiiſſet, vir dotis portionem, uxore in matrimonio defunctâ, retineret.* Mulier naufragio cum anniculo filio periit. Quia veriſimile videbatur, ante matrem, infantem periſſe: virum partem dotis retinere placuit. *l.* 26. *ff. de pact. dot. This Preſumption, that in this caſe the Child died firſt, is founded on the weakneſs of its Age, which makes it to be judged, that the Child was leſs able to reſiſt, and that the Mother lived ſome time longer than the Child.*

XVI.

16. *Another kind of Preſumption.* There is yet another ſort of Preſumptions, which do not relate to Events or Facts of which it may be neceſſary to know the truth, as in all the Caſes which have been mentioned in the preceding Articles; but which regard the ſecret of the intention of perſons, when it is neceſſary to know the ſaid intention, and when there are no certain proofs of it. For in that caſe, it is neceſſary to diſcover it by Preſumptions, if there be any ſuch as may help us to find it out. Thus, for Example, if in the caſe of two perſons who bear the ſame Name, one of them is inſtituted Executor by a Teſtator, when in the Teſtament there was no certain deſcription by which it could be known, which of the two perſons the Teſtator meant to name for his Executor, one would judge of the intention of this Teſtator by the preſumptions which might diſcover it; ſuch as the ties of Relation and Friendſhip, which he might have only with one of the two; and by the other circumſtances which might diſcover which of the two he intended to name for his Executor[x].

[x] Quoties non apparet quis hæres inſtitutus ſit, inſtitutio non valet. Quippe evenire poteſt, ſi teſtator complures amicos eodem nomine habeat, & ad deſignationem nominis ſingulari nomine utatur: niſi ex aliis apertiſſimis probationibus fuerit revelatum, pro qua perſona teſtator ſenſerit. *l. 62. §. 1. ff. de hared. inſt.* See the following Article, and the Remark on it.

XVII.

17. *Another ſort of Preſumption.* The uſe of the Preſumptions ſpoken of in the foregoing Article, reſpects the doubts, the obſcurities, the uncertainties of the intention of perſons, when it is not clearly enough explained. But there are ſome caſes, in which the Preſumptions are extended beyond what has been in the thought of the perſon whoſe will we want to know. Thus, for Example, if a Father having inſtituted his Son, and the Child of another Son already deceaſed, his Executors, and ſubſtituted the Son to the Grandſon, in caſe he ſhould die before he arrived at a certain age, it ſhould happen that this Grandſon dying before he attained the ſaid Age, leaves behind him Children; the Queſtion whether the Subſtitution ſhall take place to the prejudice of the Children of him who was charged with it, will be decided by this Preſumption, that the Teſtator did not mean to ſubſtitute, except in the caſe where his Grandſon ſhould die without Children, and that his intention could not be to call his Son to the Inheritance of his Grandſon who ſhould leave Children behind him[y].

[y] Cùm avus filium, ac nepotem ex altero filio, hæredes inſtituiſſet, à nepote petiit, ut *ſi intra annum trigeſimum moreretur, hæreditatem patruo ſuo reſtitueret.* Nepos, liberis relictis, intra ætatem ſupraſcriptam vitâ deceſſit, fideicommiſſi conditionem, conjectura pietatis, reſpondi defeciſſe. Quòd minus ſcriptum quàm dictum fuerat, inveniretur, *l. 102. ff. de condit. & demonſtr.*

It is to be remarked upon this and the preceding Article, that the uſe of theſe ſorts of Preſumptions, for diſcovering, or gueſſing at the intention of perſons, is very frequent in the interpretation of Contracts and Teſtaments, when it is neceſſary to interpret ſome ambiguity, or ſome obſcurity, and to judge of the intention of the perſons who make Covenants, or Teſtaments. And altho' this matter does not properly belong to this place, yet it is not altogether uſeleſs to diſtinguiſh here the ſeveral ſorts of Preſumptions, that we may the better underſtand their nature, and their different uſes. But we ought not to ſet down here the Rules of all theſe ſorts of Preſumptions, which may ſerve for the interpretation of Covenants and Teſtaments: for as to thoſe which concern Covenants, they have been explained in their proper places; and we ſhall explain in the Matter of Teſtaments, the Rules which have relation to them.

SECT. V.

Of the Interrogation and Confeſſion of the Parties.

Different ways of having the Confeſſion of a Party, as to Facts. SEeing it often happens that he who has occaſion to prove a Fact that is conteſted, has neither Writing, nor Witneſſes, nor Preſumptions that may be ſufficient, one therefore in that caſe, has recourſe to draw from the Mouth of the Party, a Confeſſion of the truth; and that is done three ways. One is, without the intervention of an Oath, when one Party ſummons the other by ſome Act, and requires him to own the truth of a Fact, whether it be the ſame that is in diſpute, or ſome other that may ſerve to prove it; and this firſt way, which ought to be the only one, if every body acted always honeſtly and ſincerely, may have its effect, either when he who is ſummoned to declare the truth, is ſincere enough to own it, or when his want of ſincerity engages him to make ſuch Anſwers as that one may draw from them ſome advantages againſt him.

The ſecond way of having the Confeſſion of a Party, is by interrogating him on Facts that are pertinent; that is, which have relation to the diſpute in hand. And this hath its uſe in the caſes where he who wants to prove a Fact, having no Proofs thereof, and not being willing to refer it to the Oath of his Adverſary, demands that he be interrogated by the Judge, upon Facts, which he draws up in the form of a Libel, or Allegation, dividing it into ſeveral Articles, and inſerting therein the Fact in queſtion, and other Facts or Circumſtances which may have relation thereto, and ſerve to prove it. And if the Judge finds that the ſaid Facts, or Circumſtances, upon which it is deſired that the Party may be interrogated, may ſerve to prove the Fact in queſtion, he orders the Party to be interrogated, and to make Oath that he will ſpeak the truth of all that he knows concerning every one of the articles: and the Anſwers are taken down in writing; from which he who demanded them, draws the conſequences which may turn to his advantage, whether it be by the Confeſſions, or Denials, or Variations of the Party who has been interrogated.

The third manner of having the Confeſſion of a Party, is when he who cannot have Proofs of a Fact which he alledges, refers the matter to the Oath of his Adverſary, and conſents that the declaration which he ſhall make, after having been ſworn, ſhall be held for Truth, and ſerve as a Deciſion of the matter in diſpute: and this is called a Deciſive Oath.

This laſt manner of the Deciſive Oath, ſhall be explained in the following Section, and the others ſhall be the ſubject matter of the preſent.

We muſt not confound the Deciſive Oath of a Party, to which the matter in diſpute has been referred, with the Anſwers of thoſe who are appointed to be interrogated upon Facts alledged by their adverſe Party. For when the matter is referred to the Oath of the Party, the Oath decides for the perſon who makes it; but the Anſwers of the perſon who is interrogated upon Facts, do not decide in favour of him who anſwers, but ſerve only for drawing from his Anſwers, conſequences which may help to prove the Fact in queſtion: and do not hinder the effect of other Proofs that may be brought againſt him.

There is likewiſe another kind of Oath which the Judge ordains ſometimes by virtue of his Office, that is, of his own proper motion, even altho' it be not demanded by the Party, nor the deciſion of the Controverſy referred to it; and it depends on the prudence of the Judge to enjoin this Oath in the caſes where it may be proper. Thus, for Example, if he who demands a Sum of Money having made good his demand, the Defendant alledges that he has paid it, but does not prove the payment; the Judge may, in condemning the Defendant to make payment, require the Plaintiff to ſwear that he has not been already paid. Thus, in the Orders for admitting the Claims of Creditors, it is ordained, that the Creditors whoſe Claims are allowed of, ſhall make Oath, that the Sums for which they are ſet down as Creditors, are lawfully owing to them. And this is done to hinder the colluſion between Creditors who have been already paid, and the Debtor, who, that he might reap ſome profit thereby, ſhould conſent to their payment, to the prejudice of the lawful Creditors; and likewiſe to prevent other Frauds of Creditors, who make a bad uſe of the difficulties which occur in the ranking of Creditors, and in examining and ſtating all their Claims.

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8. *Effect of Interrogations.*
9. *They do not hinder the effect of the other Proofs.*
10. *Difference between theſe Interrogations, and the demand of a ſight of the Writings belonging to one of the Parties.*

I.

1. *The Confeſſion of the Party, ſerves for a Proof.*

If the Party againſt whom one has occaſion to prove a Fact in a Civil Cauſe, acknowledges himſelf that the Fact is true, that Acknowledgment will ſerve as a Proof, and will be a ſufficient ground for the Sentence of Condemnation which ought to follow thereupon. And ſuch a Confeſſion, if it is ſerious and poſitive, cannot be revoked, eſpecially if it has been made Judicially[a]; unleſs there were in the ſaid Confeſſion ſome Error which might be rectified, as ſhall be ſhewn in the following Article.

[a] Confeſſus pro judicato eſt, qui quodammodo ſua ſententia damnatur. *l.* 1. *ff. de confeſſ. l.* 56. *ff. de re judic.*

Confeſſos in jure pro judicatis haberi placet. Quare ſine cauſâ deſideras recedi à confeſſione tua, cùm & ſolvere cogaris.. *l. un. C. de confeſſ.*

In Capital Crimes, the Confeſſion of a Criminal is not enough to condemn him, if there be no other Proofs; becauſe it might ſo fall out, that ſuch a Confeſſion were only the effect of a trouble of mind, or of deſpair. V. l. 1. §. 17. &. 27. ff. de Quæſtion.

II.

2. A Confeſſion thro' an Error in Fact. He who through Error acknowledges a Fact to be true which is not ſo, may rectify the ſaid Error by proving the Truth which he was ignorant of[b].

[b] Non fatetur qui errat. *l.* 2. *ff. de confeſſ.*

III.

3. Confeſſion thro' an Error in Law. If he who has owned the truth of a Fact, pretends to have owned it only by miſtake, upon pretext that out of ignorance of the Law he had made a Confeſſion contrary to his intereſt, he will not be allowed to revoke upon that pretence his Confeſſion[c]. Thus, for Example, if a Minor having borrowed Money, and being come of Age, gets himſelf relieved from his Obligation, but confeſſes that he employed the Money to diſcharge a debt that was due from his Father's Inheritance, he will not be admitted to revoke the ſaid Declaration, by ſaying that he made it only through miſtake, believing that by reaſon of his Minority he would nevertheleſs be diſcharged from his Obligation. For it was in point of Law that he erred, and not in matter of Fact; which does not alter the effect which his Confeſſion ought to have.

[c] Non fatetur qui errat, niſi jus ignoravit. *l.* 2. *ff. de confeſſ.*

IV.

4. Interrogation of the Party ordered by the Judge. When one of the Parties demands that the other be interrogated upon Facts which he deduces into Articles; it depends on the prudence of the Judge to order the Party to be interrogated, if the Facts are ſuch, that the knowledge thereof may be of ſervice to decide the Queſtion that is to be determined; or not to order it, if the Facts have no relation to the Queſtion in diſpute[d].

[d] Ubicumque judicem æquitas moverit: æquè oportere fieri interrogationem, dubium non eſt. *l.* 21. *ff. de interrogat.*

By the Ordinances of France, *it is lawful for the Parties to demand, that the adverſe Party be examined upon Interrogatories in all the ſteps of the Cauſe, touching Facts and Articles that are relevant, that is to ſay, that may ſerve for the proof of the Fact in queſtion: and they are interrogated upon Oath.* See the Ordinance of 1539. Art. 37. and the following Articles; the Ordinance of 1563. Art. 6. and that of 1667. Title 10. Art. 1. See the eighth Article of the firſt Section.

[*This practice of obliging the Parties, at the mutual requeſt of each other, to anſwer upon Oath to Facts which are admitted as pertinent to the Cauſe depending, is ſtill obſerved in all the Eccleſiaſtical Courts, and in the High Court of Admiralty of* England. *Only with this reſtriction, that no perſon is obliged to anſwer upon Oath to any criminous Poſition or Fact, whereby he may be liable to any Cenſure or Puniſhment.* Clarke Praxis in Curiis Eccleſiaſticis. Tit. 55. 56. Clarke Praxis Curiæ Admiralitatis Angliæ, Tit. 18. 22. Stat. 13. Car. II. cap. 12. §. 4.]

V.

5. How the Party who is interrogated ought to anſwer. He whom the Judge has directed to be interrogated, is obliged to anſwer, and to declare clearly and preciſely what he knows of the Facts concerning which he is interrogated, without feigning or diſſembling, and without ambiguity or obſcurity; ſo as that he explain himſelf diſtinctly as to each particular Fact, that his Anſwers be ſincere and natural, and that they quadrate exactly with the queſtion that is put to him[e].

[e] Nihil intereſt, neget quis, an taceat interrogatus, an obſcurè reſpondeat, ut incertum dimittat interrogatorem. *l.* 11. §. 7. *ff. de interrog.*

In totum confeſſiones ita ratæ ſunt, ſi id quod in confeſſionem venit, & jus & naturam recipere poteſt. *l.* 14. §. 1. *eod.*

Quod ait prætor *omnino non reſpondiſſe* poſteriores ſic exceperunt, ut omnino non reſpondiſſe videatur qui ad interrogatum non reſpondit, id eſt, πρὸς ἔπος. *l.* 11. §. 5. *eod.*

See the Ordinances quoted on the preceding Article.

VI.

6. Uſe of Interrogations. The uſe of theſe ſorts of Interrogations, is not only to have thereby proof of the Facts which the perſon who is interrogated ſhall own to be true; but altho' he ſhould deny or conceal the truth, yet the Interrogations may help to diſcover it by the conſequences which may be drawn againſt him from all his Anſwers. As if he denies Facts which he knows, and which are certain: if he alledges any Facts which are known to be falſe: if he varies and wavers in his Anſwers: or if he owns Facts from which one may infer the truth of thoſe which he has denied[f].

[f] Voluit prætor adſtringere eum qui convenitur ex ſua in judicio reſponſione, ut vel confitendo, vel mentiendo, ſeſe oneret. *l.* 4. *ff. de interrogat.*

VII.

7. The Anſwer which is made through an Error in Fact, does no harm. If it happens that he who has been interrogated, diſcovers that through miſtake he has owned ſome fact which was not true, or that he has been miſtaken in the circumſtances, and that having found out the truth, he can make it appear that he was miſtaken; his confeſſion can be of no prejudice to the Truth which ſhall otherwiſe appear[g].

[g] Celſus ſcribit, licere reſponſi pœnitere, ſi nulla captio ex ejus pœnitentia ſit, actoris. Quod veriſſimum mihi videtur, maximè ſi quis poſteà plenius inſtructus quid faciat inſtrumentis, vel epiſtolis amicorum, juris ſui edoctus. *l.* 11. §. *ult. ff. de interrog.*

VIII.

8. *Effect of Interrogations.* If he who has been interrogated, has owned the truth of the Facts conteſted, or if it may be gathered from his Anſwers; his Interrogation will have the ſame effect, as if he had conſented to the Sentence which condemns him to pay what is demanded of him, if the ſaid Condemnation be founded on the Proofs which reſult from his Anſwers[h].

[h] Qui interrogatus reſponderit, ſic tenetur, quaſi ex contractu obligatus, pro quo pulſabitur, dum ab adverſario interrogatur. Sed & ſi à prætore fuerit interrogatus, nihil facit prætoris auctoritas: ſed ipſius reſponſum, ſive mendacium. *l.* 11. §. 9. *ff. de interrog.*

IX.

9. *They do not hinder the effect of the other Proofs.* The Anſwers made by thoſe whom the Judge has ordered to be interrogated upon Facts alledged by their adverſe Parties, are not deciſive in their favour: and what they anſwer does not ſerve as a Proof for them, neither does it hinder the effect of the contrary Proofs. But the effect which the ſaid Anſwers ought to have in diſcovering the truth of the Facts in queſtion, depends on the Prudence of the Judge[i].

[i] *See the Law cited on the ſixth Article.*

X.

10. *Difference between theſe Interrogations, and the demand of a ſight of the Writings belonging to one of the Parties.* We may place in the ſame rank with the Confeſſions of Parties, that which may reſult from the Deeds or Writings which one Party demands a ſight of from the other, ſuch as his Journal, or other Writing, if it be exhibited by the Party of whom it is demanded. But there is this difference between a demand of the ſight of the Deeds and Writings belonging to a Party who does not exhibit them in Court, and that of Anſwers to Interrogatories; that one may refuſe to produce Papers if he himſelf does not make uſe of them, but one cannot refuſe to anſwer to Facts that are pertinent. For the Parties ought to know the truth of all the Facts, whereof the knowledge is neceſſary for determining what is in diſpute. And this knowledge ought to be common to all the perſons who have an intereſt therein. But Journals, and other Papers which belong only to one Party, are not common both to the one and the other. And theſe Papers may chance to contain Facts which ought to be kept ſecret, and which perhaps have no relation to the matter in diſpute. Thus, one Party cannot demand of the other, to produce or communicate a Writing of which the ſaid Party does not offer to make any uſe himſelf: but it depends upon his own honeſty and integrity to produce or keep up the Writings whereof the ſight is demanded. And one is obliged to produce only thoſe Writings on which he grounds his Right. But if the Refuſal to produce any Paper ſhould give juſt ground to ſuſpect ſome unfair dealing, as if a Creditor who demands Intereſt for a Sum of Money, or Arrears of a Rent, ſhould refuſe to produce his Journal, or Day-Book, in which the Debtor pretends that the payment of what is demanded is marked down; it would depend on the prudence of the Judge to give ſuch orders upon the ſaid refuſal, as the circumſtances might require[l].

[l] Edenda ſunt omnia quæ quis apud judicem editurus eſt: non tamen ut & inſtrumenta, quibus quis uſurus non eſt, compellatur edere. *l.* 1. §. 3. *ff. de edendo.*

Ipſe diſpice, quemadmodum pecuniam, quam te depoſuiſſe dicis deberi tibi probes. Nam quod deſideras, ut rationes ſuas adverſaria tua exhibeat, id ex cauſa ad judicis officium pertinere ſolet. *l.* 1. *C. eod.*

Non eſt novum, eum à quo petitur pecunia, implorare rationes creditoris, ut fides veri conſtare poſſit. *l.* 5. *C. eod.*

Et quæ à Divo Antonino patre meo, & quæ à me reſcripta ſunt, cum juris & æquitatis rationibus congruunt. Nec enim diverſa ſunt vel diſcrepantia. Quòd multum interſit an ex parte ejus qui aliquid petit, quique doli exceptione ſubmoveri ab intentione petitionis ſuæ poteſt, rationes promi reus deſideret, quibus ſe poſſe inſtrui contendit, quod utique ipſa æquitas ſuadet: an verò ab eo, à quo aliquid petitur actor deſideret rationes exhiberi, quando hoc caſu non oportet originem petitionis ex inſtrumentis ejus, qui convenitur fundari. *l.* 8. *eod.*

What is ſaid in this Article concerning the production of Papers, reſpects only thoſe Papers which are in the hands of particular perſons, and which are their own property, and has no Relation to Publick Notaries, Regiſters, and other Publick Perſons and their Heirs, or others who are Depoſitaries of Minutes, and other Writings, which have been committed to their Charge. For theſe ſorts of Perſons exercisſng a publick Function, are bound to produce the Deeds or Writings which have been depoſited in their hands, to the perſons who are intereſted in them, even altho' it were againſt themſelves; and if they refuſe to produce them, they are compelled to do it by the Judges. Is apud quem res agitur, acta publica tam civilia, quam criminalia exhiberi inſpicienda, ad inveſtigandam veritatis fidem jubebit. *l.* 2. *C. de edendo.* Argentarius rationes edere jubetur, nec intereſt, cum ipſo argentario controverſia ſit an cum alio. *l.* 10. *ff. eod.* Cogentur & ſucceſſores argentarii edere rationes. *l.* 6. §. 1. *eod.*

SECT. VI.

Of an Oath.

Diverſe uſes of an Oath.

AN Oath is a Security which the Laws require on ſeveral occaſions, either to corroborate an Engagement, or to confirm an Evidence, or Declaration touching the truth of a matter of fact; and this Security conſiſts in the confidence that one may have, that he who ſwears will not violate a duty, where he takes God to witneſs for his fidelity in what he declares, or in what he promiſes, and to be the Judge and Avenger of his infidelity, if he is guilty of perjury[a]. Thus, the Laws require, that perſons who enter upon Publick Offices ſhall make Oath, that they will execute them according to the Rules preſcribed to them. Thus they oblige Tutors, Curators, and other Adminiſtrators, to ſwear that they will faithfully perform the duties of their Function. Thus they appoint thoſe who are called upon to bear witneſs in a Court of Juſtice, or to make a Judicial Report of things within their knowledge, ſuch as perſons ſkilled in ſome Art or Profeſſion, to ſwear that they will give a true Teſtimony, or make a faithful Report. Thus when one of the Parties not being able to prove a Fact which he advances, refers it to the Oath of his adverſe Party, or that the Judge refers the matter to the Oath of the Party, he whoſe Oath is deſired, whether it be by the Judge, or by the adverſe Party, is bound to ſwear to what may be within his knowledge, and may ſerve to decide the matter in diſpute.

The uſe of an Oath on theſe and all other occaſions, has been invented as a precaution againſt the inconſtancy and infidelity of Mankind, and to ſupply, by the firmneſs of ſo ſtrict a Tie of Religion, the want of other Aſſurances, which he whoſe Oath is taken cannot give, or which it would not be juſt to require of him. Thus one cannot have any other ſecurity from a Witneſs that he will ſpeak the truth, than what may be had from his Oath, that he will be ſincere and upright in his declaration, and from the probability that he would not wilfully be guilty of perjury. Thus, it would neither be juſt, nor decent, to require of an Officer of Juſtice, that he ſhould give Surety for his faithful diſcharge of his Office, nor any other Security beſides that of his Oath.

An Oath being a precaution that is eaſy to be taken, and it being a corroboration of the Engagement of the perſon who ſwears; the uſe of an Oath has been ſo far extended, that it has been made uſe of even in bare Covenants between particular perſons, the one ſwearing to the other that he would execute what he had promiſed: and we ſtill ſee, that in Obligations and in Contracts, the Notaries make mention of this Oath. But ſeeing this was a ſuperfluous precaution, and an occaſion of Perjury, this uſage is aboliſhed, and the Parties contracting take no Oath, altho' mention be made thereof in Obligations and Contracts. There is likewiſe gone into diſuſe another ſort of Oath, which the *Roman* Laws required of all perſons engaged in any Law-Suit, obliging both Plaintiffs and Defendants, at the beginning of the Cauſe, to ſwear that their demands and their defences were ſincere and upright, without any intention to give unneceſſary trouble, or to uſe querks and cavils[b]. And this uſually ſerved to no other purpoſe, than to be an occaſion of Perjury either to the one Party or the other, or ſometimes even to both. And altho' this Oath had been renewed in *France*, by the Ordinances, in ſome caſes[c]; yet at preſent it is altogether diſuſed, and no mention made of it.

Of all the ſorts of Oaths which have been juſt now mentioned, we may imagine two uſes, which make as it were two kinds of Oaths. One is of the Oath which is uſed to enforce and corroborate an Engagement; and the other is of that which is taken by one of the Parties in default of Proofs, whether the Oath be tendered by the adverſe Party,

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[a] The Lord be a true and faithful witneſs between us. *Jerem.* xlii. 5. Even I know, and am a witneſs, ſaith the Lord. *Jerem.* xxix. 23.

[b] *L.* 2. *Cod. de jur. prop. cal. dand.*

[c] *By an Ordinance of* Philip the Fair, *in the year* 1302, *the King's Proctors were obliged to take this Oath in the Cauſes which they commenced for the King's intereſt. And by the fifty eighth Article of the Ordinance of* Orleans, *in all Civil Cauſes the Parties were obliged to take this Oath.*

[*This Oath of Calumny is ſtill practiſed in the Eccleſiaſtical Courts, and Court of Admiralty of* England, *whenever it is inſiſted on by the Parties; who may either in the beginning of the Cauſe, or at any time afterwards, demand that their adverſe Party may be obliged to take this Oath, in order to clear themſelves from all ſuſpicion of carrying on the Suit out of a ſpirit of vexation and contradiction.* Clarke Praxis in Cur. Eccleſ. Tit. 151. Clarke Praxis Curiæ Admir. Angl. Tit. 42.]

Party, or enjoined by the Judge. Thus the Oath of Publick Officers, of Tutors, Curators, and others who are made to ſwear that they will faithfully diſcharge their Functions; that taken by Witneſſes, and by perſons ſkilled in ſome Art or Profeſſion, are in order to fortify and corroborate their engagements to diſcharge faithfully their Offices and Functions, to ſpeak the truth, to make a faithful Report: and all theſe Oaths relate to future duties. But as to the Oath which is tendered to one of the Parties, altho' it ought to have, with regard to him who makes it, the effect of enforcing his engagement to ſpeak the truth, yet it is under another view that it is conſidered as holding the place of a Proof, which makes the Fact to which he ſwears to be held for a Truth. And it is under this view that this ſort of Oath is a matter which belongs to the Title of Proofs, the Rules whereof ſhall be explained in this Section; whereas the other Oaths do not make a Matter which contains a detail of Rules, but they are reduced to theſe few Remarks which we have juſt now made on this Subject.

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I.

1. Definition of an Oath, and its Uſe. AN Oath is an Act of Religion, by which he who ſwears, calls upon God to be Witneſs of his fidelity in what he promiſes, or to be Judge and Avenger of his infidelity, if he fails therein[a]. Thus an Officer makes Oath, that he will faithfully execute his Office: Thus a Witneſs promiſes and ſwears, that he will ſpeak the truth: Thus he to whoſe Oath a matter in diſpute is referred that he may be Judge in his own Cauſe, promiſes to tell the truth ſo far as he knows of the matter.

[a] Jurisjurandi contempta religio ſatis Deum ultorem habet. *l. 2. C. de reb. cred & jurej.*

II.

2. The Oath is not taken, unleſs it be directed. As a Party is never made to ſwear in his own Cauſe, except where there is a deficiency of Proof; ſo no body is admitted to ſwear, unleſs the Oath be tendred to him, and directed by the Judge, who is to enquire whether the Proofs be ſufficient, or if it be neceſſary to have recourſe to the Oath of the Party[b].

[b] Si reus juraverit nemine ei jusjurandum deferente, prætor id, jusjurandum non tuebitur, ſibi enim juravit. Alioquin facillimus quiſque ad juſjurandum decurrens, neminem ſibi deferente jusjurandum, oneribus actionum ſe liberabit. *l. 3. ff. de jurejurando.* See in the following Article the manner how a matter in diſpute is referred to the Oath of the Party, and how the Oath is enjoined by the Judge.

III.

3. How a matter is referred to the Oath of the Party. The Party who finds that he has no proofs at all, or that he has not proofs ſufficient, may refer the matter to the Oath of his Adverſary; that is, ſubmit to whatever he ſhall declare touching the matter, after he has been ſworn. And this Oath, which the Judge directs and admits, if there be occaſion, is often practiſed, and is uſeful for putting an end to Law-Suits[c].

[c] Maximum remedium expediendarum litium in uſum venit jurisjurandi religio. Qua vel ex pactione ipſorum litigatorum, vel ex auctoritate judicis decidantur controverſiæ. *l. 1. ff. de jurejur.* See the following Article.

IV.

4. The Judge may order the Oath, without the de- Altho' the Party who is deſtitute of Proofs ſhould not declare that he refers the matter to the Oath of his Adverſary; yet the Judge may order the Oath to be

taken,

ſire of the Party, if there be occaſion. taken, if he finds it reaſonable. Thus, for inſtance, if a Debtor from whom a Creditor demands a Sum of Money due by Bond, which he proves, alledges that he has paid it, but does not prove the payment, alledging only ſome circumſtances which are not ſufficient to diſcharge him from the demand; the Judge may in condemning the Debtor to pay the debt, oblige the Creditor to ſwear that he has not received payment of it[d].

[d] Ex auctoritate judicis. *See the Law quoted on the preceding Article.*

In bonæ fidei contractibus, nec non in cæteris cauſis, inopia probationum per judicem jurejurando causâ cognitâ res decidi oportet. *l.* 3. *C. de reb. cred. & jurejur.*

V.

5. The Party's refuſing to ſwear, paſſes for a Proof. He to whoſe Oath his adverſe Party refers a matter of Fact that is within his knowledge, is obliged to ſwear, if the Judge requires it: and if he refuſes to do it, the Fact will be held as proved and confeſſed, in order to found the Sentence of Condemnation which ought to follow thereupon. Thus, for Example, if he who pretends to be Creditor in a Sum of Money, for which he ſays that he either had no Bond at all, by reaſon of the ſmallneſs of the Sum, or that the Bond is loſt, and he not having ſufficient proof of the debt, declares that he is willing to refer the matter to the Oath of the perſon whom he calls his Debtor, and who denies the debt: the Debtor will be obliged to ſwear that he owes him nothing, and if he refuſes to do it, the Fact will be held for true, and he will be condemned to pay the Sum that was demanded[e].

[e] Ait prætor, *eum à quo jusjurandum petetur, ſolvere, aut jurare cogam.* Alterum itaque eligat reus, aut ſolvat, aut juret: ſi non jurat, ſolvere cogendus erit à Prætore. *l.* 34. §. 6. *ff. de jurej.*

VI.

6. The Oath referred back again to the perſon who firſt deſired it of his adverſe Party. If the Fact which one Party refers to the Oath of the other be within the knowledge of both, he to whoſe Oath the matter has been referred, has the liberty either to ſwear, or to refer the matter back again to the Oath of the perſon who deſired his. And if he ſhould refuſe to do either the one or the other, the Fact would be reputed as proved and confeſſed, and he would be condemned to what ſhould be the conſequence of the proof of the ſad Fact[f].

[f] Datur autem & alia facultas reo, ut ſi malit referat jusjurandum: & ſi is qui petet conditione jurisjurandi non utetur judicium ei prætor non dabit. Æquiſſimè enim hoc facit, cùm non deberet diſplicere conditio jurisjurandi ei qui detulit. *l.* 34. §. 7. *ff. de jurejur.*

Manifeſtæ turpitudinis, & confeſſionis eſt nolle nec jurare, nec jusjurandum referre. *l.* 38. *ff. eod.*

Delata conditione jurisjurandi, reus —— ſolvere vel jurare, niſi referat jusjurandum, neceſſe habet. *l.* 9. *C. de reb. cred. & jurejur.*

VII.

7. He who has deſired his Adverſary's Oath, may excuſe him from ſwearing. The perſon whoſe Oath was deſired, being ready to ſwear, the Party who deſired it, may excuſe him from it. And in this caſe, it will be the ſame thing as if the Oath had been actually made[g].

[g] Remittit jusjurandum qui, deferente ſe, cùm paratus eſſet adverſarius jurare, gratiam ei fecit, contentus voluntate ſuſcepti jurisjurandi. *l.* 6. *ff. de jurejur.*

VIII.

8. He may likewiſe revoke his conſent to refer the matter to his Adverſary's Oath. He who has referred the matter to the Oath of his adverſe Party, may recal that conſent, if his Adverſary has not as yet ſworn. For it may happen, either that he has found new Proofs, or that he has reaſon to fear a falſe Oath[h].

[h] Quòd ſi non ſuſcepit jusjurandum (is cui delatum erat licet) poſtea parato jurare actor nolit deferre, non videbitur remiſſum. Nam quod ſuſceptum eſt, remitti debet. *l.* 6. *in f. ff. de jurejur.*

IX.

9. The duty of the Judge in relation to the Oath that is tendred by one of the Parties to the other, or referred back again to him who firſt tendred it. It follows from all the preceding Rules, that when the matter is concerning an Oath, whether it be that one Party tenders it to the other, or that he to whom it is tendred, deſires to refer it back again to his Adverſary; it depends on the prudence of the Judge, according to the circumſtances of the quality of the Facts, and the knowledge which the perſon whoſe Oath is deſired may have of them, to direct it, or not: And altho' the Oath be not demanded by the Party, yet the Judge may enjoin it by vertue of his Office, if there be occaſion. And after the Oath has been directed, if it has been at the deſire of one of the Parties, the duty of the Judge is, to take the Oath of the Party who has been deſired to give it, and to decree what ought to be adjudged in conſequence of his Oath, whether it be that he ſhould have what he demands, or that he ſhould be diſmiſſed from the Demand that is brought againſt him. But if he ſhould refuſe to ſwear, when he is made Judge in his own Cauſe, he will be either caſt in his own demand, or condemned to pay what is demanded of him. And as to him who had referred the matter to his Adverſary's Oath, and to whoſe Oath his Adverſary refers it back again, if he has juſt reaſons for not ſwearing, as if the Facts were not within his knowledge, he ought not to be conſtrained to ſwear. But if he refuſes to make Oath touching a Fact that is within his knowledge, it will be held as proved: And the Judge will decree what ſhall be juſt according to the ſaid Fact. But if he ſwears, Judgment will be given according to his Oath[i].

[i] Non ſemper autem conſonans eſt per omnia referri jusjurandum quale defertur, forſitan ex diverſitate rerum, vel perſonarum: quibuſdam emergentibus quæ varietatem inducunt. Ideoque, ſi quid tale inciderit, officio judicis conceptio hujuſcemodi jurisjurandi terminetur. *l. 34. §. 8. ff. de jurejur.*

Cùm res in jusjurandum demiſſa ſit, judex jurantem abſolvit: referentem audiet, & ſi actor juret condemnet reum. Nolentem jurare reum, ſi ſolvat abſolvit: non ſolventem condemnat. Ex relatione non jurante actore, abſolvit reum. *d. l. 34. §. ult.*

X.

10. The Oath decides the controverſy. When one of the Parties has referred the matter to his Adverſary's Oath, and he has ſworn, his Oath will be deciſive; and what he ſhall have declared upon Oath will be held for Truth, and will ſerve as a Rule. For it was to decide the Controverſy, that his Oath was deſired. Thus, it will have as much or more force than a Thing that is adjudged: and will have the ſame effect as a Payment, if he of whom a Sum of Money was demanded, ſwears that he owes nothing; or as a Tranſaction, if it was a diſpute of another nature[l].

[l] Jusjurandum ſpeciem tranſactionis continet: majoremque habet auctoritatem, quàm res judicata. *l. 2. ff. de jurejur.*

Dato jurejurando, non aliud quæritur quàm an juratum ſit: remiſſa quæſtione an debeatur: quaſi ſatis probatum ſit jurejurando. *l. 5. §. 2. eod. l. 56. ff. de re jud.*

Jusjurandum etiam loco ſolutionis cedit. *l. 27. ff. de jurejur.* Eſt acceptilationi ſimile. *l. 40. eod.*

XI.

11. The Oath extinguiſhes the Action. The deciſion of an Oath puts an end to all other queſtions, except that of knowing what has been ſworn. And it hath this effect, that it extinguiſhes the Right of the Party who referred it to his Adverſary's Oath. For if it was the Plaintiff, his demand is annulled both in reſpect to himſelf, and alſo in reſpect to thoſe who repreſent him. And if it was the Defendant, he is debarred from making any defence, and the Plaintiff's Action remains eſtabliſhed and proved both againſt the Defendant, and againſt all thoſe who ſucceed in his room. And it would be the ſame thing, if the perſon whoſe Oath had been deſired by the contrary Party, being ready to ſwear, had been excuſed from it, his Adverſary having diſpenſed with his ſwearing[m].

[m] De eo quod juratum eſt (prætor) pollicetur ſe actionem non daturum, neque in eum qui juravit, neque in eos qui in locum ejus, cui jusjurandum delatum eſt, ſuccedunt. *l. 7. in f. ff. de jurejur.*

Jurejurando dato, vel remiſſo, reus quidem acquirit exceptionem ſibi, aliiſque: actor verò actionem acquirit, in qua hoc ſolum quæritur, an juraverit, dari ſibi oportere: vel cùm jurare paratus eſſet, jusjurandum ei remiſſum ſit. *l. 9. §. 1. ff. eod.*

XII.

12. When a Writing is diſcovered after Oath has been made. If after Oath has been made, there be found Writings which prove the contrary of what has been ſworn; theſe new Proofs will deſtroy the effect of the Oath, and will re-eſtabliſh the Right of the other Party. And this Proof, which is readily received when the Oath has been directed only by the Judge, and not at the inſtance of the Party, may alſo be received, altho' the Oath have been made at the deſire of the Party himſelf, if the quality of the Fact, and the evidence of the Proof, make it reaſonable that it ſhould be ſo. As, for Example, if he from whom a Sum of Money is demanded by vertue of a Teſtament, of a Contract, or of another Title which is not produced and proved, acknowledges the truth of the Title which happens to be loſt or miſlaid, but being ignorant whether it makes mention of what is demanded of him, refers the matter to the Oath of the Plaintiff, and having paid him after he had made Oath, the Title appears, and nothing is found in it which could oblige him to make payment of what is demanded, he may recover what he has paid upon account of this falſe Oath[n].

[n] Admonendi ſumus interdum etiam poſt jusjurandum exactum permitti conſtitutionibus Principum, ex integro cauſam agere ſi quis nova inſtrumenta ſe inveniſſe dicat, quibus nunc ſolis uſurus ſit. Sed hæ conſtitutiones tunc videntur locum habere, cùm à judice aliquis abſolutus fuerit. Solent enim ſæpe judices in dubiis cauſis, exacto jurejurando ſecundùm eum judicare, qui juraverit. Quòd ſi aliàs inter ipſos jurejurando tranſactum ſit negotium, non conceditur eandem cauſam retractare. *l. 31. ff. de jurejur.*

Cauſa jurejurando ex conſenſu utriuſque partis, vel adverſario inferente delato & præſtito, vel remiſſo, deciſa, nec perjurii prætextu retractari poteſt: niſi ſpecialiter hoc lege excipiatur. *l. 1. C. de reb. cred. & jurejur.*

Cùm quis legatum vel fideicommiſſum, utpote ſibi relictum exigeret, & teſtamento fortè non apparente, pro eo ſacramentum ei ab hærede delatum eſſet, & his religionem ſuam præſtâſſet, affirmans ſibi legatum vel fideicommiſſum derelictum eſſe, & ex hujuſmodi teſtamento id quod petebat conſecutus eſſet, poſteà autem manifeſtum eſſet factum, nihil ei penitùs fuiſſe derelictum: apud antiquos quærebatur utrùm jurejurando ſtandum eſſet, an reſtituere deberet, quod accepiſſet—nobis itaque melius viſum eſt repeti ab eo legatum vel fideicommiſſum, nullumque ex hujuſmodi perjurio ei lucrum accedere. *l. ult. C. de reb. cred. & jurejur.*

Ne cui ex delicto impium ſibi lucrum afferre noſtris legibus concedatur. *d. l. in f.*

XIII.

13. In what matters this Oath of the Party is uſed.

All that has been ſaid of an Oath in the foregoing Articles, is to be underſtood of all the caſes which may happen in all Civil Matters, when the Facts and the Circumſtances may render the uſe of an Oath juſt and decent[o]. But in Crimes, the Accuſer cannot put the party accuſed upon his Oath, nor can the Accuſed oblige the Accuſer to ſwear, neither can the Judge refer the matter to the Oath of either of them. For it would be contrary to Juſtice and to Good Manners, that the Acquittal, or Condemnation of the Party accuſed ſhould depend on an Oath, which Intereſt or Paſſion might influence contrary to Truth, or that it ſhould depend on any other cauſe beſides that of a full Proof of the Truth.

[o] Quacumque actione quis conveniatur, ſi juraverit, proficiet ei jurejurandum, ſive in perſonam, ſive in rem, ſive in factum, ſive pœnali actione, vel quavis alia agatur, ſive de interdicto. *l.* 3. §. 1. *ff. de jurejur.*

XIV.

14. Effect of the Oath with reſpect to perſons intereſted with the Parties.

If in a Cauſe decided by the Oath of the Party, he who has ſworn, or he who has referred the matter to his Adverſary's Oath, be intereſted with others for the whole debt, ſo as that any one of them alone may diſcharge the whole, or be compelled to pay the whole debt; altho' one of them only has been in Judgment, yet the Oath will have its effect with reſpect to them all, either for or againſt them[p].

[p] In duobus reis ſtipulandi ab altero delatum jusjurandum etiam alteri nocebit. *l.* 28. *ff. de jurejur.*

Ex duobus reis promittendi ejuſdem pecuniæ, alter juravit: alteri quoque prodeſſe debebit. *d. l.* 28. §. 3. See the following Article.

XV.

15. The Oath neither benefits, nor hurts third perſons.

The Deciſion made by the Oath of the Party reſpects only the Parties between whom the Oath has been ordained, or thoſe whoſe Right is in their hands, or their Sureties, and the perſons who repreſent them; but it cannot hurt third perſons. Thus, for Example, he to whoſe Oath the matter had been referred, in a demand of a Thing which he pretended did belong to him, and who had ſworn that it was his, could not plead this Oath againſt another perſon who ſhould claim a Right to the ſame Thing[q].

[q] Jusjurandum alteri neque prodeſt, neque nocet. *l.* 3. §. 3. *in fine ff. de jurejur.*

Si petitor juravit poſſeſſore deferente, *rem ſuam eſſe*, actori dabitur actio. Sed hoc duntaxat adversùs eum, qui jusjurandum detulit, eoſque qui in ejus locum ſucceſſerunt.

Cæterum adversùs alium, ſi velit prærogativa jurisjurandi uti, nihil ei proderit. Quia non debet alii nocere, quod inter alios actum eſſet. *l.* 9. §. *ult. & l.* 10. *eod.*

See touching Sureties, the fifth Article of the fifth Section of the Title of Sureties.

XVI.

16. What perſons may refer the matter in diſpute to the Oath of the Party, for others.

It is only the perſons intereſted who can refer the matter in diſpute to the Oath of the Party, and thoſe who have a right to do it in the name of others, whether it be by the Authority of Law, as a Tutor, and Guardian; or by the will of the Party concerned, as a Proxy. But the Tutor, and Proxy, cannot refer the matter to the Oath of the Party, unleſs they obſerve the Rules which have been explained in their proper place[r].

[r] *See the fifth Article of the ſecond Section of Tutors, and the tenth Article of the third Section of Proxies. See the eighth Article of the firſt Section of that which is done to defraud Creditors.*

TITLE VII.

Of POSSESSION and PRESCRIPTION.

Why Poſſeſſion and Preſcription are here joined together.

WE have joined together under the ſame Title the matter of Poſſeſſion, and that of Preſcriptions, becauſe it is by Poſſeſſion that Preſcription is acquired; ſo that one is as it were the Cauſe, and the other the Effect: And likewiſe for this reaſon, that both the one and the other are ways of acquiring and aſcertaining the Property of Things. For it will appear in this Title, that not only is the Property of a Thing acquired by Preſcription, which is in effect nothing elſe but a Poſſeſſion continued for a long time, but that it is likewiſe ſometimes acquired by the bare effect of Poſſeſſion, without Preſcription.

Uſe of Poſſeſſion, and the differences between Property, Poſſeſſion, and Detention.

The uſe of Poſſeſſion is ſuch, that without it the Property would be uſeleſs. For it is only by the means of Poſſeſſion that we have the Things in our power, that we make uſe of them, and that we enjoy them; which is the reaſon why the word *Poſſeſſion* is often uſed to ſignify Property[a], altho' they be two things which are neceſſarily to be diſtinguiſhed, they being ſo different that one may have one of them without the other[b]. Thus, for inſtance, if one ſells to another a Thing belonging to a third perſon, and delivers it to him, the Purchaſer who comes by it fairly and honeſtly, having the Thing in his cuſtody, and being conſidered as Maſter of it, he has the Poſſeſſion thereof, but not the Property, until he has acquired the ſame by a long Poſſeſſion: and this third perſon retains his Property without Poſſeſſion, until he brings his Action againſt the Purchaſer for the recovery of it.

It appears by this Example, that ſeeing Poſſeſſion and Property may be ſeparated, they are two different Things, which ought not to be confounded together. But altho' it may ſeem by this diſtinction, that Poſſeſſion is nothing elſe but a detention of that which one has in his cuſtody, whether he have the Property of it, or not; yet we muſt not take for a true Poſſeſſion all ſorts of Detention, but only that of a perſon who detains a Thing as being Maſter of it; whether it be that he himſelf has the actual detention of the Thing, it being in his own cuſtody, or that he exerciſes his Right by the Intervention of other perſons to whom he commits the cuſtody of it, ſuch as a Depoſitary, a Tenant, a Farmer; for in that caſe, he poſſeſſes the Thing by the hands of thoſe perſons who hold it in his name. So that whereas there is properly ſpeaking only one true Poſſeſſion, which is that of the Maſter; we may diſtinguiſh three ſorts of Detention, according to three different Cauſes which it may have. That of the Maſter, when he has in his own cuſtody the thing that belongs to him: that of the perſons who hold it for the Maſter: and that of Uſurpers, who detain it without any Right or Title.

Three Cauſes of Detention.

The firſt of theſe Cauſes of the Detention of a Thing, is the Right of Property, which gives to the Proprietor the right to have in his cuſtody what is his own, that he may uſe it, enjoy it, and diſpoſe of it: and it is to this firſt Cauſe that the Detention is linked naturally.

The ſecond Cauſe of Detention is the will of the Owner of the Thing, which makes it to paſs into the hands of another perſon; as if it is a Houſe which he lets, Lands which he farms out, or gives to be enjoyed by a Creditor for a certain time, in ſatisfaction of his debt: If it is a Moveable which he lends, or lets out, which he depoſites, or gives in pawn. In all theſe caſes the Detention paſſes into other hands than the Maſter's, but without depriving him of his Poſſeſſion. For he retaining always his Right of Property, which implies the right to poſſeſs, and the Detention being in the hands of other perſons only in his name, it is he who poſſeſſes by the others, and they have only a borrowed Poſſeſſion for ſome time, and which can never acquire to them the Right of Property. And as he who appoints a Factor or Agent to ſell, to give, or tranſact, does himſelf ſell, give, and tranſact, according as the ſaid Factor or Agent does it in his name; ſo the Proprietor whoſe Poſſeſſion paſſes by his conſent into the hands of another perſon, poſſeſſes by the ſaid perſon[c].

The third Cauſe of Detention is Uſurpation, whether it be by Stealth, or by Robbery, or by ſome other unlawful way. And this manner of Detention does not deſerve the name of Poſſeſſion[d]. Thus it is by the Cauſe of the Detention that we are to judge, whether it is a Poſſeſſion, or only an Uſurpation. And when it is a Poſſeſſion, we muſt diſtinguiſh if it is in the hands of the Maſter to whom it naturally belongs, or if he poſſeſſes by the hands of another.

We muſt diſtinguiſh in Poſſeſſion, that which is of Right, from that which is of Fact.

It follows from theſe Remarks, that it is neceſſary to diſtinguiſh in the general Idea which is formed from the word Poſſeſſion, a Right and a Fact; the Right to poſſeſs, and the actual Detention, which is a Fact. It is from thence that ariſe, and it is by that that we muſt explain the different ways of ſpeaking which we ſee in the Laws, That Poſſeſſion has nothing in common with Property: *Nihil commune habet proprietas cum poſſeſſione. l. 12. §. 1. ff. de acq. vel am. poſſ.* That the Poſſeſſion cannot be ſeparated from the Property: *Proprietas à poſſeſſione ſeparari non poteſt. l. 8. C. de acq. & ret. poſſ.* That Poſſeſſion is a thing of Fact, and not of Right: *Res*

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[a] Interdùm proprietatem quoque verbum poſſeſſionis ſignificat; ſicut in eo qui poſſeſſiones ſuas legâſſet, reſponſum eſt. *l. 78. de verb. ſignif.*

[b] Nihil commune habet proprietas cum poſſeſſione. *l. 12. §. 1. ff. de acq. vel am. poſſ.*

[c] *See the eighth and ninth Articles of the firſt Section.*

[d] Si vinxeris hominem liberum, eum te poſſidere non puto. *l. 23. §. 2. ff. de acq. vel amit. poſſ.*

facti, non juris. l. 1. §. 3. ff. de acq. vel am. poſſ. That Poſſeſſion is not only a thing of Fact, but that it is likewiſe a matter of Right: *Poſſeſſio non tantum corporis, ſed & juris eſt. l. 49. §. 1. eod.* That the Uſufructuary has a kind of natural Poſſeſſion: *Naturaliter videtur poſſidere is qui uſumfructum habet. l. 12. ff. de acq. vel am. poſſ.* That the Uſufructuary is not a Poſſeſſor: *Eum qui tantum uſumfructum habet, poſſeſſorem non eſſe. l. 15. §. 1. ff. qui ſatiſd. cogantur.* That he does not poſſeſs: *Non poſſidet, ſed habet jus utendi, fruendi. §. 4. inſt. per quas perſ. nobis acq. l. 1. §. 8. ff. quod legat.* From all which it is neceſſary to conclude, that the true Poſſeſſion is properly ſpeaking only that of the Maſter: and that altho' others beſides the Maſter may have a right to detain the Thing, ſuch as the Tenant, the Farmer, the Uſufructuary, who having a right to enjoy, ought by conſequence to have the detention of the Thing; which in them is only a borrowed Poſſeſſion, or rather the Maſter's own Poſſeſſion, who poſſeſſes through them; becauſe the Right of Poſſeſſion cannot be ſeparated from the Property. This is not contrary to what has been ſaid, that he who purchaſes fairly and honeſtly Lands, or any other Thing, from one who was not the Owner of them, poſſeſſes them altho' he have not the Property: For this Purchaſer is conſidered as Proprietor, and therefore is looked upon as Poſſeſſor. And altho' the Maſter may be deprived of the actual detention by the detention of an Uſurper; yet he always preſerves his right to take Poſſeſſion, whenever he is able to remove the Uſurpation: And the unjuſt detention of the Uſurper, has only the appearance of a Poſſeſſion, altho' he have in effect hold of the Thing, and enjoys it; becauſe the vice of this Detention gives it another nature than that of the true Poſſeſſion, which ought to be founded on a juſt Title.

It is becauſe of this difference between the true Poſſeſſion of the Maſter, and all other Detention, that we diſtinguiſh two ſorts of Poſſeſſion, which are expreſſed by the words of *Civil Poſſeſſion*, and *Natural Poſſeſſion*[e], or otherwiſe by the words of *Legal Poſſeſſion*, and of *Corporeal*, or *Actual Poſſeſſion*[f]. The Civil or Legal Poſſeſſion is that of the Maſter; and the Natural or Corporeal Poſſeſſion, is that of the perſons who have only the bare detention of the Thing, ſuch as the Uſufructuary, the Farmer, and others. This Poſſeſſion is called Natural, or Corporeal, becauſe it conſiſts only in the bare natural detention, without the Right of Property: And the other is called Civil, or Legal, becauſe it is joined to the Right which the Law gives to poſſeſs as Maſter, whether he have likewiſe the natural detention of the Thing in his own hands, or whether he poſſeſſes it by the hands of another.

Diverſe meanings of the word Poſſeſſion.

It is neceſſary to remark on all theſe different expreſſions of the Laws, ſome of which appear to be inconſiſtent with one another, that it ſeems as if diverſe meanings might be given to theſe words of Poſſeſſion, and of Civil and Natural Poſſeſſion, and as if we might underſtand theſe texts differently under different views, according to the ſaid different meanings, either giving to all manner of detention the name of Poſſeſſion, even to that of an Uſurper; or giving it only to that of the Maſter. But it is of no great importance, whether we qualify theſe ſeveral ſorts of Detention with the name of Poſſeſſion, or whether we diſtinguiſh them by peculiar words; provided that in confounding together the words Poſſeſſion and Detention, we do not confound the diverſe effects of theſe different manners of having a Thing in one's power: and that we diſtinguiſh the Cauſes of the Detention, and the differences between the Poſſeſſion of the Maſter, and that of an Uſurper, between theſe two Detentions and that of perſons who have a Thing in their hands, but do not claim the Property of it: and that we diſtinguiſh likewiſe among the perſons laſt mentioned, between thoſe who have ſome Right to the Thing, as an Uſufructuary, or a Farmer, and thoſe who have no Right to it, ſuch as a Depoſitary, and he who has found a Thing loſt, of which he knows the right Owner. For according to theſe differences we muſt diſtinguiſh the Rules which relate to all theſe perſons. Thus, for Example, whatever name we give to the Detention of an Uſufructuary, and whether we conſider him as poſſeſſing only in the name of the Maſter, or as having himſelf a kind of Poſſeſſion or Detention for his Uſufruct, we muſt know that he has nevertheleſs a Right to defend himſelf in his Enjoyment of the Fruits, ſince he might maintain himſelf therein, even againſt the Proprietor himſelf, in caſe he ſhould offer to turn him out of Poſſeſſion[g]. And it would be the ſame thing with reſpect to a Farmer, and a Tenant[h]; for they have all of them a Right to enjoy, which cannot have its effect without an actual detention of the Thing which they have a Right to enjoy. So that we may ſay, that as they partake of the Right which the Maſter has to enjoy, they partake alſo of his Right to poſſeſs. And that they have a kind of Poſſeſſion proportioned to the uſe which their Right demands.

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[e] Poſſeſſio non ſolùm civilis, ſed etiam naturalis intelligitur. *l. 2. §. 1. ff. pro harede.*

[f] Nemo ambigit poſſeſſionis duplicem eſſe rationem, aliam quæ jure conſiſtit, aliam quæ corpore. *l. 10. C. de acq. & ret. poſſeſſ.*

Connexion between Poſſeſſion and Property. We may judge by all theſe Remarks of the Idea which we ought to conceive of the nature of Poſſeſſion, what connexion it has with the Right of Property; and that as we cannot exerciſe fully all the Rights of Property, if we are not in actual Poſſeſſion of the Thing, ſo likewiſe we have not a compleat Poſſeſſion of a Thing, unleſs we have the Property of it alſo.

It is becauſe of this connexion between Poſſeſſion and Property, and becauſe it is natural for the Proprietor to poſſeſs what belongs to him, that Poſſeſſion and Property are acquired and preſerved, the one by the other. Thus, whoever has acquired the full Property, whether it be by Sale, by Donation, by Legacy, or by other Titles, he has a Right to take Poſſeſſion. Thus he who poſſeſſes honeſtly and fairly, acquires the Property, if he had it not before, provided his Poſſeſſion laſts during the time that is regulated for Preſcription; and the Property is likewiſe acquired by the bare Poſſeſſion, without Preſcription, in certain caſes, as has been already remarked, and as will further appear in the ſecond Section.

SECT. I.

Of the Nature of Poſſeſſion.

The CONTENTS.

1. *Definition of Poſſeſſion.*
2. *Connexion between Poſſeſſion and Property.*
3. *There are not two Poſſeſſions of one and the ſame Thing.*
4. *What things may be poſſeſſed.*
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6. *Poſſeſſion does not require a continual Detention.*
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19. *If the Poſſeſſion be doubtful, Judgment is given according to the Titles, or the Thing is ſequeſtred.*

I.

1. Definition of Poſſeſſion. POſſeſſion, taken in a proper ſenſe, is the detention of a Thing, which he who is Maſter of it, or who has reaſon to believe that he is ſo, has in his own keeping, or in that of another perſon by whom he poſſeſſes[a].

II.

2. Connexion between Poſſeſſion and Property. Seeing the uſe of Property is to have a Thing in order to enjoy it, and to diſpoſe of it, and that it is only by Poſſeſſion that one can exerciſe this Right; Poſſeſſion therefore is naturally linked to the Property, and ought not to be ſeparated from it. Thus, Poſſeſſion implies a Right and a Fact; the Right to enjoy annexed to the Right of Property, and the Fact of the real detention of the Thing, that it be in the hands of the Maſter, or of another for him[b].

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[g] *See the firſt Article of the firſt Section of Uſufruct.*

[h] *See the ſixth Article of the ſixth Section of Letting and Hiring.*

[a] Poſſeſſio appellata eſt (ut & Labeo ait) à ſedibus, quaſi poſitio: quia naturaliter tenetur ab eo qui ei inſiſtit, quam Græci κατοχὴν dicunt. *l. 1. ff. de acq. vel am. poſſ.*

This definition reſults from what has been ſaid in the Preamble, and from the ſecond, ſixth, eighth, ninth and eleventh Articles of this Section. See the twelfth Article of the ſecond Section.

[b] Proprietas à poſſeſſione ſeparari non poteſt. *l. 8. C. de acquir. & retin. poſſeſſ.* Res facti non juris (poſſeſſio.) *l. 1. §. 3. ff. de acq. vel amitt. poſſ.*

Plurimum ex jure poſſeſſio mutuatur. *l.* 49. *eod.* Poſſeſſio non tantùm corporis, ſed & juris eſt. *d. l.* 49. §. 1.

See the thirteenth Article of this Section, the firſt Article of the third Section, and the third and fourth Articles of the ſecond Section.

III.

3. There are not two Poſſeſſions of one and the ſame Thing.

As it is not poſſible when two perſons contend for the property of one and the ſame Thing, that each of them alone can have the Right of Property; ſo neither is it poſſible, when two perſons diſpute about the Poſſeſſion of one and the ſame Thing, for every one of them alone to have the Poſſeſſion. But as there is only one who is the true Owner, ſo likewiſe there is only one true Poſſeſſor[c]. And if it happens that the Poſſeſſor is another perſon than the right Owner, his Poſſeſſion will be only an Uſurpation, and he will be obliged to relinquiſh it, and to deliver it up to the Owner.

[c] Plures eamdem rem in ſolidum poſſidere non poſſunt. Contra naturam quippe eſt, ut cùm ego aliquid teneam, tu quoque id tenere videaris. *l.* 3. §. 5. *ff. de acq. vel amitt. poſſeſſ.* Ait (Celſus) duorum in ſolidum dominium, vel poſſeſſionem eſſe non poſſe. *l.* 5. §. *ult. ff. commod.* Duo in ſolidum precariò habere non magis poſſunt, quàm duo in ſolidum vi poſſidere, aut clam. Nam neque juſtæ neque injuſtæ poſſeſſiones duæ concurrere poſſunt. *l.* 19. *ff. de precar. V. l.* 5. *ff. uti poſſidetis.* See the ninth and tenth Articles of this Section.

IV.

4. What Things may be poſſeſſed.

One may poſſeſs Corporeal Things, whether they be Moveables, or Immoveables[d]; but according to the differences of their Nature, the marks of the Poſſeſſion of them are different. Thus, one may poſſeſs Moveables, by keeping them under Lock and Key, or having them otherwiſe at one's diſpoſal: Thus, one poſſeſſes Cattle, either by ſhutting them up, or giving them to be kept: Thus, one poſſeſſes a Houſe by dwelling in it, or having the Keys thereof, or truſting it to a Tenant; or by building in it. Thus, one poſſeſſes Lands by cultivating them, reaping the Fruits, going and coming through them, and diſpoſing thereof at pleaſure[e].

[d] Poſſideri poſſunt quæ ſunt corporalia. *l.* 3. *ff. de acq. vel amitt. poſſeſ.*

[e] Mercium in horreis conditarum poſſeſſio tradita videtur, ſi claves apud horrea traditæ ſint: quo facto confeſtim emptor dominium & poſſeſſionem adipiſcitur. *l.* 74. *ff. de contr. empt.*

Nerva filius res mobiles, quatenùs ſub cuſtodia noſtra ſint hactenus poſſideri: id eſt, quatenus, ſi velimus, naturalem poſſeſſionem nanciſci poſſimus. Nam pecus ſimul atque aberraverit, &c. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſeſſ.* See the ſixth Article of this Section touching the Poſſeſſion of Immoveables. See the ſeventeenth Article of the ſecond Section.

V.

5. A kind of Poſſeſſion of Rights.

There is likewiſe a kind of Poſſeſſion of Things which conſiſt only in Rights, ſuch as a Right of Juriſdiction, a Right which a Lord of a Mannor may have to oblige his Vaſſals and Tenants to grind in his Mills, and bake in his Ovens, and to pay him a Fee for the uſe of them, a Toll, an Office, and other ſorts of Goods which one poſſeſſes by the uſe and exerciſe which he makes of his Right as occaſion offers. And it is this exerciſe which makes the Poſſeſſion of ſuch Things, as well as of a Service, which is likewiſe a Right of another nature, which one poſſeſſes by the uſe he makes of it, although he does not poſſeſs the Lands or Houſes from which the Service is due. Thus, he who has a Right of Paſſage through the Ground of his Neighbour, poſſeſſes that Service by going through the ſaid Ground which he does not poſſeſs[f].

[f] Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe. *l. ult. ff. de ſervitut.*

VI.

6. Poſſeſſion does not require a continual detention.

Although Poſſeſſion implies the detention of what we poſſeſs, yet this detention ought not to be ſo underſtood, as if it were neceſſary to have always either in our hand, or in our ſight, the Things of which we have the Poſſeſſion. But after the Poſſeſſion has been once acquired, it is preſerved without an actual detention[g], as ſhall be explained in the ſecond Section.

[g] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. *l.* 4. *C. de acquir. & ret. poſſeſſ.*

VII.

7. Poſſeſſion of Living Creatures.

As we may poſſeſs Living Creatures, which it is not poſſible to have always in our power and cuſtody, ſo we retain the Poſſeſſion of them whilſt we ſhut them up, whilſt we have them under the care of a Keeper, or that being made tame, they return home without a Keeper, as Bees to their Hives, and Pigeons to their Dove-houſes. But the Creatures which eſcape out of our cuſtody, and do not come back, are no longer in our poſſeſſion, till we recover them again[h].

[h] Quidquid eorum (ferarum & volucrum) ceperimus, eò uſque noſtrum eſſe intelligitur, donec noſtra cuſtodia coercetur. *l.* 3. §. 2. *ff. de acq. rer. dom.*

Aves poſſidemus quas incluſas habemus: aut ſi quæ manſuetæ factæ, cuſtodiæ noſtræ ſubjectæ ſunt. *l.* 3. §. 15. *ff. de acq. vel amitt. poſſ.*

VIII.

8. The bare Detention, without ſome Right in the Thing, is not a true Poſſeſſion.

The bare detention of a Thing, is not properly called Poſſeſſion: and it is not enough for Poſſeſſion, that we have actual hold of a Thing, and have it in our cuſtody; but we muſt have it, together with the right to enjoy it, and to diſpoſe of it, as being Maſters of it, or as having juſt cauſe to believe our ſelves to be the right Owners[i]. For he who detains a Thing without having this Right, if he detains it againſt the will of the Owner, is not a Poſſeſſor, but an Uſurper: Or if it is with the Owner's good will, this detention leaves to the Owner his Poſſeſſion, and it is he who poſſeſſes[l].

IX.

9. One may poſſeſs by others.

One may poſſeſs a Thing, not only by one's ſelf, but alſo by other perſons. Thus, the Proprietor of a Houſe, or other Tenement, poſſeſſes by his Tenant, or by his Farmer. Thus, the Debtor who has given a Pawn to his Creditor, he who has depoſited or lent a Thing, or given it to be enjoyed by another, poſſeſs by thoſe to whom they have given the Thing in keeping. Thus, the Minor poſſeſſes by his Guardian. Thus, one poſſeſſes by a Factor, or Agent; and in general, every Proprietor poſſeſſes by the perſons who hold the Thing in his name[m].

X.

10. Precarious Poſſeſſion.

Thoſe who poſſeſs precariouſly, that is, by having prayed the Maſter to let them have the Poſſeſſion, do not deprive him thereof; but poſſeſſing by his conſent, they poſſeſs for him. Thus, for inſtance, if the Seller of a Houſe, or of Lands, does not deliver the ſame at the time of the Contract, and that he keeps poſſeſſion thereof, whether it be to reap the Fruits which he had reſerved to himſelf for a certain time, or that he might have time to evacuate the places, and to deliver them free from all incumbrances, or for other cauſes; it is mentioned in the Contract, that he ſhall poſſeſs only precariouſly. Which hath this effect, that the Purchaſer is conſidered as poſſeſſing by the hands of the Seller. And if we conſider both the one and the other as having the Poſſeſſion; that of the Purchaſer who is Maſter, is diſtinguiſhed by his Right, and by his intention of poſſeſſing as Maſter: and that of the Seller conſiſts only in a bare Detention, without the Right of Property, and is not a true Poſſeſſion[n].

XI.

11. Poſſeſſion is either honeſt or knaviſh.

There are two ſorts of Poſſeſſors, thoſe who poſſeſs honeſtly and fairly, and thoſe who poſſeſs knaviſhly[o]. The honeſt and fair Poſſeſſor is he who is truly Maſter of the Thing which he poſſeſſes, or who has juſt cauſe to believe that he is ſo, altho' it may happen in effect that he is not; as it happens to him who buys a Thing which he thinks belongs to the perſon whom he buys it of, and yet belongs to another. The knaviſh Poſſeſſor is he who poſſeſſes as Maſter, but who aſſumes this quality when he knows very well either that he has no Title at all to it, or that his Title thereto is vicious and defective. We ſhall ſee the effects of theſe two ſorts of Poſſeſſion in the third Section.

Quidam rectè putant, columbas quoque, quæ ab ædificiis noſtris volant, item apes quæ ex alveis noſtris evolant, & ſecundùm conſuetudinem redeunt, à nobis poſſideri. *d. l.* 3. §. 16.

Nerva filius, res mobiles quatenus ſub cuſtodia noſtra ſint hactenùs poſſideri, id eſt, quatenùs ſi velimus naturalem poſſeſſionem nanciſci poſſimus. Nam pecus ſimul atque aberraverit ut non inveniatur, protinùs deſinere à nobis poſſideri, licet à nullo poſſideatur. *d. l.* 3. §. 13.

[i] Opinione domini. *l.* 22. §. 1. *ff. de noxal. act.* Cogitatione domini. *l.* 21. *C. de furt.*

Poſſeſſio non tantum corporis, ſed & juris eſt. *l.* 49. §. 1. *ff. de acq. vel amitt. poſſeſſ.* See the ſecond Article.

[l] Rei depoſitæ proprietas apud deponentem manet: ſed & poſſeſſio. *l.* 17. §. 1. *ff. de poſ.* See the following Article, and the eleventh Article of the fifth Section.

[m] Is cujus colonus, aut hoſpes, aut quis alius iter ad fundum fecit, uſus videtur itinere, vel actu, vel via: & idcircò interdictum habebit. *l.* 1. §. 7. *ff. de itin. act. pr.*

Qui ex conducto poſſidet, quamvis corporaliter teneat, non tamen ſibi, ſed domino rei creditur poſſidere. *l.* 1. *C. comm. de uſuc.*

Per procuratorem, tutorem, curatorémve, poſſeſſio nobis acquiritur. *l.* 1. §. 20. *ff. de acq. vel amitt. poſſeſſ.*

Generaliter quiſquis omninò noſtro nomine ſit in poſſeſſione, veluti procurator, hoſpes, amicus, nos poſſidere videmur. *l.* 9. *eod.*

See the Preamble to this Title.

[n] Is qui rogavit, ut precariò in fundo moretur, non poſſidet: ſed poſſeſſio apud eum qui conceſſit, remanet. *l.* 6. §. 2. *ff. de precar.*

Eum qui precariò rogavit, ut ſibi poſſidere liceat, nanciſci poſſeſſionem non eſt dubium. An is quoque poſſideat, qui rogatus ſit, dubitatum eſt. Placet autem, penes utrumque eſſe eum hominem, qui precariò datus eſſet: penes eum qui rogâſſet, quia poſſederat corpore: penes dominum, quia non diſceſſerit animo poſſeſſione. *l.* 15. §. 4. *eod.*

We have added the laſt words of this Article, in order to reconcile the apparent contrariety that is between theſe two texts.

[o] Poteſt dividi poſſeſſionis genus in duas ſpecies, ut poſſideatur aut bonâ fide, aut non bonâ fide. *l.* 3. §. 22. *ff. de acq. vel amit. poſſeſſ.*

XII.

12. A clandeſtine or ſurreptitious Poſſeſſion.

We muſt reckon in the number of knaviſh Poſſeſſors, not only Uſurpers, but alſo thoſe who foreſeeing that the Right which they pretend to have will be diſputed, and fearing leſt they ſhould be hindred from taking poſſeſſion thereof, take ſome opportunity of getting into Poſſeſſion ſurreptitiouſly, without the knowledge of the perſon from whom they expect the oppoſition[p].

XIII.

13. The Poſſeſſor is preſumed to be the right Owner.

Altho' the Poſſeſſion be naturally linked with the Property, and that it ought not to be ſeparated from it[q]; yet we muſt not confound them, ſo as to believe that the one cannot be without the other[r]. For it often happens that the Property of a Thing being controverted between two perſons, there is only one of the two who is owned to be Poſſeſſor, and it may be that it is the perſon who is not the right Owner, and that thus the Poſſeſſion may be ſeparated from the Property. But even in this caſe, the natural connexion which is between the Poſſeſſion and the Property, makes the Law to preſume that they are joined in the perſon of the Poſſeſſor: and until it be proved that the Poſſeſſor is not the right Owner, the Law will have him, by the bare effect of his Poſſeſſion, to be conſidered as ſuch. For ſeeing it is the Owner who ought to poſſeſs, it is natural to preſume that he who is in poſſeſſion is alſo the right Owner, and that the right Owner has not ſuffered himſelf to be turned out of poſſeſſion[s].

XIV.

14. Detention which the Owner cannot take away.

The Poſſeſſion, or the Right which the Maſter has to poſſeſs, is often ſeparated from the actual detention, and the Maſter may have no right to take away the Thing from him who has it in his keeping. Thus, for inſtance, if he who ſells an Eſtate reſerves to himſelf the enjoyment of it for ſome years, he will keep the Poſſeſſion, and cannot be turned out of it, altho' he is not any longer Maſter of it. Thus he who has the Uſe and Profits of an Eſtate, holds and poſſeſſes it, and the Proprietor cannot moleſt him in his Poſſeſſion. Thus the Debtor cannot take away from his Creditor that which he has given him in pawn. But in theſe caſes, the Detention not being a conſequence of the Right of having a Thing to one's ſelf, and of diſpoſing of it; it is not a true Poſſeſſion, in the ſenſe of the definition explained in the firſt Article, which may entitle one to exerciſe all the Rights of Poſſeſſion when it is joined with the Property; but it is only a Right to hold the Thing for the uſe thereof which may have been granted to thoſe perſons who have the actual Detention of it[t].

XV.

15. The Poſſeſſor is maintained in his Poſſeſſion without a Title, if no Title be produced againſt him.

It follows from the Rule explained in the thirteenth Article, that all Poſſeſſors ought to be maintained in their Poſſeſſion and Enjoyment of the Thing, until they who trouble them in their Poſſeſſion prove clearly their Right. And if a demand of the Property againſt a Poſſeſſor is not grounded upon good and ſufficient Titles, it is enough for the Poſſeſſor to alledge his Poſſeſſion, without producing any other defences[u].

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[p] Clam poſſidere eum dicimus qui furtivè ingreſſus eſt poſſeſſionem ignorante eo quem ſibi controverſiam facturum ſuſpicabatur, & ne faceret timebat. *l. 6. ff. de acq. vel amitt. poſſ.*

Clam committentes, ut contumaces plectuntur. *l. ult. in f. ff. de ritu nupt. V. l. 10. ſi ſerv. vind.*

[q] *See the ſecond Article.*

[r] Poſſeſſio & proprietas miſceri non debent. *l. 52. ff. de acq. vel amitt. poſſ.*

Nihil commune habet proprietas cum poſſeſſione. *l. 12. §. 1. eod.*

Fieri enim poteſt ut alter poſſeſſor ſit, dominus non ſit: alter dominus quidem ſit, poſſeſſor verò non ſit: fieri poteſt, ut & poſſeſſor idem & dominus ſit. *l. 1. §. 2. ff. uti poſſid.*

[s] *See the firſt Article of the fourth Section of the Title of Proofs.*

[t] Qui uſusfructus nomine rem tenet non utique poſſidet. *l. 5. §. 1. ff. ad exhib. l. 1. §. 8. ff. de acq. vel amit. poſſ.* Fructuarius non poſſidet. *§. 4. inſt. per quas perſ. cuiq. acq.* See the twenty third Article of the third Section of Pawns and Mortgages.

Utrùm autem adverſus dominum dumtaxat in rem actio uſufructuario competat, an etiam adverſus quemvis poſſeſſorem, quæritur? Et Julianus, libro ſeptimo Digeſtorum, ſcribit, hanc actionem adverſus quemvis poſſeſſorem ei competere. *l. 5. §. 1. ff. ſi uſuf. pet.* See the firſt Article of the fifth Section of Uſufruct.

[u] In pari cauſa poſſeſſor potior haberi debet. *l. 126. ff. de reg. jur.* See the firſt Article of the fourth Section of the Title of Proofs.

This Rule which maintains the Poſſeſſor in his Poſſeſſion, even without a Title, againſt him who diſturbs him, ought not to be extended to matters relating to Church-Benefices, in which Law-Suits are ſo very frequent, about the Poſſeſſion of the Benefices. For there is this difference between the Poſſeſſion of Church-Benefices, and that of Temporal Goods, which enter into Commerce; that whereas in theſe all Poſſeſſors are maintained in their Poſſeſſion without any Title, if they who diſturb them therein produce no Title on their part; the Poſſeſſor of a Church Benefice is not maintained therein, if, together with his Poſſeſſion, he have not a capacity for the Function, and a good Title to the Benefice. Which difference is founded upon this, that whereas all ſorts of perſons are capable of poſſeſſing the Things which are in Commerce, and that the ways of acquiring them *are indefinite; Eccleſiaſtical Benefices cannot be poſſeſſed but by perſons who have a capacity proportioned to the quality of the Function, and who are inducted therein by the ways which the Laws of the Church have eſtabliſhed for that purpoſe. So that the Right of Poſſeſſion in Church Benefices is judged not by the bare Poſſeſſion, but according to the cleareſt Titles.* De Præbend. c. eum qui lib. 6. De Reg. Jur. c. 1. lib. 6. See the Ordinances of 1453. art. 75. 1493. art. 58. 1535. chap. 9. art. 6. 1667. tit. 15. art. 2. & 6.

XVI.

16. *If two perſons pretend to be Poſſeſſors, he who has been in poſſeſſion for the ſpace of a year, is preferred.*

Seeing the Poſſeſſion is in ſome caſes ſufficient of it ſelf to maintain the Poſſeſſor therein, it often happens that the two Parties who claim the Property of one and the ſame Eſtate, pretend likewiſe that they are in poſſeſſion of it, and that each of them on his part, in order to be maintained in the Poſſeſſion, endeavours to make it appear that he is Poſſeſſor; and that they reciprocally moleſt one another by Acts which may ſhew them to be in Poſſeſſion. And in theſe caſes, if it appears that one of the two has been in peaceable Poſſeſſion for the ſpace of a year, before the diſturbance given him by the other, he will be maintained therein[x].

[x] Hoc interdicto prætor non inquirit, utrùm habuit jure ſervitutem impoſitam, an non: ſed hoc tantùm an itinere, actuque hoc anno uſus ſit, non vi, non clam, non precariò: & tuetur eum. *l. 1. §. 2. ff. de itin. actúq. priv.*

Annum ex die interdicti retrorſum computare debemus. *d. l. §. 3.*

Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi necdum utilis annus exceſſit, certiſſimi juris eſt. *l. 2. C. unde vi.*

XVII.

17. *The queſtion about the Poſſeſſion is judged before that of the Property.*

The Controverſies whereof the matter in diſpute is to regulate between two perſons, who pretend to be Poſſeſſors of one and the ſame Thing, which of the two ſhall be maintained in the Poſſeſſion, ought to be inſtructed and decided without examining into the Right of Property. For the diſcuſſion of the Titles neceſſary for deciding the Right of Property, demands often delays which the diſpute about the Poſſeſſion cannot admit of. And ſeeing it is of importance not to leave two Poſſeſſors expoſed to the danger of the conſequences of ſuch a diſpute; the matter touching the Poſſeſſion is regulated in the firſt place, and it is only after that the ſame is fully ended, that Enquiry is made into the Right of Property[y]. Thus he who is declared to be Poſſeſſor, has the advantage of retaining the Poſſeſſion, whilſt the Property remains undetermined[z].

[y] Exitus controverſiæ poſſeſſionis hic eſt tantùm ut priùs pronuntiat judex uter poſſideat. Ita enim fiet, ut is qui victus eſt de poſſeſſione, petitoris partibus fungatur: & tunc de domino quæratur, *l. 35. ff. de acq. vel amitt. poſſ.*

Incerti juris non eſt, orta proprietatis & poſſeſſionis lite, priùs poſſeſſionis decidi oportere quæſtionem competentibus actionibus: ut ex hoc ordine facto, de dominii diſceptatione probationes ab eo qui de poſſeſſione victus eſt exigantur. *l. 3. C. de interdictis. l. 35. ff. de acq. vel amitt. poſſ.*

By the Ordinances of France, *one cannot commence his Action for the Property, till the Queſtion about the Poſſeſſion has been decided, and that he who ſhall have been condemned, has fully ſatisfied the Sentence, by reſtoring the Fruits and paying the Coſts, and Damages, if any have been awarded; and the Parties are not ſuffered to join theſe two Demands of the Poſſeſſion and Property together, in one and the ſame Action.* See the Ordinance of 1667. Tit. 18. Art. 4. and 5. See the following Article.

[z] Is qui deſtinavit rem petere animadvertere debet, an aliquo interdicto poſſit nanciſci poſſeſſionem: quia longè commodiùs eſt ipſum poſſidere, & adverſarium ad onera petitoris compellere quàm alio poſſidente, petere. *l. 24. ff. de rei vindic.*

XVIII.

18. *The Demand of the Poſſeſſion ought to be made within the year.*

He who pretends to have been interrupted in his Poſſeſſion, ought to make his Demand or Complaint thereof within the year, to be reckoned from the day of his being turned out of Poſſeſſion[a]. For if he leaves his Adverſary in Poſſeſſion for the ſpace of a year, he has loſt his own Poſſeſſion, whatever apparent Right he may have had to it. But he retains his Action for the Property[a].

[a] Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi necdùm utilis annus exceſſit, certiſſimi juris eſt. *l. 3. C. unde vi, l. 1. in f. ff. de interdict.*

By the Ordinances of France, *the Action for the Poſſeſſion ought to be begun within the year after the diſturbance.* See the Ordinance of 1539. Art. 61. and that of 1667. Title 18. Art. 4. & 5.

XIX.

19. *If the Poſſeſſion be doubtful, Judgment is given according to the Titles, or the Thing is ſequeſtred.*

If the queſtion touching the Poſſeſſion be doubtful, ſo that there does not appear ground enough to maintain any one of the Poſſeſſors therein, the Poſſeſſion will be adjudged in favour of the perſon who ſhall have the moſt probable Title; or the Judge will order the Thing in controverſy to be ſequeſtred, until the Queſtion relating to the Property, or that of the Poſſeſſion, ſhall be decided[b].

[b] *This is a conſequence of the preceding Rules.* See the Ordinances of 1453. Art. 74. of 1555. chap. 9. Art. 3. of 1498. Art. 86. of 1667. Tit. 15. Art. 10. Tit. 19.

See the fourth Section of the Title of a Depoſitum. *l. 9. §. 3. ff. de dolo. l. 39. ff. de acq. vel amit. poſſ. l. 21. §. 3. ff. de appell. l. 5. Cod. quor. appel.*

SECT. II.

Of the connexion between Poſſeſſion and Property: and how one may acquire or loſe the Poſſeſſion.

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I.

1. The Right to poſſeſs is acquired with the Property.

SEeing Poſſeſſion is naturally linked with the Right of Property, and ought not to be ſeparated from it[a], whoever has acquired the Property of a Thing, either acquires at the ſame time the Poſſeſſion thereof, or has a Right to get it, and to recover it if he had loſt it[b]. Thus there are as many different Cauſes of Poſſeſſion, as there are different Titles of Property[c].

[a] *See the ſecond Article of the firſt Section.*

[b] Rem in bonis noſtris habere intelligimur quoties poſſidentes exceptionem, aut amittentes, ad recipiendam eam, actionem habemus. *l. 52. ff. de acq. rer. dom.*

[c] Genera poſſeſſionum tot ſunt quot & cauſæ acquirendi ejus quod noſtrum fit. Velut pro emptore, pro donato, pro legato, pro dote, pro noxæ dedito, pro ſuo, ſicut in his quæ terra, marique, vel ex hoſtibus capimus: vel quæ ipſi, ut in rerum natura eſſent, fecimus: & in ſumma magis unum genus eſt poſſidendi, ſpecies infinitæ. *l. 3. §. 21. ff. de acq. vel. amitt. poſſeſſ.*

II.

2. Difference between acquiring the Right to poſſeſs, and acquiring the actual Poſſeſſion.

We muſt not confound the ways of acquiring the Right to poſſeſs, of which mention has been made in the foregoing Article, with the ways of entring and getting into Poſſeſſion, and of having a thing in one's power to uſe it, to enjoy it, and to diſpoſe of it. The ways of acquiring the Property of Things, and by means of the Property the Right to poſſeſs them, are infinite. For one acquires them by a Sale, by Exchange, by Donation, and by other different Titles which the Laws have regulated. But there is only the effectual Detention which puts us into the real and actual Poſſeſſion of what is ours. And this detention is acquired in the manner that ſhall be explained in the ſixteenth Article, and the other Articles which follow[d].

[d] Quarumdam rerum dominium nanciſcimur jure gentium quod ratione naturali inter omnes homines peræquè cuſtoditur: quarundam jure civili; id eſt, jure proprio civitatis noſtræ. *l. 1. ff. de acq. rer. dom. §. 11. inſt. de rer. diviſ.*

As to the diſtinction between the Law of Nations, and the Civil Law, of which mention is made in this text, ſee what has been ſaid thereof in the Treatiſe of Laws,

Laws, Chap. 11. *numb.* 1. 4. 32. 33. 39. *and following numbers.*

III.

3. In ſome caſes the Property may be acquired by the bare effect of Poſſeſſion. The connexion between the Poſſeſſion and the Property, has not only this firſt effect, that the Property implies and gives the Right to poſſeſs; but it has alſo this ſecond effect, that the Poſſeſſion gives often the Property. Thus, whoever acquires the Poſſeſſion of a Thing of which he may likewiſe have the Property, and which belongs to no body, he himſelf becomes Maſter of it by the bare effect of the Poſſeſſion. For by having in his power that which no body has a right to take from him, he becomes at one and the ſame time both Poſſeſſor and Proprietor thereof[e]. And this happens in ſeveral caſes, which ſhall be explained in the fifth and other following Articles.

[e] Quod nullius eſt, id naturali ratione occupanti conceditur. §. 12. *inſt. de rer. diviſ. l.* 3. *ff. de acq. rer. dom.*

IV.

4. In theſe caſes the Poſſeſſion is a Title for the Property. All the manners of acquiring the Property by the Poſſeſſion, are ſo many ways which make a part of thoſe which Nature and the Laws give to Mankind, for applying to their uſe the ſeveral Things whereof the Poſſeſſion is neceſſary in order to have the uſe of them. For there are Things which one uſes without poſſeſſing them, and which indeed cannot be poſſeſſed, whether it be becauſe of their nature, or becauſe the Uſe of them is as yet common to all perſons: and there are others of which we cannot have the uſe without poſſeſſing them. Thus, we have the uſe of the Air, the Light, the Sea, Rivers, Highways, and many other things without poſſeſſing them; and we cannot uſe without poſſeſſion that which is neceſſary for Food and Raiment, and for an infinite number of other different uſes. And it is this Poſſeſſion which is acquired, either by the Titles which convey the Property, or without any other Title beſides the Events which put the Things into our hands, and which make them ours, as if it were by a deliverance of them to us by the Divine Providence, which orders and directs thoſe Events[f].

[f] Naturali jure communia ſunt omnium hæc, aër, aqua profluens, mare. §. 1. *inſt. de rer. diviſ. l.* 2. §. 1. *eod.* See the firſt, ſecond, and third Articles of the firſt Section of the Title of Things.

V.

5. One acquires by Poſſeſſion what no other body has a right to. It is natural, according to the Principles which have been remarked in the preceding Articles, that the Things which God has created for the uſe of particular perſons, and which have not as yet paſſed into the Poſſeſſion of any body, ſhould belong to thoſe who are the firſt who diſcover, and make uſe of them. Thus, when Mankind began to increaſe and multiply, thoſe who entred firſt into the Lands which were not inhabited, and took poſſeſſion of them, became juſtly Maſters of them[g].

[g] Quod nullius eſt id ratione naturali occupanti conceditur. *l.* 3. *ff. de acq. rer. dom.*

VI.

6. As if one finds precious ſtones, and other things of value. Thoſe who diſcover, or who find without deſign precious ſtones, and other things of great value, in places where it is lawful for them to ſearch for them, and to take them, become Maſters of them[h].

[h] Lapilli, & gemmæ, & cætera quæ in littore maris inveniuntur, jure naturali ſtatim inventoris fiunt. §. 18. *inſt. de rer. divis. l.* 3. *ff. eod.*

We have not put down this Article in the general terms of an indefinite liberty to all perſons to acquire the Property of theſe kinds of Things, by diſcovering, or finding them. For according to our Uſage, the precious matters which are the produce of Mines, for Example, do not belong intirely to thoſe who diſcover them, even in their own Lands; but the King has a Right to a ſhare of them; which is regulated by the Ordinances. See the fifth Article of the ſecond Section of the Title of Things.

VII.

7. Property is acquired by Hunting, and Fiſhing. Wild Beaſts, Fowls, Fiſhes, and every thing that is taken either in Hunting, Fowling, or Fiſhing, by thoſe who have a right thereto, belongs to them as their Property, by virtue of the ſeizure which they make of them[i].

[i] Feræ beſtiæ, & volucres, & piſces, & omnia animalia quæ mari, cœlo & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. de rer. diviſ. l.* 1. §. 1. *ff. de acq. rer. dom.*

It is to be remarked on this Article, that the liberty of Hunting, Fowling, and Fiſhing, is not permitted to all perſons, in all places indifferently. See the eleventh Article of the firſt Section of the Title of Things, and the remark on the firſt Article of the ſame Title.

VIII.

8. By Captures from the Enemy. We acquire likewiſe by Capture and by the Right of War, that which we take from the Enemy[l].

[l] Ea quæ ex hoſtibus capimus jure gentium ſtatim noſtra fiunt. §. 17. *inſt. de rer. diviſ.*

It is alſo to be obſerved on this Article, that the Spoil and Booty taken from the Enemy, does not always belong indifferently and intirely to thoſe who make the Capture. For the Admiral, for inſtance, has a Right to a ſhare of the Prizes that are taken at Sea.

IX.

9. If one finds a thing that is relinquiſhed, or thrown away with intention to give it to whoſoever can catch it.

He who finds a Thing that is abandoned, that is, of which he who was Maſter of it quits and relinquiſhes the Poſſeſſion and Property, not being willing to keep it any longer, becomes Maſter of it[m]; in the ſame manner as if it had never belonged to any body. And it is with much greater reaſon, that thoſe who gather up pieces of Money, or other Things, which Princes, or other perſons, throw among the multitude, out of magnificence, on ſome extraordinary occaſions, acquire what falls into their hands. For beſides the Poſſeſſion of a Thing, which he who was Maſter of it is not willing to keep any longer, they have his intention, which makes over the Things to thoſe who catch them[n].

X.

10. Or a Thing that was loſt, the Owner whereof cannot be found.

If he who has found a Thing that was loſt, having done all that was poſſible to find out the true Owner, that he might reſtore it to him, cannot learn who he is, he remains Maſter of it, till he who was the Owner appears and proves his Right[o].

XI.

11. Or a Treaſure.

Altho' Treaſures be not of the number of Things which are loſt or relinquiſhed, or which never belonged to any body, yet they who find them acquire the Poſſeſſion and Property of them on the terms regulated by the Laws. We call that a Treaſure, which hath been hid in ſome place that it might not be found, and of which the Proprietor, or his Heirs, or others having his Right, do not appear; which has the ſame effect as if no body had any right to them[p]. But if they ſhould appear, it would be a Theft not to reſtore the Treaſure to them[q].

XII.

12. What Nature adds to a Ground, belongs to the Maſter of the Ground.

The Proprietors of Lands acquire the Poſſeſſion of that which Nature adds to them, and which augments the Land, and is as it were an Acceſſion to it. Thus the inſenſible accretion which may happen to a Ground bordering on a River, by the effect of the Water, accrues to the Maſter of the ſaid Ground. But if an Inundation, or the change of the channel of a River, ſeparates one part of a Ground, and joins it to a neighbouring Ground, the property of the ſaid part, will belong ſtill to its firſt Maſter. For whereas what is added to a Ground by an imperceptible accretion, cannot be diſtinguiſhed in order to be reſtored to another Maſter, and may perhaps come from ſome other place than the neighbouring Ground; one may diſtinguiſh in thoſe ſudden changes that which belongs to every one. Thus all theſe ſorts of accretions augment the Ground only in ſo much as does not appear to remain ſtill to its firſt Maſter[r].

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[m] Si res pro derelicto habita ſit ſtatim noſtra eſſe deſinit, & occupantis ſtatim fit. Quia iiſdem modis res deſinunt eſſe noſtræ quibus modis acquiruntur. *l. 1. ff. pro derelicto. §. 47. inſt. de rer. diviſ.* See the third, twenty eighth, and twenty ninth Articles.

[n] Hoc ampliùs interdùm & in incertas perſonas collata voluntas domini transfert rei proprietatem. Ut ecce, qui miſſilia jactat in vulgus; ignorat enim quid eorum quiſque excepturus ſit. Et tamen quia vult, quod quiſque exceperit, ejus eſſe, ſtatim eum dominum efficit. *l. 9. §. 7. ff. de acq. rer. dom. §. 46. inſt de rer. diviſ. Nov.* 105. *c.* 2. §. 1.

[o] *If the Owner cannot be found, it is the ſame thing as if the Thing belonged to no body.* See the third Article. See the firſt Article of the firſt Section, and the firſt and ſecond Articles of the ſecond Section of Engagements which are formed by Accidents.

[p] Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat. Sic enim fit ejus qui invenerit, quòd non alterius ſit. *l. 31. §. 1. ff. de acq. rer dom.*

Si in locis fiſcalibus, vel publicis, religioſiſve, aut in monumentis theſauri reperti fuerint, Divi fratres conſtituerunt, ut dimidia pars ex iis fiſco vindicaretur. Item ſi in Cæſaris poſſeſſione repertus fuerit, dimidiam æquè partem fiſco vindicari. *l. 3. §. penult. ff. de jur. fiſci.*

Qui theſaurum in proprio fundo invenit, totius fit dominus: qui in alieno, cum domino fundi partitur, & dimidiam retinet. *l. un. C. de Theſaur. §. 39. inſt. de rer. diviſ. l. 7. §. 12. ff. ſol. matr. V. Nov. Leon.* 51.

[q] Alioquin ſi quis aliquid vel lucri causâ, vel metûs, vel cuſtodiæ condiderit ſub terra, non eſt theſaurus: cujus etiam furtum fit. *d. l. 31. §. 1. ff. de acq. rer. dom. v, l. 67. ff. de rei. vind. & l. 15. ff. ad exhibendum.*

Our Uſage as to Treaſures, is different from the Roman *Law. But ſeeing this matter does not come within the deſign of this Book, and that it is of a large extent, we ſhall not explain it here.*

[r] Quòd per alluvionem agro noſtro flumen adjicit, jure gentium nobis acquiritur. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligere non poſſimus, quantùm quoquo momento temporis adjiciatur. Quod ſi vis fluminis partem aliquam ex tuo prædio detraxerit, & meo prædio attulerit, palam eſt eam tuam permanere. *l. 7. §. 1. & 2. ff. de acq. rer. dom.*

Quamvis fluminis naturalem curſum opere manufacto aliò non liceat avertere, tamen ripam ſuam adverſus rapidi amnis impetum munire, prohibitum non eſt. Et cùm fluvius priore alveo derelicto, alium ſibi facit, ager quem circumit, prioris domini manet. Quod ſi paulatim ita auferat ut alteri parti applicet, id alluvionis jure ei quæritur cujus fundo acceſſit. *l. 1. C. de alluvion.* See the ſixth Article of the firſt Section of Engagements which are formed by Accidents.

XIII.

13. The Poſſeſſion of the Building is acquired to the Maſter of the Ground.

Buildings belong to thoſe who are Maſters of the Ground on which they are built. For the Edifice is an acceſſion which is added to the Ground, and which cannot take away the Ground from the Proprietor. Thus when one perſon builds on the Ground of another, the Building is acquired to the Maſter of the Ground. And when one builds on his own Ground with Materials that are not his own, he becomes Maſter of them: for ſeeing the Materials cannot be ſeparated from the Ground but by demoliſhing the Building, which it is for the Publick Good not to ſuffer; the Poſſeſſion of the Building belongs to the Maſter of the Ground, and by vertue of that Poſſeſſion the Property, with the charge of paying the value of the Materials. But if there was put into this Building any thing of great value which it would be juſt to ſeparate from it, ſuch as a Statue, or other Ornament, it would be reſtored to the perſon who was Maſter of it. For the Right of hindering the ſeparation of the Materials, is limited to what is neceſſary for the Building, and which being a part thereof, cannot be eaſily ſeparated from it. But if he who had made uſe of Materials which were not his own, had done it knaviſhly, he would be liable to Coſts and Damages, and to other Penalties which the quality of the Fact might deſerve[f].

XIV.

14. It is the ſame thing in reſpect of what is planted.

It is the ſame thing with reſpect to what is planted in a Ground, as it is with Buildings: and if it happens that the Maſter of a Ground has planted in it Trees which were not his own, or that the Owner of the Trees has planted them in the Ground of another perſon, and that they have taken root in it, they will belong to the Maſter of the Ground[t]: But he will be obliged to pay the price of the Trees, and be liable to Coſts and Damages, and other Penalties, if there be ground for it, according to the Rule explained in the foregoing Article.

XV.

15. Poſſeſſion of what is added to a Moveable.

The ſame reaſon which makes the Proprietor of a Ground to be Maſter of what is built or planted in it, holds likewiſe with reſpect to Moveable Things, and makes that which becomes inſeparable from the Moveable, to become the Poſſeſſion and Property of him who is Maſter of the Moveable. Thus a piece which is part of a Moveable that is made up of ſeveral Pieces put together, is acquired to him who owns the Moveable, he paying the price which that Piece might have been worth by it ſelf. For what cannot be ſeparated from the Whole, belongs to him who is Maſter of the reſt. But if what is added be of greater value than the Moveable, ſuch as a Picture upon a Canvas; the value and dignity of the moſt precious Thing, will draw to it the other which is of leſs value[u]: And the Painter will be Maſter of the Picture, he paying the price of the Canvas. And it would be the ſame thing, if of a Matter of little value, there had been made a precious Work, ſuch as a Statue of Marble or Braſs, or a precious Compoſition made of ſeveral Matters of ſmall value. For in all theſe caſes, although there had been nothing added to the ſaid Materials beſides the Art which made the Work out of them; he who gives being to a Thing, ought to be Maſter of it[x]: unleſs the Workmanſhip were of leſs value than the Matter, ſuch as the engraving of Seals on precious Stones. Thus in order to judge to whom the Things ought to belong after theſe ſorts of changes, it is neceſſary to conſider the circumſtances of the quality of the Work, of that of the Matter, of the cauſes for which the Work has been made, if it was for the uſe of the perſon who made it, or of the Maſter of the matter, or of ſome other perſon who had beſpoke it. And by all theſe views, and others of the like nature, one may determine who ought to have the Thing; and likewiſe regulate what he who keeps the Thing is to give either for the Matter or for the Workmanſhip.

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[f] Cùm in ſuo loco aliquis aliena materia ædificaverit, ipſe dominus intelligitur ædificii: quia omne quod inædificatur ſolo cedit. Nec tamen ideò is qui materiæ dominus fuit, deſiit ejus dominus eſſe: ſed tantiſper neque vindicare eam poteſt, neque ad exhibendum de ea agere propter legem xii. tab. qua cavetur, ne quis tignum alienum ædibus ſuis junctum eximere cogatur. Sed duplum pro eo præſtet. Appellatione autem tigni, omnes materiæ ſignificantur, ex quibus ædificia fiunt. *l. 7. §. 10. ff. de acq. rer. dom.*

Ex diverſo ſi quis in alieno ſolo ſua materia ædificaverit, illius fit ædificium cujus & ſolum eſt. *d. l. §. 12.*

Certè, ſi dominus ſoli petat ædificium, nec ſolvat pretium materiæ, & mercedem fabrorum, poterit per exceptionem doli mali repelli. *d. §. 12.*

[t] Si alienam plantam in meo ſolo poſuero, mea erit. Ex diverſo, ſi meam plantam in alieno ſolo poſuero, illius erit: ſi modo utroque caſu radices egerit. Antequam enim radices ageret, illius permanet, cujus & fuit. *l. 7. §. 13. ff. de acq. rer. dom. l. 5. §. 3. ff. de rei vindic. l. 11. C. eod.*

[w] Si quis rei ſuæ alienam rem ità adjecerit, ut pars ejus fieret, veluti ſi quis ſtatuæ ſuæ, brachium aut pedem alienum adjecerit, aut ſcypho anſam, vel fundum, vel candelabro ſigillum, aut menſæ pedem, dominum ejus totius rei effici: verèque ſtatuam ſuam dicturum, & ſcyphum. *l.* 23. §. 2. *ff. de rei vindic.*

Literæ quoque, licet aureæ ſint, perinde chartis membraniſque cedunt, ac ſolo cedere ſolent, ea quæ ædificantur aut ſeruntur. *l.* 9. §. 1. *ff. de acq. rer. dom.*

Sed non uti literæ chartis membraniſve cedunt, ita ſolent picturæ tabulis cedere: ſed ex diverſo placuit, tabulas picturæ cedere. *d. l.* §. 2.

In omnibus igitur iſtis in quibus mea res per prævalentiam alienam rem trahit, meámque efficit, ſi eam rem vindicem, per exceptionem doli màli cogar pretium ejus quod acceſſerit dare. *l.* 23. §. 4. *ff. de rei vindic.*

We have not put down in this Article the Example of Writing upon Paper; for the Text cited on this Article ought to be underſtood either of ſome other Matter more precious than our Paper, or of Writing which would not deſerve that the Matter upon which it is written ſhould be taken away from the Maſter, as that which was written in Table-Books made of Wax in order to be blotted out.. But as to Writing on our Paper, it is moſt certain that the Maſter of the Paper would not become Maſter of what ſhould be writ on it, although it were only a bare Letter: and much leſs if it were Writings or Deeds of any conſequence.

[x] Vel quæ ipſi ut in natura eſſent fecimus. *l.* 3. §. 21. *ff. de acq. vel amit. poſſ.*

See another Caſe where a Thing is compoſed of a mixture of divers Matters which did belong to ſeveral perſons, in the ſeventh Article of the firſt Section of Engagements which are formed by Accidents.

XVI.

16. In what Poſſeſſion conſiſts.

All that has been ſaid in the preceding Articles relates to the Cauſes which may give us the Poſſeſſion, or the Right to poſſeſs: And we are now to conſider how one becomes Poſſeſſor, and the ways of entring upon a real and actual Poſſeſſion. Seeing the uſe of Poſſeſſion is to exerciſe the Right of Property, it implies three things, a juſt cauſe of poſſeſſing as Maſter, the intention to poſſeſs in this quality, and detention. This intention is not underſtood of that of an Uſurper, or of a knaviſh Poſſeſſor, who have the intention to poſſeſs as Maſter, but of him who is in reality Maſter, or who poſſeſſes ſo as to have juſt reaſon to believe that he is Maſter. The detention is underſtood not only of him who has the thing in his own hands, or in his power; but likewiſe of him who holds it by the intervention of other perſons, ſuch as a Depoſitary, a Tenant, a Farmer. Without the intention there is no Poſſeſſion: Thus the poſſeſſor of a Ground in which there is a Treaſure unknown to him, does not poſſeſs the Treaſure, although he poſſeſſes the place in which it is. Without the detention, the intention is uſeleſs, and does not make the Poſſeſſion: Thus he whoſe Thing has been ſtolen, does not poſſeſs it any longer. And without a juſt cauſe the detention is only an Uſurpation[y].

[y] Cogitatione domini, opinione domini. *See the eighth Article of the firſt Section.*

Apiſcimur poſſeſſionem corpore, & animo: neque per ſe animo, aut per ſe corpore. *l.* 3. §. 1. *ff. de acq. vel amitt. poſſeſſ.*

Solo animo non poſſe nos acquirere poſſeſſionem, ſi non antecedat naturalis poſſeſſio. *d. l.* 3. §. 3. *l.* 4. *C. de acq. & retin. poſſ.*

Nulla poſſeſſio acquiri niſi animo, & corpore poteſt. *l.* 8. *ff. eod.*

Sciendum eſt adverſus poſſeſſorem hac actione (ad exhibendum) agendum: non ſolum eum qui civiliter, ſed & eum qui naturaliter incumbat poſſeſſioni. *l.* 3. §. *ult. ff. ad exhibend.* Naturalis poſſeſſio. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſ.*

We have explained in the Preamble, the difference between this Natural Poſſeſſion, and that which the Laws call Civil. Quod Brutus & Manilius putant, eum qui fundum longa poſſeſſione cepit, etiam theſaurum cepiſſe, quamvis neſciat in fundo eſſe, non eſt verum. Is enim qui neſcit, non poſſidet theſaurum, quamvis fundum poſſideat. *l.* 3. §. 3. *eod. V. l.* 30. *eod.* See the firſt Article of the firſt Section. See the twenty third Article.

XVII.

17. Poſſeſſion which one takes of his own accord, without a preceding Right.

The Poſſeſſion of the Things which we acquire by their falling into our hands, ſuch as that which we find, and which has no Maſter, that which we take in hunting, and thoſe things which we have a Right to take from the Owners, as the Spoil of an Enemy, is acquired by the bare fact of our laying our hands upon them[z].

[z] Lapilli, & gemmæ, & cætera quæ in litore maris inveniuntur, jure naturali ſtatim inventoris fiunt. §. 18. *inſt. de rer. drviſ.*

Simul atque capta fuerint, jure gentium ſtatim illius eſſe incipiunt. §. 12. *inſt. eod.* See the third Article of this Section.

XVIII.

18. Poſſeſſion which is only taken by delivery of the thing.

The Poſſeſſion of Things which one acquires from other perſons who have them in their cuſtody, does not paſs to the Purchaſer but by the delivery which is made of them to him by the Seller, Donor, or other perſon from whom he purchaſes them. And if the ſaid perſon ſhould refuſe to deliver them, the Purchaſer cannot take poſſeſſion of the Thing by force, but ought to have recourſe to a Court of Juſtice for obtaining it[a].

[a] Traditionibus, & uſucapionibus dominia rerum, non nudis pactis transferuntur. *l.* 20. *C. de pact.*

Res quæ traditione noſtræ fiunt, jure gentium nobis acquiruntur. Nihil enim tam conveniens eſt naturali æquitati, quàm voluntatem domini volentis

tis rem ſuam in alium transferre, ratam haberi. *l.* 9. §. 3. *ff. de acq. rer. dom.*

Si vendidero, nec tradidero rem, ſi non voluntate mea nactus ſis poſſeſſionem, non pro emptore poſſides, ſed prædo es. *l.* 5. *ff. de acq. vel amitt. poſſeſſ.* See the ſeventh Article of the third Section.

XIX.

19. *In what conſiſts the Delivery which gives Poſſeſſion.* The delivery that is neceſſary for putting into Poſſeſſion the perſon who purchaſes a Thing of another, conſiſts in that which makes it to paſs out of the power of the one into that of the other. Thus Moveables may be delivered from hand to hand: or one may tranſport them from one place to another, and put them into the poſſeſſion of him who becomes Maſter of them[b].

[b] *See the following Article, and the fifth and ſixth Articles of the ſecond Section of the Contract of Sale.*

XX.

20. *Delivery and taking of Poſſeſſion.* The delivery, and the taking poſſeſſion of Moveables, does not always require that they ſhould be removed from one place to another; but it is ſufficient for putting them into the poſſeſſion of the new Maſter, either to leave them in his hands, if he had them already, as if a Depoſitary ſhould buy what was depoſited with him: or if they are kept in a place under Lock and Key, to deliver to him the Key. But if they are neither kept under Lock and Key, nor eaſy to be tranſported, ſuch as Materials for a Building, one takes Poſſeſſion thereof by a bare view of them, and by the intention of him who parts with them, and of him who becomes Maſter of them. And there is alſo a kind of tacit delivery, which is made by the bare will of the contracting parties, as among thoſe who join their Goods in Partnerſhip. For from the moment of their agreement, each of them begins to poſſeſs by the others the Goods which they are willing to have in common[c].

[c] Non eſt corpore & actu neceſſe apprehendere poſſeſſionem. Sed etiam oculis, & affectu. Et argumento eſſe eas res quæ propter magnitudinem ponderis moveri non poſſunt, ut columnas. Nam pro traditis eas haberi, ſi in re præſenti conſenſerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſeſſ.*

Si quis merces in horreo repoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transferre proprietatem mercium ad emptorem. *l.* 9. §. 6. *ff. de acq. rer. dom.*

Vina tradita videri, cùm claves cellæ vinariæ emptori traditæ fuerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſeſſ.*

Interdùm ſine traditione, nuda voluntas domini ſufficit ad rem transferendam. Veluti ſi rem quam commodavi, aut locavi tibi aut apud te depoſui, vendidero tibi. Licet enim ex ea cauſa tibi eam non tradiderim, eò tamen quòd patior eam ex cauſa emptionis apud te eſſe, tuam efficio. *l.* 9. §. 5. *ff. de acq. rer. dom.* §. 44. *inſt. de rer. diviſ.*

Nerva filius, res mobiles quatenùs ſub cuſtodia noſtra ſint hactenùs poſſideri, id eſt, quatenùs, ſi velimus naturalem poſſeſſionem nanciſci, poſſimus. *l.* 3. §. 13. *ff. de acq. vel amitt. poſſeſſ.* Simul atque cuſtodiam poſuiſſem. *l.* 51. *eod.*

Res quæ coëuntium ſunt continuò communicantur: quia licet ſpecialiter traditio non interveniat, tacita tamen creditur intervenire. *l.* 1. §. 1. *& l.* 2. *ff. pro ſocio.* See the ſixth Article of the ſecond Section of the Contract of Sale.

XXI.

21. *Delivery and taking Poſſeſſion of Immoveables.* As to Immoveables; thoſe who alienate them either by Sale, or by other Titles, ſtrip themſelves of the Poſſeſſion by declaring only either that they will not poſſeſs any longer, or that if they hold ſtill the Land or Tenement, it ſhall be only precariouſly, or by delivering the Keys, if it is a place that is locked up. And the Poſſeſſion paſſes to the new Maſter by the bare effect of the intention to poſſeſs, joined to ſome Act which denotes his Right, as if he goes in perſon to the Land or Tenement, to take poſſeſſion of it as Maſter, altho' he do not go over all the parts of it. And one may likewiſe take Poſſeſſion of a Land or Tenement by a bare view thereof[d].

[d] *See the ſeventh Article of the ſecond Section of the Contract of Sale.* Apiſcimur poſſeſſionem corpore & animo, neque per ſe animo, aut per ſe corpore. Quod autem diximus, *& corpore, & animo acquirere nos debere poſſeſſionem*, non utique ita accipiendum eſt, ut qui fundum poſſidere velit omnes glebas circumambulet: ſed ſufficit quamlibet partem ejus fundi introire: dùm mente & cogitatione hac ſit, uti fundum uſque ad terminum velit poſſidere. *l.* 3. §. 1. *ff. de acq. vel amitt. poſſ.*

Si vicinum mihi fundum mercato, venditor in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat, non minùs poſſidere cepi, quam ſi pedem finibus intuliſſem. *l.* 18. §. 1. *ff. de acq. vel amitt. poſſ.*

According to the Uſage in France, *Inſtruments of Seiſine, or taking Poſſeſſion, are drawn up by Publick Notaries, in order to make proof thereof. Which ſerves to mark the time from which Preſcription begins to run, as well againſt thoſe who ſhould pretend to be Proprietors, as againſt perſons who have other Rights which are to laſt only a certain time, ſuch as a Power of Redemption belonging to the Kindred of a Family, or reſerved by the Contract of Sale.*

XXII.

22. *Delivery and taking poſſeſſion of Things which conſiſt in Rights.* The delivery of that which conſiſts in Rights, ſuch as a Juriſdiction, a Right which the Lord of a Mannor has to oblige all his Vaſſals and Tenants to make uſe of his Mills and Ovens, an Office, a Service, a Rent, and other Goods of this nature, is made by giving up the Titles, if there are any; and if there be no Titles, by the bare effect of the purchaſe, together with the common intention of the Contracters that the Purchaſer ſhould put himſelf into Poſſeſſion. And one takes Poſſeſſion by Acts which

may have that effect. Thus one takes poſſeſſion of a Juriſdiction, by naming Officers to exerciſe it, receiving the Fines and Confiſcations, and by exerciſing the other Rights which depend thereon. Thus one takes poſſeſſion of an Office, by taking the Rank and Place which it intitles one to, and by exerciſing ſome Function thereof. Thus one takes poſſeſſion of a Service by uſing it for the purpoſes for which it was intended, and of a Rent which one has acquired, or of another Right, by giving notice of the Aſſignment, or of the Title of the Purchaſe, to the Debtor, and by the enjoyment thereof[e].

[e] *See the fifth Article of the firſt Section of this Title, and the ninth Article of the ſecond Section of the Contract of Sale.*

XXIII.

23. *One can poſſeſs only a Thing which is certain and determined.*

Whatever may be the nature of the Thing, which one ought to have the Poſſeſſion of, whether it be Moveable, or Immoveable, or ſome Right, one can never poſſeſs but a Thing which is certain and determined; that is, ſuch as one may know preciſely what has been poſſeſſed. Thus one may poſſeſs either an entire Field, or a diſtinct part of the ſaid Field, as ſuch a particular Acre, or even an undivided Portion thereof, as a Fourth Part, or a Moiety, enjoying the Fruits thereof in proportion. But one cannot poſſeſs an uncertain portion of a Ground or Field, as if one had purchaſed a portion not yet determined which one had in a Ground, ſuch as ſhould appear to belong to him, his Right not being as yet adjuſted. For Poſſeſſion implying the detention of the Thing, one cannot poſſeſs, no more than he can hold indefinitely an uncertain Thing, which one does not know what it conſiſts in[f].

[f] Incertam partem rei poſſidere nemo poteſt. Veluti ſi hac mente ſis, ut quidquid Titius poſſidet, tu quoque velis poſſidere. *l.* 3. §. 2. *ff. de acquir. vel amitt. poſſeſſ.*

Locus certus ex fundo & poſſideri, & per longam poſſeſſionem capi poteſt: & certa pars pro indiviſo, quæ introducitur vel ex emptione, vel ex donatione, vel qualibet alia ex cauſa. Incerta autem pars nec tradi, nec capi poteſt: veluti ſi ità tibi tradam, *quidquid mei juris in eo fundo eſt.* Nam qui ignorat, nec tradere, nec accipere id quod incertum eſt, poteſt. *l.* 26. *eod.* See the ſixteenth Article.

XXIV.

24. *How the Poſſeſſion is preſerved.*

The Poſſeſſion being once acquired, the Poſſeſſor retains it afterwards by the bare effect of his intention to keep it, joined to the Right and Liberty of uſing the Thing when he pleaſes; whether he puts in execution the ſaid Liberty by making uſe of the Thing, or whether he lets it alone without touching it: Thus one poſſeſſes not only the Lands which he cultivates, and of which he gathers the Fruits; but alſo thoſe which he lets lie uncultivated, and which he never goes near[g], provided only that he do not ſuffer the Poſſeſſion of them to be uſurped by other perſons.

[g] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. Si ergò prædiorum deſertam poſſeſſionem, non derelinquendi affectione, tranſacto tempore non contuliſti, ſed metus neceſſitate culturam eorum diſtuliſti, præjudicium tibi ex tranſmiſſi temporis injuria generari non poteſt. *l.* 4. *C. de acq. & ret. poſſ.*

XXV.

25. *One retains the Poſſeſſion by other perſons.*

The Proprietor preſerves likewiſe his Poſſeſſion by the hands of other perſons who poſſeſs in his name, ſuch as a Farmer, a Depoſitary, he who has borrowed a Thing, the Creditor who has it in pawn, the Uſufructuary, and other perſons who hold the Things by Titles of the like nature[h].

[h] Generaliter quiſquis omninò noſtro nomine ſit in poſſeſſionem, veluti procurator, hoſpes, amicus, nos poſſidere videmur. *l.* 9. *ff. de acq. vel am. poſſ.* See the eighth, ninth, and tenth Articles of the firſt Section.

XXVI.

26. *One may take Poſſeſſion either himſelf, or by other perſons.*

One may take Poſſeſſion of a Thing either himſelf, or by a Factor, or Agent. And he who gives it away, may likewiſe deliver it either himſelf, or by his Agent. And Minors acquire the Poſſeſſion by their Guardians, as the Guardians may alſo deliver the Goods of Minors which are alienated[i].

[i] Apiſcimur poſſeſſionem per noſmetipſos. *l.* 1. §. 2. *ff. de acq. vel amitt. poſſ.* Per procuratorem, tutorem, curatoremve, poſſeſſio nobis acquiritur. *d. l.* 1. §. 20. *l.* 20. §. 2. *ff. de acq. rer. dom. l.* 13. *eod. d. l.* §. 1.

XXVII.

27. *The Poſſeſſor ſucceeds to the Right of his Author.*

He who enters into the Poſſeſſion of a Thing which he acquires from another, ſucceeds to the ſame Right, and poſſeſſes neither more nor leſs than his Author did poſſeſs. Thus he who purchaſes Lands, and is put into poſſeſſion of them, will poſſeſs in the ſame manner as the Seller did, the Services which may be due to the ſaid Lands, and will be ſubject to the Services which they may owe.

[l] Traditio nihil ampliùs transferre debet, vel poteſt ad eum qui accipit, quàm eſt apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert. Si non habuit, ad eum qui accipit nihil transfert. Quoties autem dominium

transfertur ad eum qui accipit, tale transfertur, quale fuit apud eum qui tradit. Si ſervus fuit fundus, cum ſervitutibus tranſit: ſi liber, uti fuit: & ſi fortè ſervitutes debebantur fundo qui traditus eſt, cum jure ſervitutum debitarum transfertur. *l.* 20, *ff. de acq. rer. dom.*

XXVIII.

28. *One loſes the Poſſeſſion of what one alienates, or relinquiſhes.* As Poſſeſſion is acquired by the intention to poſſeſs, joined with the actual detention of the Thing, it is likewiſe loſt by the intention of not poſſeſſing any longer, the Owner putting out of his hands and out of his power that which he did poſſeſs; whether it be that he alienates it to another, or relinquiſhes it, he parting therewith with intention never to have it any more. And the bare intention not to poſſeſs any longer, is of it ſelf ſufficient to deprive one of the Poſſeſſion, as it happens to the Seller whom the Buyer intreats to keep for ſome time the Thing that is ſold; for it is not any longer the Seller who poſſeſſes it, but the Buyer who poſſeſſes through him[m].

[m] Ferè quibuſcumque modis obligamur, iiſdem in contrarium actis liberamur. Cùm quibus modis acquirimus, iiſdem in contrarium actis amittimus. Ut igitur nulla poſſeſſio acquiri niſi animo & corpore poteſt: ita nulla amittitur, niſi in qua utrumque in contrarium actum. *l.* 153. *ff. de reg. jur. l.* 8. *ff. de acq. vel. amitt. poſſ.* Amitti & animo ſolo poteſt (poſſeſſio) quamvis acquiri non poteſt. *l.* 3. §. 6. *eod.* Pro derelicto habetur quod dominus eâ mente abjecerit, ut id numero rerum ſuarum eſſe noluit. §. 47. *inſt. de rer. diviſ.*

XXIX.

29. *Things that are loſt, and thoſe which are thrown into the Sea in a danger of Shipwrack, are not relinquiſhed.* We muſt not reckon in the number of Things relinquiſhed, thoſe which one has loſt, nor that which is thrown into the Sea in a danger of Shipwrack to ſave the Veſſel, nor thoſe which are loſt in a Shipwrack. For altho' the Owners of thoſe things loſe the Poſſeſſion of them, yet they retain the Property, and the Right to recover them. Thus thoſe who find Things of this kind, cannot make themſelves Maſters of them; but are obliged to reſtore them, purſuant to the Rules explained in their place[n].

[n] Idem ait, & ſi naufragio quid amiſſum ſit, non ſtatim noſtrum eſſe deſinere. *l.* 44. *ff. de acq. rer. dom.*

Non eſt in derelicto quod ex naufragio expulſum eſt, ſed in deperdito. *l.* 21. §. 1. *ff. de acq. vel amitt. poſſ.*

Idem juris eſſe exiſtimo in his rebus quæ jactæ ſunt. Quoniam non poteſt videri id pro derelicto habitum, quod ſalutis cauſa interim dimiſſum eſt. *d. l.* §. 2. See the firſt Article of the firſt Section, and the firſt Article of the ſecond Section of Engagements which are formed by Accidents.

XXX.

30. *One loſes his Poſſeſſion by the Poſſeſſion of another perſon.* Poſſeſſion is likewiſe loſt when another comes to poſſeſs, and has been in poſſeſſion for the ſpace of a year. For a year's Poſſeſſion even in the perſon of an Uſurper, if it has been peaceable and unmoleſted, makes him to be conſidered as a juſt Poſſeſſor, and even as Maſter, until the true Owner make out his right in order to recover his Poſſeſſion[o].

[o] Vi pulſos reſtituendos eſſe, interdicti exemplo, ſi necdum utilis annus exceſſit, certiſſimi juris eſt. *l.* 2. *C. unde vi.* See the eighteenth Article of the firſt Section.

SECT. III.

Of the Effects of Poſſeſſion.

The CONTENTS.

1. *The firſt effect of Poſſeſſion is the Enjoyment.*
2. *Another effect, is to acquire in certain caſes the property at the ſame time that one enters upon poſſeſſion.*
3. *Another effect, to acquire the Property by a long poſſeſſion.*
4. *Another effect, is to make the Poſſeſſor be conſidered as Maſter.*
5. *Effect of a fair and honeſt Poſſeſſion.*
6. *Effect of a knaviſh Poſſeſſion.*
7. *Poſſeſſion by force.*

I.

1. *The firſt effect of Poſſeſſion is the Enjoyment.* THE moſt natural effect of Poſſeſſion, is to put the Property in uſe, and to give to the Proprietor the actual exerciſe of his Right, by enjoying the Thing, and diſpoſing of it. And it is for the ſake of this uſe, that the Poſſeſſion is naturally linked to the Property[a].

[a] Proprietas à poſſeſſione ſeparari non poteſt. *l.* 8. *C. de acq. & ret. poſſ.* See the ſecond Article of the firſt Section.

II.

2. *Another effect, is to acquire in certain caſes the property at the ſame time that one enters upon poſſeſſion.* This is alſo another effect of Poſſeſſion, that in many caſes, explained in the foregoing Section, it gives the Property. And it is even by Poſſeſſion that Men naturally began to acquire the dominion of Things[b]. Thus, Poſſeſſion is in one ſenſe the cauſe of Property; and on the contrary it is the effect of it in another ſenſe, in the caſes where one acquires the Property before they can enter into Poſſeſſion; as if one buys a thing which is not delivered at the time of the purchaſe. For in this caſe, the Property gives the right to have the Poſſeſſion.

[b] Dominium rerum ex naturali poſſeſſione cœpiſſe, Nerva filius ait. Ejuſque rei veſtigium remanere de his quæ terra, mari, cœloque capiuntur: nam hæc protinùs eorum fiunt, qui primi poſſeſſionem eorum apprehenderint. *l.* 1. §. 1. *ff. de acq. vel amitt. poſſ.*

Statim inventoris fiunt. §. 18. *inſt. de rer. diviſ.* See the firſt Articles of the ſecond Section.

III.

3. Another effect, to acquire the Property by a long poſſeſſion. Poſſeſſion hath likewiſe this effect, that if in the time that one acquires it, the Property is not joined therewith, it follows the Poſſeſſion, not in the ſame inſtant that one enters into Poſſeſſion, as in the caſe mentioned in the preceding Article; but by a Poſſeſſion that is continued during the time regulated for preſcribing. Thus, he who buys a Thing which he believes the Seller to be Owner of, and yet belongs to another, does not become Maſter of it in the moment that it is delivered to him by the Seller; but if he continues to poſſeſs it during the time limited for Preſcription, he will become Maſter of it, even altho' the perſon of whom he bought it had poſſeſſed it knaviſhly[c].

[c] Jure civili conſtitutum fuerat, ut qui bonâ fide ab eo qui dominus non erat, cùm crederet eum dominum eſſe, rem emerit, vel ex donatione, aliáve quavis juſta cauſa acceperit, is eam (uſucaperet) *inſt. de uſucap. & long. temp. præſcr. V. l.* 36. *ff. de uſu & uſufr. leg.*

Quamvis (poſſeſſor) malâ fide poſſideat, quia intelligit ſe alienum fundum occupâſſe, tamen ſi alii bonâ fide accipienti tradiderit, poterit ei longâ poſſeſſione res acquiri. §. 7. *inſt. de uſucap. & long. temp. præſc.*

IV.

4. Another effect, is to make the Poſſeſſor be conſidered as Maſter. This is likewiſe another effect of Poſſeſſion, that the Poſſeſſor is conſidered as Maſter of the Thing, altho' it may happen that he is not ſo[d].

[d] *See the firſt Article of the fourth Section of Proofs.*

V.

5. Effect of a fair and honeſt Poſſeſſion. The Poſſeſſion of him who poſſeſſes with a good conſcience has this effect, that while he is ignorant of any better right to the thing than his own, he enjoys and makes his own the Fruits which he gathers, and not only thoſe which he reaps from the Ground by his own induſtry, but likewiſe thoſe which the Ground produces without culture. For as has been remarked in another place, his ſincere and upright belief of his own Right is to him inſtead of Truth, and makes him look upon himſelf, and be looked upon by others, as right Owner of the Thing, whilſt his upright belief is not interrupted by any demand. And if it happens that the Thing is evicted from him, he ſhall reſtore no part of what he enjoyed before the demand[e]. But he will be obliged to reſtore the Fruits which he reaped after the demand. For he ought to have acquieſced to the Demand, ſeeing it was juſt, as appears by the event of the Eviction; and after the demand he could not pretend any longer to be ignorant of the right of the true Owner, which ignorance was the cauſe of his honeſty and integrity[f].

[e] Bonæ fidei emptor non dubiè percipiendo fructus etiam ex aliena re ſuos interim facit, non tantùm eos qui diligentia & opera ejus provenerunt, ſed omnes. Quia quod ad fructus attinet, loco domini penè eſt. *l.* 48. *ff. de acq. rer. dom.*

Bonæ fidei poſſeſſor in percipiendis fructibus id juris habet, quod dominis prædiorum tributum eſt. *l.* 25. §. 1. *ff. de uſur.* Bona fides tantùmdem poſſidenti præſtat, quantùm veritas, quoties lex impedimento non eſt. *l.* 136. *ff. de reg. jur.*

[f] *See the fifth and ſixth Articles of the third Section of Intereſt, Coſts, and Damages,* &c. *See the ninth and tenth Articles of the ſame Section, touching the caſes where the honeſt and upright Poſſeſſor reſtores the Fruits gathered before the demand.*

VI.

6. Effect of a knaviſh Poſſeſſion. The Poſſeſſion of him who poſſeſſes knaviſhly, has this effect, that it hinders him from preſcribing[g], and obliges him to reſtore not only the Fruits which he has enjoyed, but likewiſe thoſe which a careful Huſband might have reaped from the Land or Tenement which he was in poſſeſſion of[h].

[g] Uſucapio non competit (furi & ei qui per vim poſſidet) quia ſcilicet malâ fide poſſident. §. 3. *inſt. de uſucap. & long. temp. præſcript.* Non capiet longa poſſeſſione (qui) ſcit alienum eſſe. *l.* 3. §. 3. *ff. de acq. vel am. poſſ.*

[h] *See the thirteenth Article of Intereſt, Coſts and Damages.*

VII.

7. Poſſeſſion by force. All that has been ſaid of Poſſeſſion in this and the preceding Sections, ought not to be underſtood of the Poſſeſſion of Uſurpers, and of knaviſh Poſſeſſors, who know they poſſeſs what they have no right to. For not only are they not conſidered as Poſſeſſors, but they are puniſhed according to the quality of their attempt. And it is the ſame thing with reſpect to thoſe who being commanded by a Court of Juſtice to quit their Poſſeſſion, altho' it may have been juſt in its beginning, do not obey the Sentence. And they are turned out of poſſeſſion with all the Force that their reſiſtance may make neceſſary, and undergo the Penalties which their diſobedience may deſerve. But this force cannot be employed except by Authority of Juſtice, which allows of no other Force except what is in her own hands[i].

[l] Ne quid per vim admittatur, etiam legibus Juliis proſpicitur publicorum & privatorum, nec non & conſtitutionibus principum. *l.* 1. §. 2. *ff. de vi & de vi arm.*

Qui reſtituere juſſus judici non paret, contendens non poſſe reſtituere, ſi quidem habeat rem, manu militari officio judicis ab eo poſſeſſio transfertur. *l.* 68. *ff. de rei vindic.*

SECT. IV.

Of the nature and uſe of Preſcription, and of the manner in which it is acquired.

The nature and uſe of Preſcriptions.

NO body is ignorant of this advantage, among others, of Preſcriptions, that they aſcertain to Poſſeſſors, the Property of Eſtates, after a Poſſeſſion that has laſted during the time regulated by Law. But altho' Preſcriptions ſeem naturally to be neceſſary for this uſe, yet they were not ſo by the Divine Law, which ordained that the Eſtates which were alienated ſhould return to the firſt Poſſeſſors, every fiftieth year, to be computed from the day of eſtabliſhing that Uſage, and that one ſhould have power to alienate only the Enjoyment of his Eſtate, for the number of years which ſhould remain from the day of the Alienation, to the ſaid fiftieth year, which was to reſtore all Eſtates to the Families of the firſt Poſſeſſors. And likewiſe theſe Alienations could not be made, except with a perpetual Power of redeeming the Eſtate whenever they would. It was only Houſes ſituated within walled Towns, and which belonged to others than Levites, that could be alienated for ever[a].

[a] *Levit.* xxv. 8.

This Divine Law, which prohibited perpetual Alienations, in order to extinguiſh the deſire of increaſing our Poſſeſſions, aboliſhed by that means Preſcriptions. But the letter of this Law being no longer in force, and Alienations which transfer the Property for ever, being allowed with us, the uſe of Preſcriptions is wholly natural in the ſtate and condition we are in; and ſo neceſſary, that without this remedy every Purchaſer and every Poſſeſſor being liable to be troubled to all eternity, there would never be any perfect aſſurance of a ſure and peaceable Poſſeſſion: And even thoſe who ſhould chance to have the oldeſt Poſſeſſion, would have moſt reaſon to be afraid, if together with their Poſſeſſion they had not preſerved their Titles.

And therefore altho' there were no other reaſon to juſtify the uſe of Preſcriptions, beſides the publick advantage of aſcertaining the quiet and tranquillity of Poſſeſſors; it would be juſt to prevent the Property of Things from being always in an uncertainty, leaving ſtill to the Proprietors a time ſufficient for recovering the poſſeſſion of their Eſtates[b]. But it may be ſaid further, that Preſcriptions have otherwiſe their Juſtice and their Equity founded upon the Principle which has already been remarked, that Poſſeſſion being naturally linked to the Right of Property, it is juſt to preſume, that as it is the Maſter who ought to poſſeſs, ſo he who poſſeſſes ought to be Maſter: and that the ancient Proprietor has not been deprived of his Poſſeſſion, without juſt cauſe[c].

[b] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù, & ferè ſemper incerta dominia eſſent. Cùm ſufficeret dominis ad inquirendas res ſuas ſtatuti temporis ſpatium. *l.* 1. *ff. de uſurp. & uſuc.*

[c] *See the thirteenth Article of the firſt Section.*

Preſcription of all ſorts of Rights.

The ſame reaſons which make that a long Poſſeſſion acquires the Property, and that it ſtrips the ancient Proprietor; make likewiſe that all ſorts of Rights and Acquiſitions are acquired and loſt by the effect of time. Thus, a Creditor who has omitted to demand what is due to him, within the time regulated by the Law, has loſt his Debt, and the Debtor is diſcharged from it. Thus, he who has enjoyed a Rent out of an Eſtate during the time regulated for Preſcription, cannot afterwards be deprived of it, altho' he ſhould have no other Title beſides his long enjoyment of it. Thus, he who has ceaſed to enjoy a Service during the time limited for Preſcription, has loſt the Right to it: and on the contrary, he who enjoys a Service, altho' without a Title, acquires the Right to it by a long enjoyment, unleſs there be ſome Cuſtom which directs otherwiſe[d]. And in general, all ſorts of Pretenſions, and Rights of all kinds whatſoever, are acquired and loſt by Preſcription, unleſs they be ſuch as the Laws have particularly excepted. Thus, we ſee two effects of Preſcription, or rather two ſorts of Preſcription. One which acquires to the Poſſeſſor the property of what he poſſeſſes, and which diveſts the Proprietor of his Right becauſe of his not poſſeſſing: And the other, by which all other kinds of Rights are acquired, or loſt; whether there be any poſſeſſion of them, as in the caſe of the enjoyment of a Service, or whether there be no poſſeſſion at all, as in the loſs of a Debt for want of demanding it.

[d] *See the eleventh Article of this Section, and the places which are there quoted.*

All theſe ſorts of Preſcriptions by which Rights are acquired or loſt, are grounded upon this preſumption, that he who enjoys a Right is ſuppoſed to have ſome juſt Title to it, without which he had not been ſuffered to enjoy it ſo long: That he who ceaſes to exerciſe a Right, has been diveſted of it for ſome juſt cauſe: And that he who has tarried ſo long time without demanding his Debt, has either received payment of it, or been convinced that nothing was due to him.

Two ſorts of Rules concerning Preſcriptions.

We muſt diſtinguiſh two ſorts of Rules relating to Preſcriptions; thoſe which concern the different manners in which the Laws have regulated the time for preſcribing; and thoſe which reſpect the nature of Preſcriptions, their uſe; that which may be ſubject to Preſcription, and that which is not; that which renders Preſcription juſt or vicious, the perſons againſt whom Preſcription does not run, and what ſort of Poſſeſſion it is that is required for preſcribing; what may interrupt Preſcription, and other matters of the like nature. Theſe are Natural Rules of Equity; but thoſe which mark the times of Preſcriptions are only Arbitrary Laws. For Nature does not fix what time is preciſely neceſſary for preſcribing. So that theſe Rules may be changed, and they are different in divers places: And this diverſity is ſeen even in the *Roman* Law, where Preſcriptions have been differently regulated in different times.

Seeing the deſign of this Book reſpects chiefly the Rules of Equity, we ſhall explain here thoſe which are of this kind in the matter of Preſcriptions: and as to thoſe Rules which regulate only the time of Preſcriptions, we have not thought proper to put them down in Articles, in the Sections of this Title, judging it to be ſufficient to take notice of them here in the Preamble. For beſides that the times of Preſcriptions are differently regulated in many of the Provinces of *France*, there are even ſome of the Provinces which are governed according to the written Law, in which they do not obſerve the ſeveral times limited for Preſcription by the *Roman* Law. Thus, it will be ſufficient to give here a ſhort Abſtract of what was in uſe touching this matter in the time of *Juſtinian*. And it will be eaſy for every one to ſee, in every place, what the uſage of that place is, as to the times of Preſcriptions, and wherein the ſeveral Uſages differ from the *Roman* Law, or agree with it.

Preſcription in Moveables, was acquired in the ſpace of three years[e].

[e] Si quis alienam rem mobilem, ſeu ſe moventem in quacunque terra, ſive in italica, ſive in provinciali, bonâ fide per continuum triennium detinuerit: is firmo jure eam poſſideat, quaſi per uſucapionem eam acquiſitam. *l. un. C. de uſuc. tranſ. inſt. de uſuc. & long. temp. præſcr.*

As to Immoveables, the *Romans* made different diſtinctions in the Preſcription of them.

The fair and honeſt Poſſeſſor, who had a Title, preſcribed by a Poſſeſſion of ten years among thoſe who were preſent, and of twenty years among thoſe who were abſent, altho' the perſon of whom he purchaſed had poſſeſſed it knaviſhly. And they reputed thoſe to be preſent, who had their abode in one and the ſame Province[f].

[f] Super longi temporis præſcriptione, quæ ex decem vel viginti annis introducitur, perſpicuo jure ſancimus ut ſive ex donatione, ſive ex alia lucrativa cauſâ, bonâ fide quis per decem, vel viginti annos rem detinuiſſe probetur, adjecto ſcilicet tempore etiam prioris poſſeſſionis memorata longi temporis exceptio ſine dubio ei competat, nec occaſione lucrativæ cauſæ repellatur. *l.* 11. *C. de præſcr. long. temp.*

Rursùs ſancimus, ut ſi quis malâ fide rem poſſidens, aut per venditionem, aut per donationem, aut aliter hanc rem alienet; qui verò putat eaſdem res competere ſibi, hoc agnoſcens, intra decem annos inter præſentes, & viginti inter abſentes non conteſtatus fuerit, ſecundùm leges emptorem, aut donationem accipientem, aut illum ad quem res alio quolibet modo tranſlatæ ſunt: eum qui tales res habet, firmè eas habere, poſt decennii videlicet inter præſentes, & vicennii inter abſentes diſcurſum. *Nov.* 119. *c.* 7.

Sancimus itaque—— hoc etenim magis nobis eligendum videtur, ut non in civitate concludatur domicilium, ſed magis provincia, & ſi uterque domicilium in eadem habet provincia, cauſam inter præſentes eſſe videri. *l. ult. C. de præſc. long. temp.*

He who poſſeſſed without a Title, preſcribed by a Poſſeſſion of thirty years; and after that time, he could not be moleſted by the Proprietor[g].

[g] In rem ſpeciales—— actiones ultra triginta annorum ſpatium minimè protendantur. *l.* 3. *C. de præſc.* 30. *vel* 40. *ann.*

Actions, that is, the Right to make Demands in a Court of Juſtice, ſuch as the Demand of an Inheritance, of a Legacy, a Debt, a Service, and other Rights, were preſcribed in thirty years[h].

[h] Sicut

The Action for recovering a Mortgage did not preſcribe but in the ſpace of forty years, when the Thing mortgaged was in the poſſeſſion of the Debtor, or of his Heirs, or even in the hands of a third perſon, if the Debtor was ſtill living. Thus, the Hypothecary Action laſted longer in this caſe, than tho bare Perſonal Action. After the death of the Debtor, it laſted only thirty years[i].

All the other ſorts of Preſcriptions of Goods or Rights, of what nature ſoever they were, and as to which it might have been pretended that they ought not to preſcribe in thirty years, were regulated to forty years; even as to Goods and Rights belonging to the Church, and to the Publick[l].

All theſe different Preſcriptions have been reduced in many of the Provinces of *France*, which have their peculiar Cuſtoms, and even in thoſe Provinces which are governed by the *Roman* Law, to one bare Preſcription of thirty years. And in the others, they obſerve theſe different Preſcriptions of ten, twenty, thirty, forty years. And there are even ſome of them which have made ſome changes therein, and which have received the Preſcription of thirty years, only for Perſonal and Mobilary Actions, and have extended the other Preſcriptions to forty years.

It is not neceſſary to conſider the motives of theſe different Diſpoſitions of the *Roman* Law, nor the reaſons why they are not obſerved in many of the Cuſtoms. Every Uſage hath its views, and conſiders in the oppoſite Uſages their inconveniences. And it ſufficeth to remark here what is common to all theſe different Diſpoſitions of the *Roman* Law, and of the Cuſtoms, as to what concerns the times of Preſcriptions. Which conſiſts in two views; one, to leave to the Owners of Things, and to thoſe who pretend to any Rights, a certain time to recover them: and the other, to give peace and quiet to thoſe whom others would diſturb in their Poſſeſſions, or in their Rights, after the ſaid time is expired.

We muſt take notice here of the difference which the *Roman* Law makes between Preſcription in general, and that kind of it which they diſtinguiſhed by the name of *Uſucapio*. By *Uſucapio*, they meant the manner of acquiring the Property of Things, by the effect of time[m]. And Preſcription had alſo the ſame meaning, but it ſignified moreover the manner of acquiring and loſing all ſorts of Rights, and Actions, by the ſame effect of the time regulated by Law. We make this remark here, only to acquaint the Reader, that theſe two words, *Præſcriptio*, and *Uſucapio*, which we ſhall meet with in ſeveral Laws quoted on this Title, are to be taken in the ſenſe which the word Preſcription ſhall have in the Articles where the ſaid Laws ſhall be quoted. For we ſhall never make uſe of the word *Uſucapio*; that of Preſcription being common by our Uſage, both to the manner of acquiring the Property of Things, and to that of acquiring and loſing all ſorts of Rights, by the effect of time.

Beſides theſe ſeveral ſorts of Preſcriptions of the *Roman* Law which have been juſt now mentioned, there are in *France* other ſorts of Preſcriptions eſtabliſhed by the Ordinances, and by ſome Cuſtoms which have regulated the time, which may be here added to the other ſorts of Preſcriptions which have been mentioned.

The

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[*] Sicut in rem ſpeciales, ita de univerſitate, ac perſonales actiones ultra triginta annorum ſpatium minimè protendantur. Sed ſi qua res, vel jus aliquod poſtuletur, vel perſona qualicunque actione vel perſecutione pulſetur, nihilominùs erit agenti triginta annorum præſcriptio metuenda. *l.* 3. *C. de præſcr.* 30. *vel* 40 *ann.*

[i] Quamobrem jubemus hypothecarum perſecutionem, quæ rerum movetur gratia vel apud debitores conſiſtentium, vel apud debitorum hæredes, non ultra quadraginta annos, ex quo tempore cœpit, prorogari. *l.* 7. §. 1. *C. de præſcr.* 30. *vel* 40. *ann.*

Ex quo autem in fata ſua debitor deceſſerit, ex eo quaſi ſuo nomine poſſidentem poſteriorem creditorem, meritò poſſe triginta annorum opponere præſcriptionem. *d. l.* §. 2.

[l] Quidquid præteritarum præſcriptionum vel verbis vel ſenſibus minùs continetur, implentes, per hanc in perpetuum valituram legem ſancimus, ut ſi quis contractus, ſi qua ſit actio, quæ cùm non eſſet expreſſim ſupradictis temporalibus præſcriptionibus concepta, quorundam tamen vel fortuita, vel excognita interpretatione ſæpè dictarum exceptionum laqueos evadere poſſe videatur: huic ſaluberrimæ noſtræ ſanctioni ſuccumbat, & quadraginta annorum curriculis proculdubio ſopiatur. Nullumque jus privatum, *vel publicum in quacumque cauſa, vel quacumque perſona,* quod prædictorum quadraginta annorum extinctum eſt jugi ſilentio, moveatur. *l.* 4. *C. de præſcr.* 30. *vel* 40. *ann.* See the ſecond Article of the fifth Section, and the remarks which are there made.

Pro temporalibus autem præſcriptionibus decem & viginti, & triginta annorum, ſacroſanctis Eccleſiis & aliis venerabilibus locis ſolam quadraginta annorum præſcriptionem opponi præcipimus: hoc ipſo ſervando & in exactione legatorum, & hæreditatum, quæ ad pias cauſas relicta ſunt. *Nov.* 131. *c.* 6.

[m] *V. l. un. C. de uſucap. transf. inſt. de uſucap.*

The Power of Redemption belonging to the Kindred of a Family.

The Action which the Kindred of a Family have for redeeming Lands that are ſold out of the Family to Strangers, which is eſtabliſhed in general throughout the whole Kingdom, by an Ordinance of the month of *November*, 1581, and in particular, by ſeveral Cuſtoms, preſcribes in the ſpace of one year, according to the ſaid Ordinance, and the Cuſtoms.

Reſciſions.

Reſciſions and Reſtitutions of things to their former ſtate, preſcribe in ten years, purſuant to the Ordinance of 1510. art. 46. and that of 1535. c. 8. art. 30. as ſhall be obſerved in the Preamble to the firſt Section of the Title of Reſciſions.

Servants Wages.

Actions for the Wages of Servants, preſcribe in one year, according to the Ordinance of 1510. art. 67. And ſome Cuſtoms have alſo fixed to one year, the Fees or Demands of Phyſicians, Apothecaries and Surgeons.

Merchants Accounts, and Tradeſmens Bills.

The Accounts of Merchants who ſell by Retail, and Tradeſmens Bills, preſcribe in ſix months time, according to the Ordinance of 1539. art. 19.

Peremption of Inſtance.

The Actions which one ceaſes to proſecute for three years together without any proceedings in the Cauſe, are loſt by a Preſcription which is called Peremption, which has this effect, that the Inſtance is annulled, and has not ſo much as the effect to interrupt the Preſcription. And if the Demand were not already extinguiſhed by Preſcription, and that the Plaintiff had a mind to proſecute it, he would be obliged to begin a new Inſtance, according to the Ordinance of 1563. art. 15. This Peremption has ſome relation to what *Juſtinian* had ordained, that Inſtances ſhould not laſt longer than three years[n]. Which it is not our buſineſs to explain in this place; for beſides that this Regulation does not agree with our Uſage, this matter does not come within the deſign of this Book.

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I.

1. Definition of Preſcription.

Preſcription is a manner of acquiring and loſing the Right of Property in a Thing, and of all other Rights, by

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[n] *V. l. 13. C. de judic.*

[*Preſcription, in the common acceptation which it hath in the Law of* England, *is ſuch a portion of Time, as exceeds the memory of Man. For whoſoever will preſcribe againſt another an Annuity, or the Cognizance of any Plea in his Court, or any Service in his Fee, or other Rights of the like kind, he muſt prove them to have been time out of mind. Nor do we mean any other than this, when we ſpeak generally of Preſcription.* Coke 1 Inſt. fol. 113, 114. Cowel's Inſtit. lib. 2. tit. 6. Bracton de legibus & conſuet. Angliæ. lib. 2. cap. 22.

But there are in England, *Preſcriptions of ſhorter time. For by* Stat. 32. H. VIII. cap. 2. *it is enacted, That no perſon ſhall have or maintain any Writ of Right, or make any Preſcription, Title or Claim, to any Mannors, Lands, Tenements, or other Hereditaments, of the poſſeſſion of his Anceſtor or Predeceſſor, and declare and alledge any further ſeiſin or poſſeſſion of his Anceſtor or Predeceſſor, than within threeſcore years next before the date of the ſaid Writ, or commencement of the ſaid Action or Claim. And by the ſame Statute, all Actions Poſſeſſory are limited to the ſpace of fifty years.*

And by Stat. 21. Ja. 1. cap. 16. *it is enacted, That all Writs of* Formedon in Deſcender, Formedon in Remainder, *and* Formedon in Reverter, *ſhall be ſued and taken within twenty years next after the title and cauſe of Action firſt deſcended and fallen, and at no time after the ſaid twenty years. And it is thereby further enacted, that all Actions of Treſpaſs,* Quare clauſum fregit, Detinue, *Action ſur* Trover, *and Replevin for taking away of Goods and Cattle, all Actions of Accompt, and upon the Caſe, other than ſuch Accompts as concern the Trade of Merchandize between Merchant and Merchant, their Factors or Servants, all Actions of Debt grounded upon any lending or Contract, without Specialty, ſhall be brought within ſix years next after the cauſe of ſuch Action or Suit; except the Action upon the caſe for Slander, which is to be brought within two years next after the words ſpoken, and not after. Actions of Treſpaſs, of Aſſault, Battery, Wounding, and Impriſonment, are to be commenced within four years next after the cauſe of ſuch Actions or Suit.*]

the effect of Time. Thus a fair and honeſt Poſſeſſor acquires the Property of an Eſtate by a peaceable poſſeſſion during the time regulated by Law; and the ancient Proprietor is ſtript thereof, for having ceaſed to poſſeſs it, or to demand it, during the ſaid time. Thus a Creditor loſes his debt, for having omitted to demand it within the time limited for Preſcription, and the Debtor is diſcharged from it by the long ſilence of his Creditor. Thus other Rights are acquired by a long Enjoyment, and are loſt for want of exerciſing them[a].

[a] Uſucapio eſt adjectio dominii, per continuationem poſſeſſionis temporis Lege definiti. *l.* 3. *ff. de uſurp. & uſuc.* See the ninth Article.

Longi temporis præſcriptio his qui bonâ fide acceptam poſſeſſionem, & continuatam: nec interruptam inquietudine litis tenuerunt, ſolet patrocinari. *l.* 2. *C. de præſcr. longi temp.*

II.

2. The motive of Preſcription, and its effect. Seeing Preſcriptions have been eſtabliſhed for the Publick Good, that the Property of Things and other Rights may not be always in an uncertainty, he who has acquired the Preſcription has no need of a Title; the Preſcription being to him inſtead of a Title[b].

[b] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù & ferè ſemper incerta dominia eſſent. *l.* 1. *ff. de uſurp. & uſuc.*

This Article is to be underſtood only of Preſcriptions which may be acquired without a Title, and not of the Preſcription of ten and twenty years, of which mention has been made in the Preamble, and which ſuppoſes a Title.

III.

3. When it is acquired. Preſcription being founded on the duration of the Poſſeſſion during the time regulated by Law, it is acquired only after the ſaid time is elapſed[c].

[c] In uſucapionibus non à momento ad momentum, ſed totum poſtremum diem computamus. Ideòque qui horâ ſextâ diei Kalendarum Januariarum poſſidere cœpit, horâ ſextâ noctis pridie Kalendas Januarias, implet uſucapionem. *l.* 6. *& l.* 7. *de uſurp. & uſuc.* In uſucapione ità ſervatur, ut etiamſi minimo momento noviſſimi diei poſſeſſa ſit res, nihilominùs repleatur uſucapio: nec totus dies exigitur ad explendum conſtitutum tempus. *l.* 15. *ff. de div. temp. præſcr.*

We have conceived this Rule in theſe general terms, after the time of the Preſcription is elapſed, becauſe in whatever ſenſe we underſtand this time, whether it be that we will have the Preſcription to end at the beginning of the laſt day, or only the laſt moment of the laſt day, it holds ſtill true, that the time neceſſary to preſcribe muſt be elapſed. Which we have done to avoid ſaying that the Preſcription is acquired only at the laſt moment of the time regulated for preſcribing; becauſe this expreſſion would be contrary to the texts cited on this Article. But according to our Uſage, Preſcription is acquired only at the laſt moment of the laſt day. And a demand made on the laſt day would interrupt the Preſcription. For altho' the effect of Preſcription be favourable, when it is once acquired; yet this favour is not extended ſo far as to ſhorten the time that is neceſſary for ſtripping Proprietors of their Right. And that which can hinder the Preſcription before it be acquired, ought to be favourably received, for reinſtating the Owner in his Right. Thus it is juſt to reserve a demand for interrupting the Preſcription, provided the laſt moment be not yet expired, according to the Rule which was obſerved in the Roman *Law, for thoſe kinds of Actions which were called Temporal, in which Preſcription had not its effect till after the laſt moment was expired.* In omnibus temporalibus actionibus niſi noviſſimus totus dies compleatur, non finit obligationem. *l.* 6. *ff. de obl. & action. Which was alſo obſerved, as we likewiſe do, in computing the time of Minority, which in* France *ends only at the laſt moment of the age of twenty five years, as ſhall be ſhewn in the twentieth Article of the ſecond Section of the Reſciſion of Contracts. And in fine, wherever ten, or twenty, or thirty years are neceſſary for a Preſcription, the years ought to be underſtood according to the ordinary computation, which comprehends all the moments of all the days neceſſary to make up the year. And this computation is particularly juſt in the Preſcriptions which one Law terms odious.* l. ult. Cod. de ann. excep. v. l. 2. ff. de diverſ. temp. præſcrip. *To which we may add, that the texts cited upon this Article do not ſpeak of all ſorts of Preſcriptions indifferently, but only of that particular kind of Preſcription which the* Romans *called* Uſucapio, *and therefore they ought not to be extended to the other kinds of Preſcriptions, which we do not diſtinguiſh from* Uſucapio. See the difference between Preſcription in general, and that kind of it called *Uſucapio*, at the end of the Preamble to this Section.

IV.

4. The Poſſeſſor joins to his poſſeſſion that of his Author. If a Poſſeſſor chances to die before he has acquired the Preſcription, and his Heir continues in poſſeſſion, we join together the time of the poſſeſſion of the one and the other, and the Preſcription is acquired to the Heir after the poſſeſſion of his Author and his own joined together have laſted the time regulated for preſcribing. And the ſame thing holds in the poſſeſſion of the Buyer joined to that of the Seller to whom he ſucceeds, and in the poſſeſſion of the Donee and Donor, of the Legatee and Teſtator, and in the ſame manner of all thoſe who poſſeſs ſucceſſively, having right the one from the other[d].

[d] Planè tribuuntur (acceſſiones poſſeſſionum) his qui in locum aliorum ſuccedunt. Sive ex contractu, ſive voluntate. Hæredibus enim, & his qui ſucceſſorum loco habentur, datur acceſſio teſtatoris. *l.* 14. §. 1 *ff. de div. tem. præſcr.* Emptori tempus venditoris ad uſucapionem procedit. *l.* 2. §. 20. *ff. pro emptore. l.* 76. §. 1. *ff. de contr. empt.* Legatario dandam acceſſionem ejus temporis quo fuit apud teſtatorem, ſciendum eſt. *l.* 13. §. 10. *ff. de acq. vel amit. poſſ.* Sed & is cui res donata eſt acceſſione utetur ex perſona ejus qui donavit. *l.* 13. §. 11. *ff. eod. l.* 11. *C. de præſc. long. temp.*

V.

5. A caſe where the poſſeſſion of another than the Author, Poſſeſſion is not only continued between two poſſeſſors, one of whom derives his right from the other; but it may happen that a poſſeſſor may acquire the *avails the Poſſeſſor.* the Preſcription, by joining to his poſſeſſion that of another perſon from whom he does not derive his right. Thus, for example, if an Heir poſſeſſes during ſome time a Thing bequeathed to another perſon before it is delivered to the Legatee, whether it be that they wait for the event of the condition of the Legacy, or that it is occaſioned barely thro' delay, the time of that Poſſeſſion will ſerve to acquire the Preſcription to the ſaid Legatee, altho' he does not derive his right from the Heir[e]. For the poſſeſſion of the Teſtamentary Heir, who repreſents the Teſtator, is conſidered, as if it were the Teſtator himſelf who had poſſeſſed. Thus in the like caſes, it is by Equity, according to the circumſtances, that we are to judge if the Poſſeſſions of ſeveral perſons may be joined[f].

[e] An hæredis poſſeſſio accedat (legatario) videamus, & puto ſive purè, ſive ſub conditione fuerit relictum, dicendum eſſe, id temporis quo hæres poſſedit, ante exiſtentem conditionem, vel reſtitutionem rei, legatario proficere. *l.* 13. §. 10. *ff. de acq. vel amitt. poſſ.*

[f] De acceſſionibus poſſeſſionum nihil in perpetuum, neque generaliter definire poſſumus: conſiſtunt enim in ſola æquitate. *l.* 14. *ff. de diverſ. temp. præſcr.*

VI.

6. Poſſeſſions interrupted. The poſſeſſions of divers poſſeſſors who ſucceed the one to the other, are joined only in the caſes where they follow one another without interruption. But if there be any interval of another poſſeſſion of a third perſon who has interrupted thoſe poſſeſſions, the poſſeſſions which had preceded the ſaid interruption would be uſeleſs to the laſt poſſeſſor. For Preſcription is acquired only by a continued poſſeſſion, which one enjoys peaceably during all the time regulated for preſcribing[g].

[g] Acceſſio poſſeſſionis fit non ſolùm temporis quod apud eum fuit, unde is emit; ſed & qui ei vendidit, unde tu emiſti. Sed ſi medius aliquis de auctoribus non poſſederit, præcedentium auctorum poſſeſſio non proderit: quia conjuncta non eſt. *l.* 15. §. 1. *ff. de div. temp. præſcr.* Poſſeſſio teſtatoris ita hæredi procedit, ſi medio tempore à nullo poſſeſſa eſt. *l.* 20. *ff. de uſurp. & uſuc.*

But if this interruption had been cauſed only by ſome Uſurpation, or by a trouble given without any juſt ground, as if a third perſon had recovered the thing at Law from one of the poſſeſſors under a falſe Title, and by a Sentence which was afterwards reverſed upon an Appeal; this trouble having ceaſed, would it not be juſt not only to join together the poſſeſſions, but even to add to them the time of the ſaid trouble? Since it would be true, that the former trouble not having proceeded from him who ſhould occaſion the new interruption, it would be altogether uſeleſs to him: and that the poſſeſſor would have retained his right during an interruption which would be found to have been only an unjuſt trouble, and which would not have hindred him from remaining Maſter, with an intention to poſſeſs, which had the ſame effect as Poſſeſſion, and rendered his condition like to that of a poſſeſſor thruſt out of poſſeſſion by force, who is nevertheleſs conſidered as poſſeſſor. Si quis vi de poſſeſſione dejectus ſit, perinde haberi debet ac ſi poſſideret: cùm interdicto de vi recuperandæ poſſeſſionis facultatem habeat. *l.* 17. *ff. de acq. vel amitt. poſſ.* See the twenty fourth Article of the ſecond Section.

VII.

The intervals in which the poſſeſſor ceaſes to exerciſe his poſſeſſion, do not interrupt it, and do not hinder him from continuing his Preſcription. Thus, when a poſſeſſor being either abſent, or negligent, ceaſes for ſome years to go upon his Eſtate and to cultivate it; he retains nevertheleſs his poſſeſſion. And he joins not only the times of his actual exerciſe of his Poſſeſſion, but he adds to them likewiſe the interval wherein he ceaſed to exerciſe it[h]. *7. Intervals without any apparent poſſeſſion.*

[h] Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poteſt. Si ergo prædiorum deſertam poſſeſſionem, non derelinquendi affectione, tranſacto tempore non coluiſti: ſed metus neceſſitate culturam eorum diſtuliſti, præjudicium tibi ex tranſmiſſi temporis injuria, generari non poteſt. *l.* 4. *C. de acq. & ret. poſſ.* See the twenty fourth Article of the ſecond Section.

VIII.

It may happen that there may be an interval without a poſſeſſor, which does not interrupt the Preſcription. Thus when an Executor, who was either abſent, or was ignorant of his Right, does not take poſſeſſion of the Eſtate till ſome time after the Succeſſion has been open, he will nevertheleſs join to his poſſeſſion that of the deceaſed, and even the time of the Interval between the falling of the Inheritance, and his entring to the poſſeſſion of it. For the Goods are preſerved to the future Heir or Executor, and are as it were poſſeſſed by the Inheritance it ſelf, which holds the place of Maſter[i]. *8. Interval without a poſſeſſor, which does not interrupt the Preſcription.*

[i] Hæreditas dominæ locum obtinet: & rectè dicetur, hæredi quoque competere (interdictum) & cæteris ſucceſſoribus, ſive antequam ſucceſſerit, ſive poſteà aliquid ſit vi aut clam admiſſum. *l.* 13. §. 5. *in f. ff. quod vi aut clam.*

Vacuum tempus quod ante aditam hæreditatem, vel poſt aditam interceſſit, ad uſucapionem hæredi procedit. *l.* 31. §. 5. *ff. de uſurp. & uſuc.*

This Article may be applied likewiſe to the Heir at Law, or next of kin, who ſucceeds to one dying Inteſtate, although by our Uſage he be ſeized and poſſeſſed of the Eſtate by the death of him to whom he ſucceeds. For if he is ignorant of his Right, he does not poſſeſs the Goods although he be Maſter of them.

IX.

We may acquire by Preſcription all things which are in Commerce, and of which we may have the property[l], if the *9. What things may be preſcribed.*

the Law makes no exception thereto, as will appear in the fifth Section.

[l] *This is a conſequence of the Rules explained in the two firſt Articles.*

X.

10. Rights and Actions preſcribe. The uſe of Preſcription is not only to acquire the Property to thoſe who have preſcribed by Poſſeſſion, and to diveſt the proprietors of it, who have ſuffered others to preſcribe; but there is yet another uſe of Preſcriptions, in which poſſeſſion is not neceſſary, which is that of annulling the Rights and Actions which one has ceaſed to exerciſe during a time ſufficient for preſcribing. Thus a Creditor loſes his debt, and all Rights and Actions are loſt, although thoſe who are Debtors of them poſſeſs nothing, if a demand is not made of the debt, or if one ceaſes to exerciſe his right during the time regulated by Law [m].

[m] Sicut in rem ſpeciales ita de univerſitate, ac perſonales actiones ultra triginta annorum ſpatium minimè protendantur. Sed ſi qua res, vel jus aliquod poſtuletur, vel perſona qualicumque actione vel perſecutione pulſetur, nihilominus erit agenti triginta annorum præſcriptio metuenda. *l. 3. C. de præſc. 30. vel 40. an.*

XI.

11. A caſe where one preſcribes things that are out of commerce. One may acquire or loſe by Preſcription certain Things which are out of Commerce. And they are acquired by their connexion with others of which one may have the Property. Thus, he who acquires an Eſtate to which is annexed a Right of Patronage, or of which the Mannor-Houſe has a Chapel in it for the uſe of the Maſter, may preſcribe this Right of Patronage, and the uſe of the Chapel [n].

[n] Quædam quæ non poſſunt ſola alienari, per univerſitatem tranſeunt: ut fundus dotalis ad hæredem, & res cujus aliquis commercium non habet. Nam etſi ei legari non poſſit, tamen hæres inſtitutus dominus ejus efficitur. *l. 62. ff. de acq. rer. dom.*

Although this Text have no preciſe relation to the Rights mentioned in this Article, yet it may be applied to them.

XII.

12. Services preſcribe. Services are acquired, and are loſt by Preſcription [o].

[o] *See the eleventh Article of the firſt Section of Services, with the Remark made upon it; and the fifth and following Articles of the ſixth Section of the ſame Title.*

XIII.

13. A ſincere belief of one's Right, neceſſary for preſcribing. To acquire Preſcription, it is neceſſary to have poſſeſſed honeſtly and fairly, that is, that the poſſeſſor muſt have been perſuaded that he had a juſt cauſe of Poſſeſſion, and muſt have been ignorant that what he poſſeſſed did belong to another perſon. And this integrity is always preſumed in every poſſeſſor, if it is not proved that he has poſſeſſed with a bad conſcience, knowing the thing to be another's [p]. But altho' an upright and ſincere belief of one's Right be a juſt cauſe which gives a Right to preſcribe, yet it is not always ſufficient of itſelf, and it is neceſſary over and above that the Preſcription be not obſtructed by any one of the cauſes which ſhall be explained in the following Section [q].

[p] Bonæ fidei emptor eſſe videtur qui ignoravit eam rem alienam eſſe, aut putavit eum qui vendidit, jus vendendi habere, putà procuratorem, aut tutorem. *l. 109. ff. de verb. ſign.*

Non procedit ejus uſucapio qui non bonâ fide videatur poſſidere. *l. 32. §. 1. ff. de uſurp. & uſuc.*

His uſucapio non competit, qui malâ fide poſſident. *§. 3. inſt. de uſuc. & long. temp. præſcr.* See the firſt Article of the fourth Section of the Title of Proofs.

[q] Ubi lex inhibet uſucapionem, bona fides poſſidenti nihil prodeſt. *l. 24. ff. de uſurp. & uſuc.*

XIV.

14. Preſcription without a Title. Seeing Poſſeſſion joined with a ſincere belief of one's own Right, is ſufficient for preſcribing Things which are capable of Preſcription, and that it holds the place of a Title, altho' one have not any other; the poſſeſſor who has preſcribed, whether he be ignorant of the origin and cauſe of his Poſſeſſion, or that having had a Title, he is not able to juſtify it, will be maintained againſt the ancient proprietor who ſhews a Title. In the ſame manner as a Debtor who has preſcribed the debt, has no need of an Acquittance to be diſcharged from the demand of his Creditor. For Preſcription annuls the Titles of the Proprietors and Creditors. And they ought to blame themſelves for having neglected their Rights for ſo long a time [r].

[r] Bono publico uſucapio introducta eſt, ne ſcilicet quarumdam rerum diù & ferè ſemper incerta dominia eſſent. Cùm ſufficeret dominis ad inquirendas res ſuas, ſtatuti temporis ſpatium. *l. 1. ff. de uſur. & uſucap.*

In rem ſpeciales actiones ultra triginta annorum ſpatium minimè protendantur. *l. 3. C. de præſc. 30. vel 40. ann.* See the ninth Article.

It is neceſſary to take notice here, that what is ſaid in this Article, of its not being neceſſary for preſcribing to have a Title, ought to be ſo underſtood as not to confound the Law of thoſe Provinces in France, *where there is only one Preſcription of thirty years, which demands no Title, with that obſerved in other Provinces, where they diſtinguiſh, according to the* Roman *Law, this Preſcription of thirty years, from that of ten, and twenty years, which preſuppoſes a Title, as has been remarked in the Preamble to this Section.*

It is likewiſe to be obſerved, that we have not comprehended in this Article the caſe where the poſſeſſor never had a Title; becauſe we cannot ſuppoſe an honeſt upright Poſſeſſion which has not proceeded from ſome Title or other; that is to ſay, which has not had ſome juſt foundation in its beginning, and ſome lawful cauſe which gave him Right *to poſſeſs, altho' there remain no* Deed, *or other Proof thereof; for otherwiſe the Poſſeſſion would be knaviſh and diſhoneſt. And even he who ſhould put himſelf in poſſeſſion of an Eſtate that is vacant, ſuch as any Land that is part of an Inheritance which is abandoned, or any Tenement belonging to one who has been abſent for a long time, would be a diſhoneſt poſſeſſor, ſeeing he could not but know that he had uſurped what another ought to have.* Fundi alieni poteſt aliquis ſine vi nanciſci poſſeſſionem, quæ vel ex negligentia domini vacet, vel quia dominus ſine ſucceſſore deceſſerit, vel longo tempore abſuerit. Quam rem ipſe quidem non poteſt uſurpare, quia intelligit alienum ſe poſſidere, & ob id mala fide poſſidet. *l.* 37. §. 1. *& l.* 38. *ff. de uſurp. & uſuc.* Ridiculum etenim eſt dicere, vel audire, quod per ignorantiam alienam rem aliquis quaſi propriam occupaverit. *l. ult. Cod. unde vi.*

But although ſuch a Poſſeſſor be in the ſame condition with an Uſurper, ſancimus talem poſſeſſorem (qui vacuam poſſeſſionem abſentium, ſine judiciali ſententia detinuit) ut prædonem intelligi. *d. l. ult. C. unde vi. If nevertheleſs he has poſſeſſed for the ſpace of thirty years, which acquires a Preſcription without a Title, the ſame Law, and the eighth Law,* §. 1. C. de præſcr. 30. vel 40. annor. *and likewiſe the firſt Law,* §. 1. C. de ann. except. *will have him not to be troubled any more after ſo long a time, notwithſtanding he knew that he had no right to what he poſſeſſed. The meaning of which is not, as if theſe Laws juſtified this poſſeſſor in point of Conſcience; but only that the Civil Policy does not permit that poſſeſſors be moleſted after a long Poſſeſſion, or that they be obliged to make good their Titles, or even to declare the origine of their Poſſeſſion. For the pretext of enquiring after unjuſt poſſeſſors, would diſturb the peace and quiet of juſt and lawful poſſeſſors. But as to the point of Conſcience, it is moſt certain, that the length of time does not ſecure unjuſt poſſeſſors from the guilt of ſin, and that on the contrary their long poſſeſſion is only a continuation of their injuſtice. And therefore it is that the Canon Law does not allow that an unjuſt Poſſeſſor can ever preſcribe, how long ſoever his poſſeſſion may have been.* Poſſeſſor malæ fidei ullo tempore non præſcribit. *Reg.* 2. *de reg. jur. in* 6.

Quoniam omne quod non eſt ex fide peccatum eſt, Synodali judicio definimus, ut nulla valeat abſque bona fide præſcriptio tam canonica, quàm civilis. Cùm generaliter ſit omni conſtitutioni, atque conſuetudini derogandum, quæ abſque mortali peccato non poteſt obſervari. Unde oportet, ut qui præſcribit, in nulla temporis parte rei habeat conſcientiam alienæ. *C. ult. extrà de præſcript.*

And it is likewiſe our Uſage, that although the poſſeſſor who has preſcribed be not obliged to prove his Title, nor to declare the origine of his Poſſeſſion, yet nevertheleſs if it is diſcovered, and it be found to be knaviſh, the Poſſeſſion will be uſeleſs, againſt the Maſter, who ſhall prove his Right. Thus a Depoſitary who in that quality had poſſeſſed a Thing for upwards of thirty years, would not have acquired the Preſcription. See the eleventh Article of the fifth Section.

XV.

15. *If the Poſſeſſor has loſt his Title.*

In the places, and in the caſes, where Preſcription preſuppoſes a Title to be proved, if he who has preſcribed has loſt his, he ſhall nevertheleſs be maintained in his poſſeſſion; provided he has proofs of the truth of the Title which is loſt[f].

[f] Longi temporis poſſeſſione munitis, inſtrumentorum amiſſio nihil juris aufert. Nec diuturnitate poſſeſſionis partam ſecuritatem, maleficium alterius turbare poteſt. *l.* 7. *C. de præſcr. long. temp.*

We muſt apply the uſe of this Article to the Provinces which obſerve the Preſcription of ten and twenty years, according to the Roman *Law.* See the Preamble to this Section. See the eleventh Article of the ſecond Section of Proofs.

XVI.

16. *Of him who purchaſes fairly and honeſtly of an unjuſt Poſſeſſor.*

The integrity that is neceſſary for acquiring Preſcription is conſidered only in the perſon of him who has poſſeſſed, and the knavery of his Author ought not to harm him. Thus, he who believes that the Seller of whom he buys a thing is Maſter of what he ſells him, does nevet heleſs preſcribe although the Seller were an Uſurper[t].

[t] Si (malæ fidei poſſeſſor) alii bonâ fide accipienti tradiderit, poterit ei longâ poſſeſſione res acquiri. §. 7. *inſt. de uſucap.* De auctoris dolo exceptio emptori non objicitur. *l.* 4. §. 27. *ff. de dol. mal. & met. exc.* See the third Article of the third Section, and the eighteenth and nineteenth of this Section.

XVII.

17. *Difference between a good and a bad conſcience in one and the ſame caſe.*

It may happen by a conſequence of the Rule explained in the foregoing Article, that in the caſe of two Poſſeſſors of two parts of an Eſtate that was uſurped, the one may be maintained by Preſcription, and the Poſſeſſion during the ſame time be uſeleſs to the other. Thus, for example, if an unjuſt Poſſeſſor ſells one half of an Eſtate which he has uſurped, reſerving to himſelf the other half, and the Purchaſer of the half that is ſold having poſſeſſed it with a good conſcience during the time of Preſcription, and the Seller having likewiſe poſſeſſed the other half during the ſame time, the Proprietor demands to be reſtored to his Eſtate, and brings his Action againſt both the Poſſeſſors; the Purchaſer of the half that was ſold will be maintained in his Poſſeſſion, by the effect of his good conſcience: and the Proprietor will be able to recover only the other half from the Uſurper, whoſe bad conſcience, or knowledge of his poſſeſſing another man's Eſtate will have hindred the Preſcription[u].

[u] Si partem poſſeſſionis malæ fidei poſſeſſor vendidit: id quidem quod ab ipſo tenetur, omnino cum fructibus recipi poteſt. Portio autem quæ diſtracta eſt ita demum rectè petitur à poſſidente, ſi ſciens aliena comparavit, vel bonâ fide emptor nondum implevit uſucapionem. *l. 5. C. de uſuc. pro emp.* See the ninth and tenth Articles of the fifth Section.

XVIII.

18. *The Heir or Executor is anſwerable for the knavery of the deceaſed.* We muſt not comprehend under the Rule explained in the ſixteenth Article, the Heir or Executor who enters with a good conſcience on the Poſſeſſion of the Goods of the Inheritance. For as he is univerſal Succeſſor, who inherits all the Rights of the deceaſed, and who obliges himſelf to all the Charges the deceaſed was liable to, ſo he is likewiſe anſwerable for all his deeds. Thus, although the Heir or Executor were ignorant of the vice of the Poſſeſſion of the deceaſed who had poſſeſſed with a bad conſcience, yet he could not preſcribe what the deceaſed had uſurped[x].

[x] Cùm hæres in jus omne defuncti ſuccedit ignoratione ſua defuncti vitia non excludit. *l. 11. ff. de diverſ. temp. præſcr.* Uſucapere (hæres) non poterit, quod defunctus non potuit. Idem juris eſt cùm de longa poſſeſſione quæritur. Neque enim rectè defendetur; cùm exordium ei bonæ fidei ratio non tueatur. *d. l. V. l. 4. §. 15. ff. de uſurp. & uſuc. l. ult C. com. de uſuc.* Vitia poſſeſſionum à majoribus contracta perdurant, & ſucceſſorem auctoris ſui culpa comitatur. *l. 11. C. de acq. & ret. poſſ.*

But if the Heir or Executor of him who had acquired with a good conſcience, knows that the Thing belonged to another perſon, will not his knowledge of the other's right to the Thing which he poſſeſſes, if the ſame is well proved, hinder him from preſcribing? It is ſaid in ſome Laws, that if the deceaſed has made the purchaſe with a good conſcience, his Heir ſhall preſcribe, although he knows that the Thing belonged to another, and not to the Seller. Si defunctus bonâ fide emerit, uſucapietur res, quamvis hæres ſcit alienam eſſe. l. 2. §. 19. ff. pro emptore. l. un. C. de uſuc. transf. *And another Law makes this diſtinction in the matter; that if the deceaſed had not begun to poſſeſs, and that the delivery of what the deceaſed had bought was only made to his Heir, who knows that the Thing did not belong to the Seller, the Heir ſhall not preſcribe, becauſe the good conſcience is conſidered in the beginning of the Preſcription. But if the delivery had been made to the deceaſed, and he had poſſeſſed with a good conſcience, this Poſſeſſion being continued in the perſon of the Heir, will acquire to him the Preſcription, altho' he know that the Thing was not the Seller's.* Hæres ejus qui bonâ fide rem emit, uſu non capiet ſciens alienam, ſi modò ipſi poſſeſſio tradita ſit: continuatione verò non impedietur hæredis ſcientia. l. 43. ff. de uſurp. & uſuc. *One may judge by the Remark which has been made on the fourteenth Article, that if it were well proved that this Heir knew what he poſſeſſed to be another's, the good conſcience of the deceaſed ought not to juſtify his Poſſeſſion.*

XIX.

Legatees, and Donees are not anſwerable, as the Heir or Executor is, for the deed of the Teſtators, and Donors; becauſe they do not ſucceed to all their Goods and to all their Rights, and ſo are not bound for all their Charges. And if they have received with a good conſcience what has been bequeathed or given to them, although the Teſtator, or Donor had poſſeſſed the thing knaviſhly and with a bad conſcience, knowing it to be another's, yet that will not hinder them from preſcribing, if they poſſeſs it peaceably during the time regulated by Law[y]. 19. *But not the Legatee, or Donee.*

[y] An vitium auctoris, vel donatoris, ejuſve qui mihi rem legavit mihi noceat, ſi fortè auctor meus juſtum initium poſſidendi non habuit, videndum eſt. Et puto neque nocere, neque prodeſſe. Nam denique & uſucapere poſſum, quod auctor meus uſucapere non potuit. *l. 5. ff. de diverſ. temp. præſcr.* See the ſeventeenth Article.

This Article is not to be underſtood of thoſe who are univerſal Donees and Legatees, to whom the whole Eſtate of the deceaſed, or a certain Quota of it is given or bequeathed, and who hold the place of Heirs or Executors; but of particular Donees and Legatees, to whom a certain particular Thing is given or bequeathed.

Although particular Legatees and Donees, to whom a certain Thing is given or bequeathed, be not accountable in the ſame manner as the Heir or Executor, for the deed of the Teſtator and Donor; yet nevertheleſs, ſeeing they acquire by a lucrative Title, which diſtinguiſhes their condition from that of a Buyer, or other who acquires for a valuable conſideration, it may be doubted, whether the Rule explained in this Article may give them as great ſecurity in point of Conſcience, as it does in their Poſſeſſion. And if we ſuppoſe, for inſtance, that he who had wrongfully ſeized on an Eſtate belonging to a poor man, had bequeathed it, or given it away to a rich perſon, who after having acquired the Preſcription, being ignorant of the vice in the acquiſition made by his Author, comes to diſcover the Uſurpation: could this Legatee, or Donee, in conſcience make uſe of the Right which the Law gives him to retain this Eſtate, which to him would be ſuperfluous, and which would be ſo neceſſary to thoſe whom his Benefactor had unjuſtly deprived of it? We put the queſtion in theſe circumſtances; for if we ſuppoſe on the other hand, that the Legatee, or Donee was a poor man, and thoſe to whom the Eſtate was to return were perſons at their eaſe, the integrity of the Legatee, or Donee, who knew nothing of the other's Right till after his Preſcription, would ſeem to be a juſt cauſe why he might lawfully take advantage of the Right which the Law gives indifferently to all Legatees.

Seeing this Queſtion is a matter of Conſcience, and for that reaſon does not come within the deſign of this Book, we ſhall not inſiſt any longer on it: and ſhall only remark, that the Queſtions of this nature, where the buſineſs is to examine in one's own conſcience the uſe which a poſſeſſor may make of the Preſcription which he has acquired, in the caſes where ſome duty may raiſe a ſcruple, whether it be lawful to make uſe of it, ought to be decided by the Spirit of the ſecond Law, and by the uſe which it allows to be made of the Law of Preſcriptions. For this Law having been enacted only for the Publick Good, upon the Motives already explained, it does not enter into the ſecret of the Duties of Conſcience which may render the uſe of Preſcription unlawful. And in *that every one ought to take for his Rule the Spirit of the ſecond Law, on which depends the good uſe of all the others.*

XX.

20. Preſcription of the Arrears of Rents, and of other annual Duties.

The Debtor of a Rent, or of a Penſion, or of other things which are paid yearly, may preſcribe the Rent or Penſion of each year, if it is not demanded within the time regulated by the Law, to reckon from the day that it fell due, even altho' the Principal debt could not be preſcribed. Thus, thoſe who owe Rights which are not liable to Preſcription, ſuch as Quit-Rents in ſome Provinces, may preſcribe the Arrears of ſuch Rights, if they are not demanded within the time that the Preſcription of them takes place; and the Arrears of each year are preſcribed within the time appointed for Preſcription, to be computed from the moment that the Arrears of that year fell due[a].

[a] In his etiam promiſſionibus, vel legatis, vel aliis obligationibus quæ dationem per ſingulos annos, vel menſes, aut aliquod ſingulare tempus continent, tempora memoratarum præſcriptionum, non ab exordio talis obligationis; ſed ab initio cujuſque anni, vel menſis, vel alterius ſingularis, computari, manifeſtum eſt, nulla ſcilicet danda licentia vel ei qui jure emphyteutico rem aliquam per quadraginta vel quoſcumque alios annos detinuerit, dicendi ex tranſacto tempore dominium ſibi in iiſdem rebus quæſitum eſſe, cùm in eodem ſtatu ſemper manere datas jure emphyteutico res oporteat. *l.* 7. §. *ult. de præſcr.* 30. *vel* 40. *ann.*

According to the Ordinance *of* 1510. *Art.* 71. *the Arrears of Annuities cannot be demanded but within the ſpace of five years after they fall due; which is not to be extended to Ground Rents. And in ſome of the Cuſtoms in* France *the Arrears of Quit Rents are preſcribed in a ſhorter time.*

XXI.

21. Preſcription may be acquired, although we have not poſſeſſion in our own hands.

Seeing Preſcription is acquired by Poſſeſſion, and that we may poſſeſs by other perſons, we may therefore preſcribe not only by having the poſſeſſion in our own hands, but alſo by others who poſſeſs for us; as by a Farmer, a Tenant, a Depoſitary, an Uſufructuary, a Tutor, a Guardian, a Factor, or Agent[a].

[a] *See the eighth and ninth Articles of the firſt Section.*

SECT. V.

Of the cauſes which hinder Preſcription.

The CONTENTS.

1. *Cauſes which make the Preſcription to ceaſe.*
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7. *In what ſenſe it is that the Wife's Dowry does not preſcribe.*
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9. *The poſſeſſor's knowing that the thing belongs to another, binders the Preſcription.*
10. *If ſeveral Poſſeſſions are to be joined together, a good conſcience is neceſſary in every one of them.*
11. *Another vice in Poſſeſſion, which binders Preſcription.*
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13. *A vice in the Title binders the Preſcription.*
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15. *A demand made Judicially interrupts the Preſcription.*
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17. *A demand made againſt one of many Debtors.*
18. *Force does not interrupt the Poſſeſſion.*

I.

1. Cauſes which make the Preſcription to ceaſe.

THE effect of Preſcription ceaſes in the caſes where the Law renders it uſeleſs. Which happens either thro' the nature of the Thing, or by the quality of the Perſon againſt whom the Preſcription is pleaded, or by reaſon of ſome vice in the Poſſeſſion, or becauſe of the interruption, as we ſhall ſee in the Articles which follow[a].

[a] *This Article reſults from thoſe which follow.*

II.

2. What things cannot be preſcribed.

Seeing Preſcription is one of the ways of acquiring Property, we can preſcribe only ſuch Things as are in Commerce, and of which we may become Maſters. Thus, we cannot acquire by Preſcription the Things which Nature, or the Law of Nations, deſtine to a common and publick uſe, ſuch as the Banks of Rivers neceſſary for Navigation, the Walls and Ditches of Towns, and other the like places. Neither can we preſcribe that which the Law renders impreſcriptible,

preſcriptible, ſuch as in *France* the King's Demeſns, which cannot be acquired by Preſcription, not even of a hundred years[b].

III.

3. Preſcription of debts due at a certain Term, or on a certain condition.

The Preſcription of Actions for debts, or other things which are due upon ſome condition, and which cannot be demanded till after the condition has happened, begins to run only from the day on which the condition was accompliſhed, from which time the Creditor began only to have a right to demand the thing. And the Preſcription of debts which are to be paid at a certain Term, begins to run only after the Term is elapſed[c].

IV.

4. Preſcription does not run againſt Minors.

One cannot preſcribe againſt Minors during their Minority, and the Preſcription does not begin to run till after they have attained the years of Majority[d]. For the time of Preſcription being given to Proprietors, that they may recover their Goods and their Rights, this time does not run againſt perſons, whom the Laws do not allow to have the Adminiſtration of their own Goods.

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[b] Uſucapionem recipiunt maximè res corporales, exceptis rebus ſacris, ſanctis, publicis populi Romani, & civitatum. *l. 9. ff. de uſurp. & uſuc.* §. 1. *inſt. eod.* Præſcriptio longæ poſſeſſionis, ad obtinenda loca juris gentium publica, concedi non ſolet. *l. 45. eod.*

Res fiſci noſtri uſucapi non poteſt. §. 9. *inſt. de uſuc. l. 2. C. comm. de uſuc.*

Viam publicam populus non utendo amittere non poteſt. *l. 2. ff. de via publica.*

By the Ordinance of Francis I. *bearing date the thirtieth of* June 1539. *every thing which belongs to the King's Demeſns is impreſcriptible, even by a Poſſeſſion of a hundred years. And by ſeveral Cuſtoms Quit Rents cannot be preſcribed againſt the Lord of the Manor.*

We have not comprehended indifferently in this Article all Things belonging to Towns, as one may be apt to think that they are comprehended in the firſt of the Texts cited on this Article: and we have put down in it only Things which are of publick uſe. For as to other Things belonging to Towns, or Churches, Hoſpitals, and Corporations, and which for that reaſon are out of Commerce, and cannot be alienated except for certain cauſes, and after a due obſervance of the formalities preſcribed for theſe ſorts of Alienations; they are not for all that impreſcriptible. But one may preſcribe by the time regulated by the Laws and Cuſtoms, the Goods and Rights belonging to Churches, to Towns, and Corporations, and to all other Bodies Politick. Thus in the Roman *Law theſe ſorts of Goods and Rights are preſcribed by forty years Poſſeſſion, even without a Title.* Nullum jus privatum, vel publicum, in quacumque cauſa, vel quacumque perſona, quod prædictorum quadraginta annorum extinctum eſt jugi ſilentio, moveatur. *l. 4. C. de præſcr.* 30. *vel* 40. *ann. v. l. 6. eod.* Jubemus omnes qui in quacumque diœceſi, aut quacumque provinciâ, vel quolibet ſaltu vel civitate fundos patrimoniales, vel templorum, aut agnothetici, ſeu relevatorum jugorum, vel cujuſcunque juris, per quadraginta jugiter annos (poſſeſſione ſcilicet non ſolùm eorum qui nunc detinent, verùm etiam eorum qui anteà poſſederant, computanda) ex quocunque titulo, vel etiam ſine titulo hactenùs poſſederunt, vel poſteà per memoratum quadraginta annorum ſpatium poſſederint, nulla penitùs ſuper dominio memoratorum omnium fundorum, vel locorum, vel domorum à publico actionem vel moleſtiam, aut quamlibet inquietudinem formidare. l. ult. C. de fundis patrim. Nov. 131. c. 6. *There was only the Burdens of the Publick Taxes upon Lands or Houſes, which were called* tributa, indictiones, functiones publicæ, civiles canones, *that could not be preſcribed.* l. 6. C. de præſcr. 30. vel 40. ann. *And many of the Cuſtoms of* France *do expreſly regulate, that one may preſcribe againſt the Church by a poſſeſſion of thirty years.*

We have not put down in this Article Things that are conſecrated; for they are of another nature than the Things ſpecified in the Article, which by their ſituation, and by the neceſſity of their uſe are impreſcriptible; whereas things conſecrated are not ſuch by their nature, but only by an expreſs deſtination, and therefore may be prophaned and alienated, and return again into Commerce. A Church may be prophaned, or demoliſhed, and tranſlated to another place. So that it is by the circumſtances, that we are to judge if a long Poſſeſſion may ſuffice to acquire the property of a place which had been formerly conſecrated: if there were ground to preſume that the place had been lawfully alienated, or if the Poſſeſſion appeared to be an Uſurpation. And the ſame thing might happen in a place of publick uſe, ſuch as the Ditch of a Town, or other Thing of the like nature, if any change had reſtored theſe Things to Commerce again, and had rendred them ſubject to Preſcription.

[c] Illud plus quàm manifeſtum eſt, in omnibus contractibus in quibus ſub aliqua conditione, vel ſub die certa vel incerta ſtipulationes, & promiſſiones, vel pacta ponuntur: poſt conditionis exitum, vel poſt inſtitutæ diei certæ vel incertæ lapſum, præſcriptiones triginta, vel quadraginta annorum, quæ perſonalibus, vel hypothecariis actionibus opponuntur, initium accipiunt. *l. 7. §. 4. C. de præſcr.* 30. *vel* 40. *ann.*

[d] Non eſt incognitum, id temporis quod in minori ætate tranſmiſſum eſt, longi temporis præſcriptioni non imputari. Ea enim tunc currere incipit, quando ad majorem ætatem dominus rei pervenerit. *l. 3. C. quib. non objic. long. temp. præſcr.*

We do not make here the diſtinction which the Roman *Law made in the matter of Preſcriptions, between Infants who have not attained to ripeneſs of Age, that is, to fourteen years in Males, and twelve in Females, and Adults, that is, thoſe who have attained to the ſaid ripeneſs of Age, but are ſtill Minors under the age of five and twenty years. This diſtinction of the* Romans *conſiſted in this, that the Adults, not being any more under the direction of Tutors, but under the care of Curators, the Preſcription of thirty years began to run againſt them, but it did not run againſt Infants, who were under the age of Adults.* l. 3. C. de præſcr. 30. vel 40. ann. *For ſince according to our Uſage in* France *Minority laſts to the age of five and twenty years, and that Minors being under Guardianſhip, are excluded from the Adminiſtration of their Eſtates, Preſcription does not run againſt them.*

V.

5. If a Major happens to be interested with a Minor.

If one that is Major happens to have a Right undivided with a Minor, the Preſcription which could not run againſt the Minor, will have no effect againſt the Major. Thus, for example, if a Service of a Paſſage is due to a Major and to a Minor, for a Ground which is common to them both, the one and the other having ceaſed to make uſe of this Right during the time ſufficient to preſcribe; the Service which the Minor could not loſe by Preſcription, will be preſerved likewiſe for the Major[e]. For the Service was due for the whole Ground, and the Minor having his Right undivided upon the Whole, there was no part of the Ground for which he had not preſerved the Right of Service.

[e] Si communem fundum ego & pupillus habemus, licet uterque non uteretur, tamen propter pupillum, & ego viam retineo. *l.* 10. *ff. quem. ſerv. amitt.* See the twenty firſt Article of the firſt Section of Services. *But if the Ground that belonged in common to the Major and to the Minor, had been divided into Shares or Portions, the Service which would be preſerved for the Portion of the Minor, would be loſt for the Portion of the Major; becauſe in this caſe their Cauſe was not common.*

VI.

6. In what ſenſe it is that Preſcription does not run againſt abſent perſons.

The ſame reaſon for which Preſcription does not run againſt Minors, hinders it likewiſe from running againſt thoſe whom a long abſence diſables from purſuing their Rights. Which is to be underſtood not only of an abſence on the account of Publick Buſineſs, but alſo of other abſences occaſioned by Accidents, ſuch as Captivity. And if the abſence has not laſted the whole time of the Preſcription, the time which it has laſted is deducted from it[f]. But if the Right which one ſhould pretend to make the abſent perſon loſe by Preſcription, had fallen to him during his abſence, and without his knowledge, ſuch as a Legacy, or an Inheritance; or if the abſence had laſted during the laſt years of the Preſcription, there would ſtill be more reaſon for his being reſtored to his Right; for one could not impute to him the letting that time ſlip without ſuing for his Right.

[f] Cùm per abſentiam tuam eos de quibus quereris, in res juris tui irruiſſe aſſeveres, teque ob medendi curam à comitatu noſtro diſcedere non poſſe palàm ſit præfectus prætorio noſter accerſitis his quos causâ contingit, inter vos cognoſcet. *l.* 2. *C. quibus non objic. long. temp. præſcr.*

Si poſſeſſio inconcuſſa ſine controverſia perſeveravit, firmitatem ſuam teneat objecta præſcriptio, quam contra abſentes, vel reipublicæ cauſa, *vel maxime fortuito caſu*, nequaquam valere decernimus. *l.* 4. *eod.*

Judices abſentium qui cujuſlibet rei poſſeſſione privati ſunt, ſuſcipiant in jure perſonas, & auctoritatis ſuæ formidabile miniſterium objiciant. Atque ità tueantur abſentes, ut id ſolum diligenter inquirant an *ejus qui quolibet modo peregrinatur*, poſſeſſio ablata ſit quàm propinquus, vel parens, vel proximus, vel amicus, vel colonus, quolibet titulo retineat. *l.* 1. *C. ſi per vim, vel alio mod. abſ. pert. ſit poſſ.*

Domino quolibet tempore reverſo, actionem poſſeſſionis recuperandæ indulgemus. *d. l.* Abſentibus enim officere non debet tempus emenſum, quod recuperandæ poſſeſſioni legibus præſtitutum eſt. *d. l.* In primis exigendum eſt ut ſit facultas agendi. *l.* 1. *ff. de diverſ. tempor. præſcr. l.* 25. *ff. de ſtip. ſerv.*

We muſt diſtinguiſh in the matter of Preſcriptions, two ſorts of Abſence; that which is ſpoken of in this Article, of perſons whom ſome cauſe keeps at a diſtance from the place of their abode, ſuch as an Embaſſy, a Captivity, and others the like, and that which has been mentioned at the end of the Preamble to the fourth Section, in relation to the Preſcription of ten or twenty years, that was in uſe among the Romans; *where it is ſaid, that a Preſcription grounded upon a Title, is acquired within the ſpace of twenty years, againſt abſent perſons; which has no relation to the abſence that keeps one at a diſtance from his dwelling, but reſpects barely the diſtance of one perſon from another, becauſe of the diſtance of their Habitations. It is eaſy to perceive, that we are not to confound together theſe two ſorts of Abſence, and in what manner that which concerns the Preſcription of twenty years, ought to have its effect in the places where this Preſcription is received. But as to the other Abſence, which is the Abſence of a perſon from his own Dwelling, it is not ſo eaſy to determine preciſely in what manner it can hinder the Preſcription. And altho' the Rule be conceived in general terms in this Article, as it is likewiſe in ſome of the texts cited upon it; yet we are not to underſtand it in ſuch a large ſenſe, as if all ſorts of Abſence hindred all Preſcription. For by the third Law,* C. de præſcr. 30. vel 40. ann. *it is ſaid, that Abſence does not hinder the Preſcription of thirty years. And as to the Preſcription of ten and twenty years, there may happen difficulties therein becauſe of the circumſtances, either of the cauſe of the Abſence, or of its ſhort duration, or others of the like nature, which may give occaſion to doubt, whether the abſence does, or does not hinder the Preſcription; concerning which it is not poſſible to give certain and preciſe Rules. And even as to the Preſcription of thirty years, if we ſuppoſe that the perſon againſt whom it is pleaded, had been abſent on an Embaſſy for ſome years, would it not be reaſonable to deduct from the time of the Preſcription the time of that Abſence? Thus it is by the circumſtances that we are to judge of the effect of Abſence in Preſcriptions.*

VII.

7. In what ſenſe it is that the Wife's Dowry does not preſcribe.

The Wife's Dowry cannot be preſcribed during the Marriage[g].

[g] Si fundum quem Titius poſſidebat bonâ fide, longi temporis poſſeſſione poterat ſibi quærere, mulier ut ſuum marito dedit in dotem, eumque petere neglexerit vir, cùm id facere poſſet, rem periculi ſui fecit. Nam licet lex Julia quæ vetat

fundum dotalem alienari, pertineat etiam ad hujuſmodi acquiſitionem: non tamen interpellat eam poſſeſſionem quæ per longum tempus fit, ſi antequam conſtitueretur dotalis fundus jam cœperat. *l.* 16. *ff. de fund. dotal.*

This Article is to be underſtood according to the different Uſages of the Places. By the Cuſtoms of ſome of the Provinces in France, *the Wife's Dowry may be alienated by the Husband and Wife together, but not by the Husband alone, nor the Wife alone. In others the Alienation is null, altho' the Wife have conſented to it. Among theſe laſt Cuſtoms, ſome of them annul abſolutely the Preſcription of the Wife's Dowry. Others annul it only in caſe the Husband or his Heirs be inſolvent, ſo as that they are not able to make good the Dowry that is preſcribed. So that it is according to the different Diſpoſitions of the Cuſtoms, and their Uſages, that we are to regulate the manner in which Preſcription is to take place in Womens Dowries.* See the thirteenth Article of the firſt Section of the Title of Dowries.

VIII.

8. Warranty does not preſcribe.

The Action of Warranty does not preſcribe. For a Seller, for inſtance, and every other perſon who engages to warrant what he ſells, aſſigns, or gives upon any other Title, obliges himſelf thereby to maintain the Purchaſer in a peaceable poſſeſſion, ſo as never to be moleſted therein by any Right precedent to the Alienation. Thus, in what time ſoever the Eviction happens, as if after a Poſſeſſion of a hundred years, the Purchaſer is evicted of an Eſtate which is found to be part of the Demeſns of the Crown, the Heirs of his Author will be bound to warrant him againſt the ſaid Eviction[h].

[h] Empti actio longi temporis præſcriptione non ſubmovetur: licet poſt multa ſpatia rem evictam emptori fuerit comprobatum. *l.* 21. *C. de evict.* See the ſixth Article of the tenth Section of the Contract of Sale.

IX.

9. The poſſeſſor's knowing that the thing belongs to another, hinders the Preſcription.

There happens often in Poſſeſſions, vices or defects which hinder Preſcription. Thus, the knavery of the Poſſeſſor hinders him from preſcribing, whether it be that he has ſeized upon the Thing without any pretence of Right, or that having a Title, he was not ignorant of the defect thereof; as if he has purchaſed that which he knew the Seller could not alienate[i]. We ſhall ſee in the following Articles, the other vices of Poſſeſſions which may hinder Preſcription.

[i] Non capiet longâ poſſeſſione (qui) ſcit alienum eſſe. *l.* 3. §. 3. *ff. de acq. vel amitt. poſſ.* Si ab eo emas quem prætor vetuit alienare, idque tu ſcias, uſucapere non potes. *l.* 12. *ff. de uſurp. & uſuc.* See the ſixth Article of the third Section.

X.

10. If ſeveral Poſſeſſions are to be joined together, a good conſcience is neceſſary in every one of them.

If a Poſſeſſor who pretends to have acquired the Preſcription, not having poſſeſſed the Thing during the whole time that is neceſſary for preſcribing, has occaſion to join to his own poſſeſſion that of his Author, as of a Teſtator, a Donor, a Seller, or other perſon from whom he derives his right; it is not enough that he himſelf has poſſeſſed it with a good conſcience, but it is neceſſary likewiſe that the poſſeſſion which he joins to his own, have been a poſſeſſion held with a good conſcience[l]. For all Poſſeſſion neceſſary for preſcribing, ought to have been without knavery, and without conſciouſneſs of another's right.

[l] Cùm quis utitur adminiculo ex perſona auctoris, uti debet cum ſua cauſa, ſuiſque vitiis. *l.* 13. §. 1. *ff. de acq. vel amitt. poſſ.*

De auctoris dolo exceptio emptori non objicitur. Si autem acceſſione auctoris utitur, æquiſſimum viſum eſt eum qui ex perſona auctoris utitur acceſſione, pati dolum auctoris. *l.* 4. §. 27. *ff. de doli mali & met. except.* See the third Article of the third Section, and the ſixteenth Article of the fourth Section.

XI.

11. Another vice in Poſſeſſion, which hinders Preſcription.

Thoſe who poſſeſs for others, cannot preſcribe what they poſſeſs in this manner. Thus, he who poſſeſſes precariouſly[m], the Depoſitary[n], the Creditor who has a Pawn[o], the Uſufructuary[p], the Farmer or Tenant[q], cannot acquire by Preſcription, what they hold by theſe Titles. For in order to preſcribe, it is neceſſary to poſſeſs, and to poſſeſs as Maſter; and in all theſe ſorts of Poſſeſſion, it is the Maſter who poſſeſſes by him who holds the thing in his hands. And they who hold the Things by theſe Titles, cannot without knavery pretend to be Proprietors of them.

[m] Malè agitur cum dominis prædiorum, ſi tanta precario poſſidentibus prærogativa defertur, ut eos poſt quadraginta annorum ſpatia, qualibet ratione decurſa, inquietare non liceat. Cùm lex Conſtantiniana jubeat, ab his poſſeſſoribus initium non requiri, qui ſibi potiùs quàm actori poſſederunt. *l.* 2. *C. de præſcr.* 30. *vel* 40. *ann.*

[n] Rei depoſitæ proprietas apud poſſidentem manet, ſed & poſſeſſio. *l.* 17. §. 1. *ff. de poſſ.*

[o] *See the ſeventh Article of the fourth Section of Pawns and Mortgages.*

Quominus—— pignora (creditor) reſtituat debitori, nullo ſpatio longi temporis defenditur. *l. ult. C. de pign. act. l.* 10. *eod.* Pignori rem acceptam uſu non capimus, quia pro alieno poſſidemus. *l.* 13. *ff. de uſurp. & uſuc.* Poſſeſſor non eſt tametſi poſſeſſionem habeat. *l.* 15. §. 2. *ff. qui ſatiſd. cog.* Licet juſtè poſſideat, non tamen opinione domini poſſidet.

XII.

12. *In what sense the Possessor cannot change the cause of his Possession.*

He who happens to have a thing in his cuſtody which he has not right to poſſeſs as Maſter, cannot change his condition, and make to himſelf another Title of Poſſeſſion, to the prejudice of the Right of another perſon. Thus, for inſtance, he who is in poſſeſſion of a Ground as Farmer, cannot make himſelf Proprietor thereof by a feigned purchaſe from another Seller, than the Maſter to whom he is Farmer. For this new Title would not change the quality of his Poſſeſſion, and would not give him the right to poſſeſs as Maſter, nor to preſcribe againſt him of whom he held the Farm. Thus, for another inſtance, the Heir of a Depoſitary cannot pretend to poſſeſs the thing depoſited, as Heir, and he will always have the quality of a Depoſitary[r]. But if an Heir happening to diſcover that a Ground which he poſſeſſed as Heir, was not part of the Inheritance, had bought it honeſtly of the perſon who pretended to be Maſter of it, in order to poſſeſs it, not any longer as Heir, but by the Title of Sale, one could not accuſe him of having changed the cauſe of his Poſſeſſion in order to palliate a vicious Poſſeſſion, with an apparent Title; and he would acquire by this new Title, both the right to poſſeſs as Maſter, and the right to preſcribe[s].

XIII.

13. *A vice in the Title, hinders the Preſcription.*

It is likewiſe a vice in the Poſſeſſion, that it has begun by a falſe Title, and of which the defect was ſuch that the Poſſeſſor ought to have known it, altho' he ſhould pretend to have been ignorant thereof. Thus, for example, he who buys of a Tutor a Houſe or Lands belonging to his Minor, without obſerving the formalities, cannot preſcribe it, under pretext that he verily believed that the Tutor had power to alienate it. For he ought to have known, that the Goods of the Minor could not be alienated except for neceſſary cauſes, and when the formalities preſcribed by the Laws in ſuch Alienations, were obſerved. And this being ſuch a Rule, that his ignorance thereof could avail him nothing, his condition is not diſtinguiſhed from that of a Purchaſer who was apprized of the defect of the Title[t]. Thus, for another example, he who purchaſes a Houſe or Lands held of a Church-Benefice, and which is alienated by the Incumbent, without a neceſſary cauſe, and without obſerving the formalities, cannot preſcribe them.

XIV.

14. *A vice in the Title, which does not hinder Preſcription.*

There may be vices in the Titles which may be ſufficient to annul them, but not ſufficient to hinder Preſcription. Thus, for example, if the perſon to whom a Houſe or Lands have been deviſed, has been put into poſſeſſion thereof by him whom he took to be Heir, and after the ſaid Legatee had enjoyed the ſaid Houſe and Lands for a time ſufficient to acquire Preſcription, it be found that he who called himſelf Heir, was not the true Heir, or that he had Co-heirs, and that the true Heir, or Co-heirs, trouble the Legatee in his Poſſeſſion, and alledge againſt him nullities in the Teſtament,

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poſſidet. *l.* 22. §. 1. *ff. de noxal. act.* *We add theſe texts, to ſhew by the by, what has been already remarked touching the different Ideas that one may conceive of Poſſeſſion.* See what has been ſaid on this ſubject, at the end of the Preamble to this Title.

[p] Fructuarius non poſſidet. §. 4. *inſt. per quas perſon. cuiq. acq.*

[q] Colonus & inquilinus ſunt in prædio, & tamen non poſſident. *l.* 6. §. 2. *ff. de precar.* Et per colonos, & inquilinos poſſidemus. *l.* 25. *ff. de acq. vel am. poſſ.*

[r] Illud à veteribus præceptum eſt, neminem ſibi ipſum cauſam poſſeſſionis mutare poſſe. *l.* 3. §. 19. *ff. de acq. vel amitt. poſſ.*

Cùm nemo cauſam ſibi poſſeſſionis mutare poſſit, proponaſque colonum nulla extrinſecùs accidente cauſa, excolendi occaſione, ad iniquæ venditionis vitium eſſe prolapſum, præſes provinciæ inquiſita fide veri dominii tui jus convelli non ſinet. *l.* 5. *C. de acq. & ret. poſſ.*

Quod vulgò reſpondetur, cauſam poſſeſſionis neminem ſibi mutare poſſe, ſic accipiendum eſt ut poſſeſſio non ſolùm civilis, ſed etiam naturalis intelligatur; & propterea reſponſum eſt, neque colonum, neque eum apud quem res depoſita, aut cui commodata eſt, lucri faciendi cauſa pro hærede uſucapere poſſe. *l.* 2. §. 1. *ff. pro hærede.*

[s] Quod ſcriptum eſt apud veteres, neminem ſibi cauſam poſſeſſionis poſſe mutare, credibile eſt de eo cogitatum & qui corpore & animo poſſeſſioni incumbens, hoc ſolum ſtatuit, ut alia ex cauſa id poſſideret: non ſi quis dimiſſa poſſeſſione prima ejuſdem rei, denuò ex alia cauſa poſſeſſionem nanciſci velit. *l.* 19. §. 1. *ff. de acq. vel am. poſſ.*

[t] Nunquàm in uſucapionibus juris error poſſeſſori prodeſt. Et ideò Proculus ait, ſi per errorem initio venditionis tutor pupillo auctor factus ſit, vel poſt longum tempus venditionis peractum, uſucapi non poſſe, quia juris error eſt. *l.* 31. *ff. de uſurp. & uſuc.* Si ſcias pupillum eſſe, putes tamen pupillis licere res ſuas ſine tutoris auctoritate adminiſtrare, non capies uſu, quia juris error nulli prodeſt. *l.* 2. §. 15. *ff. pro emptore.* See the ninth Article of the firſt Section of the Rules of Law.

as that it was not atteſted by a ſufficient number of Witneſſes duly qualified, or that other formalities were wanting; theſe defects of the Teſtament will not hinder the effect of the Preſcription of this Legatee, whether he was ignorant of them, or whether he knew them. For he had the apparent Heir's approbation of the Teſtament; which was ſufficient, together with his own good conſcience, to acquire to him the Right of Preſcription[u].

[u] *This is a conſequence of the third Article of the third Section. There is this difference between the caſe of this Article, and that of the foregoing Article; that in this the vice of the Teſtament ceaſed by the approbation of the Heir, and that the Will of the Teſtator might be executed notwithſtanding the want of the formalities in the Teſtament, but in the caſe of the foregoing Article, the vice of the Title was the incapacity of the perſon who had alienated, contrary to the prohibition of the Law, the Goods of a Minor.* V. l. 25. §. 6. ff. de hæred. pet.

XV.

15. A demand made Judicially interrupts the Preſcription.

The Preſcription is interrupted, and ceaſes to run by making a Demand in a Court of Juſtice againſt the Poſſeſſor. For in order to preſcribe, it is neceſſary that the Poſſeſſion have been peaceable, and with a good conſcience: and the Demand in a Court of Juſtice makes the Poſſeſſion to be no longer peaceable, and makes the poſſeſſor to hold it afterwards with a bad conſcience, when he knows of the other's right[x].

[x] Nec bonâ fide poſſeſſionem adeptis, longi temporis præſcriptio, poſt moram litis conteſtatæ completa, proficit. Cùm poſt motam controverſiam, in præteritum æſtimetur. *l.* 10. *C. de præſcr. long. temp.*

Ità demùm (poſſeſſio eſt) legitima, cùm omnium adverſariorum ſilentio & taciturnitate firmatur. Interpellatione verò controverſiâ progreſsâ, non poſſe eum intelligi poſſeſſorem, qui licet poſſeſſionem corpore teneat, tamen ex interpoſita conteſtatione, & causâ in judicium deductâ, ſuper jure poſſeſſionis vacillet, ac dubitet. *l.* 10. *C. de acq. & ret. poſſ.*

What is ſaid in this Article is to be underſtood of a Demand that is reduced into a Libel, which explains what is demanded. As to which it is neceſſary to remark, that whereas in the Roman *Law he who ſummoned his adverſary, was bound only to explain in the preſence of the Judge what it was that he demanded; and that even* Juſtinian *had decreed, that a general Summons to appear before the Judge, without mentioning any one of the things which the Plaintiff might demand, ſhould be deemed ſufficient for all his Claims, and ſhould interrupt the Preſcription.* l. ult. C. de ann. excep. *By the Ordinance all Demands ought to be by way of Libel, and the Citations are null if the Cauſe of Action is not therein explained.* See the Ordinance of 1667. tit. 2. art. 1. See the Remark on the fifth Article of the firſt Section of Intereſt.

XVI.

16. A demand made by one of many Creditors.

If one and the ſame Right, whether it be that of Property, or any other, belongs in common to many perſons, the Action entred by any one of them will interrupt the Preſcription for them all. For it is the whole Right that is demanded, and every one preſerves by this demand that ſhare of the Right which belongs to him[y].

[y] Cùm quidam rei ſtipulandi certos habebant reos promittendi, vel unus fortè creditor duos vel plures debitores habebat, vel è contrario multi creditores unum debitorem —— nobis pietate ſuggerente videtur eſſe humanum, ſemel in uno eodemque contractu, qualicumque interruptione vel agnitione adhibita, omnes ſimul compelli ad perſolvendum debitum: ſive plures ſint rei, ſive unus: ſive plures ſint creditores, ſive non ampliùs quam unus. Sancimuſque in omnibus caſibus quos noſter ſermo complexus eſt, aliorum devotionem, vel agnitionem, vel ex libello admonitionem, aliis debitoribus præjudicare, & aliis prodeſſe creditoribus. Sit itaque generalis devotio, & nemini liceat alienam indevotionem ſequi. Cùm ex una ſtirpe, unoque fonte unus effluxit contractus: vel debiti cauſa ex eadem actione apparuit. *l. ult. C. de duobus reis.* See the following Article, and the remark which is there made; the ninth Article of the firſt Section of Solidity, *&c.* and the fifth Article of the ſecond Section of the ſame Title.

XVII.

17. A demand made againſt one of many Debtors.

If ſeveral perſons happen to be bound for one and the ſame debt, or to poſſeſs Houſes or Lands in common, the Action entred againſt any one of them by the Creditor of the ſaid debt, or by the Proprietor of the ſaid Houſes or Lands, will interrupt the Preſcription with regard to them all; for the demand was made for the whole Right[z].

[z] *See the Text cited on the preceding Article.*

It is to be obſerved upon this and the foregoing Article, that it is no matter although there be no Solidity either among the Debtors of one and the ſame Sum of Money, or among the poſſeſſors of the ſame Houſes and Lands, or among the Creditors or Proprietors, and that it is ſufficient to interrupt the Preſcription with reſpect to them all by a Demand made by any one, or againſt any one of them, that it be one and the ſame Thing, or one and the ſame Right which is common to them. Thus, for example, if the Creditor to an Inheritance demands his whole debt from one of many Heirs of his Debtor, he will interrupt the Preſcription with regard to them all, although each of them be indebted only for his portion. For this Creditor may be ignorant of the number and Right of the Heirs; and although he ſhould know it, yet he may demand the whole debt from any one of them. Thus, when one of the Heirs or Executors of a Creditor demands from the Debtor of the deceaſed what he owed him, he interrupts the Pre-

ſcription for his Co-Heirs or Co-Executors. For he makes his demand for the whole debt, and he has an intereſt that the whole debt be preſerved intire.

XVIII.

18. Force does not interrupt the Poſſeſſion.

He whoſe Poſſeſſion is interrupted only by an act of violence, without any form of Law or Juſtice, is nevertheleſs conſidered as Poſſeſſor, becauſe he has the right to enter again to his Poſſeſſion. Thus the time of the Uſurper's poſſeſſion does not interrupt his[a].

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[a] Si quis vi de poſſeſſione dejectus, perindè haberi debet ac ſi poſſideret: cum interdicto de vi recuperandæ poſſeſſionis facultatem habeat. *l. 17. ff. de acq. vel amitt. poſſ.*

THE
CIVIL LAW
IN ITS
NATURAL ORDER.

BOOK IV.

Of the CONSEQUENCES *which annul, or diminiſh* ENGAGEMENTS.

WE muſt not confine to the matters which ſhall be treated of in this Book, all the manners of annulling or diminiſhing Engagements; for Proofs, an Oath, Preſcriptions, have this effect, and we muſt alſo reckon them in this number. But it was not here that we propoſed to treat of them, and their proper place was in the foregoing Book, for the reaſon that has been remarked in the Plan of the Matters[a]; that Proofs, an Oath, and Preſcriptions having theſe two oppoſite effects, both to fortify Engagements, and to annul or diminiſh them; it was natural, that ſeeing they were to be treated of only in one place, they ſhould be conſidered in the firſt place where it ſhould be neceſſary to explain the Rules thereof. Thus, we are to conſider the Rules of Proofs, of an Oath, and of Preſcriptions, as a matter common, both to the third Book, and to this.

There are three ways of annulling or diminiſhing an Engagement. The firſt is, by executing and performing it; either

Three ways of annulling or diminiſhing

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[a] *See the fourteenth Chapter of the Treatiſe of Laws. n. 12.*

Engagements. either in the whole, as he does who pays a Sum which he owes: or in part, if he pays only a part of the debt upon account. The ſecond, by procuring the Engagement to be declared null by a Court of Juſtice, either in the whole, as if it was Money lent to a Minor who had ſquandered it away upon his pleaſures: or in part, if only one part of the Money lent was imployed to profitable uſes. The third, by ſubſtituting a ſecond Engagement in the room of the firſt, ſo that there be only the ſecond which ſubſiſts, the firſt being annulled.

Order of the Titles of this Book. Payments which we ſhall treat of in the firſt Title of this Book, are of the firſt of theſe three ways: And Compenſations, which are nothing elſe but mutual Payments, and which ſhall be conſidered under the ſecond Title, are of the ſame nature. Reſciſions of Contracts, and Reſtitutions of Things to their firſt eſtate, which ſhall be the ſubject matter of the laſt Title, belong to the ſecond of theſe ways of annulling Engagements. And Novations and Delegations, which ſhall be explained in the third and fourth Titles, are of the third ſort.

Ceſſion of Goods, which ſhall be the ſubject matter of the fifth Title, is a mixture of the two firſt of theſe three ways. For it diſcharges a part of the Debts, and if it happens that the Effects yielded up by a Debtor be Real Eſtate which is ſufficient to ſatisfy ſome of the Creditors who have preferable Mortgages, their debts are entirely acquitted and annulled; and the Debts of the other Creditors, whom the Remainder of the ſaid Real Eſtate is not ſufficient to clear off, are diminiſhed in proportion to what they receive. And if there be only Moveables, which are not ſufficient to clear off all the Creditors, the Ceſſion of Goods will not acquit any one debt entirely, but diminiſh them all. For every Creditor will come in for his proportion of the Price of the Moveables; as ſhall be explained in the fifth Title. And the Ceſſion of Goods has likewiſe this effect, with regard to the Creditors who might arreſt the perſon of the Debtor, that it annuls in this his Engagement, and that after he has ſurrendred all his Effects, he is no longer liable to this Arreſt.

As the matters of the preceding Book, where we have treated of all that can add to Engagements, or ſtrengthen and corroborate them, are common to all ſorts of Engagements, whether they have been formed by Covenant, or without Covenant; ſo the matters of this fourth Book are likewiſe common to all ſorts of Engagements of theſe two kinds.

TITLE I.

Of PAYMENTS.

Although we underſtand commonly by the word *Payment*, only that manner in which thoſe who are indebted in Sums of Money acquit themſelves of their Obligation, by paying Money; yet we may give the name of Payment in general to all the manners in which Debtors acquit themſelves of their Obligations. For whatever frees the Debtor from his Obligation, is inſtead of Payment. And in this ſenſe we may comprehend under the word *Payment*, Compenſations, Novations, and Delegations. But ſeeing theſe three manners of Payment have peculiar characters which give them a nature quite different from that of ſimple Payment; it has been thought proper to diſtinguiſh them under their proper Titles: and in this Title we ſhall only conſider what concerns Payments in general; what is their nature, their effects, the divers manners in which perſons may acquit themſelves of their Obligations, who may make a Payment or receive it, and in what manner Payments are applied to the ſeveral debts; all which matters ſhall be treated of in the Sections of this Title.

The Reader may conſult upon the ſubject matter of Payments, the Title, *Of thoſe who receive what is not due to them*; ſeveral Rules whereof have relation to this matter.

SECT. I.

Of the nature of Payments, and of their effects.

The CONTENTS.

1. *Definition of Payments.*
2. *In what manner the Debtor acquits himſelf.*
3. *The word* acquitting, *is applicable to all Engagements.*
4. *Payment of what was not due, or what one could not have been compelled to pay.*
5. *One may pay before the term.*
6. *Effect of the Payment.*
7. *Payment made by another than the Debtor.*
8. *The Payment frees the Sureties, and the Mortgages.*
9. *The Payment which one makes that he may have an Aſſignment to the debt, does not extinguiſh the debt.*
10. *The Sale of the Pawn does not acquit the debt, except in ſo much as is raiſed by the Sale.*
11. *Several Acquittals for ſeveral Debtors, by one ſingle Payment.*
12. *Two Obligations of one and the ſame Debtor, acquitted by one ſingle Payment.*
13. *Effect of general or particular Acquittances.*
14. *He who alledges a Payment, ought to prove it.*
15. *Payment of the Rents for three years laſt paſt, proves the payment of the former years.*
16. *The Creditor is not obliged to divide his Payment.*

I.

1. *Definition of Payments.*

PAyments are the ways in which a Debtor acquits himſelf of what he owed, or of a part of it[a].

[a] Liberationis verbum eandem vim habet quàm ſolutionis. *l.* 47. *ff. de verb. ſignif.*

II.

2. *In what manner the Debtor acquits himſelf.*

Whatever annuls the debt, or diminiſhes it, is in lieu of Payment; whether it be that the Debtor gives to the Creditor Money, or other things which he may owe him, or that he acquits himſelf of his Obligation by ſatisfying him ſome other way, purſuant to the Rules which ſhall be explained in the ſecond Section[b].

[b] Solutionis verbo ſatisfactionem quoque omnem accipiendam placet. *l.* 176. *ff. de verb. ſign.* See the ſecond Section.

III.

3. *The word* acquitting, *is applicable to all Engagements.*

As we give the name of debt, to every thing that is due not only from Debtors of Sums of Money, or of things of another nature, but alſo from thoſe who are obliged either to do ſome thing, as an Undertaker of a Work, or to reſtore a thing which is not theirs, as the Depoſitary, and he who has borrowed a thing for uſe[c]; ſo likewiſe we conſider as Payments or Acquittals, all the manners in which one acquits, or delivers himſelf from Engagements of all kinds[d].

[c] Credendi generalis appellatio eſt. Ideò ſub hoc titulo prætor & de commodato, & de pignore edixit. Nam cuicumque rei aſſentiamur, alienam fidem ſecuti, mox recepturi quid ex hoc contractu, credere dicimur. *l.* 1. *ff. de reb. cred.*

[d] Solvere dicimus eum qui fecit quod facere promiſit. *l.* 176. *ff. de verb. ſignif.*

IV.

4. *Payment of what was not due, or what one could not have been compelled to pay.*

The Payment preſuppoſing the debt, he who has paid through miſtake, that which was not due, may recover it[e]. But if he has paid nothing but what was due in Equity, altho' the debt had been ſuch that he could not have been condemned in a Court of Juſtice to pay it, he cannot demand reſtitution of what he has paid[f]. Thus, for example, if a Minor being come of Age, pays a Sum of Money which he had borrowed in his Minority, upon an Obligation againſt which he could have been relieved, he cannot revoke the Payment which he has made. For by paying the Money, he has confirmed and ratified his Obligation[g].

[e] Si quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt. *l.* 1. §. 1. *ff. de cond. ind.*

[f] Naturales obligationes non ex eo ſolo æſtimantur, ſi actio aliqua earum nomine competit, verùm etiam eo, ſi ſoluta pecunia repeti non poſſit. *l.* 10. *ff. de obl. & act.* See touching Payments of that which is not due, the firſt Section of thoſe who receive what is not due to them.

[g] Placet, ut & eſt conſtitutum, ſi quis major factus comprobaverit quod minor geſſerat, conſtitutionem ceſſare. *l.* 5. §. 1. *ff. de minor.* See the eleventh Article of the firſt Section of thoſe who receive that which is not due to them.

This Article is conceived in this manner, that he who pays that which was not due, may recover it, and not that he who pays what he owed not, may recover it. For if any one pays for another, altho' he was not obliged to do it, he cannot demand back what he has paid. See the ſecond Article of the third Section.

V. One

V.

5. One may pay before the term.

If the Debtor who had a term fixed for payment, has a mind to pay before-hand, the Creditor cannot compel him to wait till the term. For all the time of the delay is given to the Debtor, that he may acquit himſelf when he can[h]. And if he cannot do it ſooner, he ought to do it at the term. But if he pays before-hand, he cannot take back what he has paid, for he owed it[i].

[h] Quod certa die promiſſum eſt, vel ſtatim dari poteſt. Totum enim medium tempus ad ſolvendum promiſſori liberum relinqui intelligitur. *l. 70. ff. de ſolut.*

[i] *See the ſecond Article of the firſt Section of thoſe who receive what is not due to them.*

VI.

6. Effect of the Payment.

The effect of Payment is to annul the debt, if one pays the whole[l], or to diminiſh it in proportion to what is paid.

[l] Tollitur omnis obligatio ſolutione ejus quod debetur. *Inſt. quib. mod. toll. obl.*

VII.

7. Payment made by another than the Debtor.

If a Payment is made for a Debtor by another perſon than himſelf, he will nevertheleſs be acquitted from his Obligation to the Creditor, who has received his Payment: and the debt, with regard to the ſaid Creditor, will be annulled, although the Debtor knew nothing of the Payment, and even although it had been made againſt his will; becauſe the Creditor was at liberty to receive what was due to him, and when he has received it, the debt is acquitted[m].

[m] Nec intereſt quis ſolvat, utrum ipſe qui debet, an alius pro eo. Liberatur enim & alio ſolvente, ſive ſciente, ſive ignorante debitore, vel invito eo ſolutio fiat. *inſt. quib. mod. toll. obl.* Solvere pro ignorante, & invito, cuique licet. *l. 53. ff. de ſolut.*

This Article ſuppoſes that a third perſon may pay for the Debtor, as ſhall be explained in the ſecond Article of the third Section.

VIII.

8. The Payment frees the Sureties, and Mortgages.

The debt being annulled by the Payment, the Creditor has no longer any right upon the Pawns and Mortgages which he had for his ſecurity; and the Bail and Sureties are no longer obliged. For they were Acceſſories to the Obligation, which do not ſubſiſt after it is acquitted[n].

[n] In omnibus ſpeciebus liberationum, etiam acceſſiones liberantur: putà adpromiſſores, hypothecæ, pignora. *l. 43. ff. de ſolut.*

IX.

9. The Payment which one makes, that he may have an Aſſignment to the debt, does not extinguiſh the debt.

Although the Payment extinguiſhes the debt, yet if a Creditor who is paid by another than his Debtor, aſſigns over his debt to him who pays him; the debt will ſubſiſt, and will paſs from the perſon of the Creditor to the Aſſignee. For what is tranſacted between them, is not a Payment to diſcharge the Debtor, but a Sale which the Creditor makes of his Right to him who pays him. Which is to be underſtood of an Aſſignment made either before, or at the time of Payment. For if the Payment had been made before the Aſſignment, the debt being acquitted, the Creditor could not make over a Right which was no longer in being[o].

[o] Modeſtinus reſpondit, ſi poſt ſolutum ſine ullo pacto omne, quod ex cauſa tutelæ debeatur, actiones poſt aliquod intervallum ceſſæ ſint, nihil ex ceſſione actum, cùm nulla actio ſuperfuerit. Quod ſi ante ſolutionem hoc factum eſt, vel cùm conveniſſet, *ut mandarentur actiones*, tunc ſolutio facta eſſet, mandatum ſubſecutum eſt, ſalvas eſſe mandatas actiones: cùm noviſſimo quoque caſu pretium magis mandatarum actionum ſolutum, quàm actio quæ fuit, perempta videatur. *l. 76. ff. de ſolut.*

X.

10. The Sale of the Pawn does not acquit the debt, except in ſo much as is raiſed by the Sale.

If a Creditor who had taken Pawns for his ſecurity, receives in payment the price of the Pawns, ſold either by order of the Judge, or by the Debtor, and the Money raiſed by the Sale of the Pawns be not ſufficient to acquit the whole debt; he will remain ſtill Creditor for the overplus, although the Pawns ſhould be worth more than the debt. For the perſonal Obligation, to which the Pledge was only an Acceſſory, ſubſiſts ſtill for what remains of the debt[p]. Unleſs it had been agreed, that the Pawns ſhould be inſtead of an entire payment, without any regard to the price which ſhould be raiſed by the Sale of them.

[p] Adverſus debitorem electis pignoribus, perſonalis actio non tollitur, ſed eo quod de pretio ſervari potuit, in debitum computato, de reſiduo manet integra. *l. 10. C. de obl. & act.*

XI.

11. Several Acquittals for ſeveral Debtors, by one ſingle Payment.

It often happens, that by the effect of one ſingle Payment, many Obligations of divers perſons are acquitted; as when a Debtor pays, by order of his Creditor, to another perſon to whom the ſaid Creditor was indebted; which might run into ſeveral Payments from one Creditor to another. But although there appear in ſuch caſes one ſingle Payment, yet there are in reality as many

Payments made as there are debts paid. For it is the ſame thing, as if every one of thoſe who are paid, and who pay to others by this one Payment, did receive from the hands of his Debtor that which is due to him, and deliver it into the hands of his Creditor. And theſe Payments which are eclipſed in outward appearance, are true in effect [q].

[q] Cùm juſſu meo id quod mihi debes ſolvis creditori meo, & tu à me, & ego à creditore meo liberor. *l.* 64. *ff. de ſolut.*

Eum rei geſtæ ordinem futurum, ut pecunia ad te à debitore tuo, deinde à te ad mulierem perveniret. Nam celeritate conjungendarum inter ſe actionum, unam actionem occultari. *l.* 3. §. 12. *ff. de don. int. vir. & ux.*

XII.

12. Two Obligations of one and the same Debtor, acquitted by one single Payment.

It may alſo happen that one and the ſame Payment acquits at one inſtant two Obligations of one and the ſame perſon to the ſame Creditor: as for example, if a Teſtator who is Creditor to a Minor who might get himſelf relieved from his Obligation, leaves him a Legacy upon this condition, that he ſhall pay the debt to his Executor. For in this caſe, the Payment which the ſaid Legatee ſhall make will acquit his debt, and will ſatisfy the condition impoſed for the Legacy [r].

[r] In numerationibus aliquando evenit, ut una numeratione duæ obligationes tollantur uno momento: veluti ſi quis pignus pro debito vendiderit creditori. Evenit enim ut ex vendito tollatur obligatio debiti. Item ſi pupillo qui ſine tutoris auctoritate mutuam pecuniam accepit, legatum à creditore fuerit, ſub ea conditione, *ſi eam pecuniam numeravit*, in duas cauſas videri eum numerâſſe: & in debitum ſuum, ut Falcidiam hæredi imputetur, & conditionis gratia, ut legatum conſequatur. *l.* 44. *ff. de ſolut.*

XIII.

13. Effect of general or particular Acquittances.

Seeing a Debtor may owe to one and the ſame Creditor different debts for diverſe cauſes, and ſeeing he may either pay only ſome of them, or pay them all; one may comprehend in one and the ſame Acquittance either all the payments, if all the debts are paid, or a part of them. And the effect of ſuch an Acquittance is, to annul either the debts only which are ſpecified therein, or all that is due, if the Acquittance is general, and conceived in terms which comprehend the whole [ſ].

[ſ] Pluribus ſtipulationibus factis, ſi promiſſor ita accepto rogâſſet quod ego tibi promiſi, habeſne acceptum? ſi quidem apparet quid actum eſt, id ſolum per acceptilationem ſublatum eſt: ſi non apparet, omnes ſtipulationes ſolutæ ſunt. *l.* 6. *ff. de acceptil.*

Et uno & pluribus contractibus, vel certis, vel incertis; vel quibuſdam exceptis cæteris, & omnibus ex cauſis una acceptilatio, & liberatio fieri poteſt. *l.* 18. *ff. de acceptil.*

Per Aquilianam ſtipulationem pacto ſubditam, obligatione præcedente ſublata, & acceptilatione quæ fuit inducta, perempta, ei qui ex nulla cauſa reſtitui poteſt, omnis agendi via præcluditur. *l. ult. C. de acceptil.*

XIV.

14. He who alledges a Payment ought to prove it.

As he who pretends to be a Creditor ought to eſtabliſh his Right; ſo he who acknowledges the debt, and alledges that he has paid it, ought to make proof of it [t].

[t] Solutionem aſſeveranti probationis onus incumbit. *l. ult. C. de ſolut.*

XV.

15. Payment of the Rents for three years last past, proves the payment of the former years.

The Payment for three ſubſequent years of the Arrears of Quit-Rents, Rents, and other Annual Duties, has this effect, that he who proves the Payment for three years laſt paſt, is diſcharged from the preceding years, although he ſhould produce no Acquittance for them. Unleſs it ſhould be made appear by good proofs that the Arrears of former years are ſtill due, as if there were a Promiſe to pay them, or a Reſervation of them in the latter Acquittances. For it is juſt to preſume, that the Creditor would not have taken the three laſt Payments without receiving either ſome Acknowledgment of the old Arrears remaining ſtill due, or reſerving them. And this Preſumption has its effect even with regard to the Rents of the Crown againſt thoſe who are intruſted with the Receipt of them [u].

[u] Quicumque de provincialibus, & collatoribus, decurſo poſthàc quantolibet annorum numero, cùm probatio aliqua ab eo tributariæ ſolutionis expoſcitur, ſi trium cohærentium ſibi annorum apochas ſecuritateſque protulerit, ſuperiorum temporum apochas non cogatur oſtendere. Neque de præterito ad illationem functionis tributariæ coërceatur. Niſi fortè aut curialis, aut quicunque apparitor, vel optio, vel actuarius, vel quilibet publici debiti exactor ſive compulſor, poſſeſſorum vel collatorum habuerit cautionem: aut id quod repoſcit, deberi ſibi manifeſta geſtorum aſſertione patefecerit. *l.* 3. *C. de apoch. public.*

But if it were a new Farmer who had farmed ſome part of the King's Revenue, and had received the three firſt years of his Farm, his Acquittances ought to be of no prejudice to his Predeceſſor who had the Farm before him, as to the years which ſhould remain due to him.

XVI.

16. The Creditor is not obliged to divide his Payment.

The Creditor having a right to demand the entire payment of his whole debt, is not obliged to divide it, and to receive ſuch part of it as the Debtor is willing to acquit [x]. But if the Debtor had any ground to conteſt a part of the debt, and ſhould offer to pay the remainder; it would be prudent for the

Judge in this caſe, to oblige the Creditor to receive what ſhould be offered, purſuant to the Rule explained in another place[y].

[x] Quidam exiſtimaverunt, neque eum qui decem peteret cogendum quinque accipere, & reliqua perſequi: neque eum qui fundum ſuum diceret, partem duntaxat judicio proſequi. *l.* 21. *ff. de cred.* See the eighth Article of the ſecond Section.

[y] *See the fifth Article of the ſecond Section of the Loan of Money.*

SECT. II.

Of the ſeveral ways of making Payment.

The CONTENTS.

1. *Diverſe manners of Payment.*
2. *Delegation is a Payment.*
3. *An Aſſignment of a debt, without Warranty, in order to be diſcharged, is a Payment.*
4. *Novation is a Payment.*
5. *The Oath of the debtor, when the debt is referred to it, or a Sentence, are inſtead of Payment.*
6. *If the thing that is due periſhes, the debtor is acquitted.*
7. *If the Creditor ſucceeds to the Surety, or the Surety to the Creditor.*
8. *Conſignment of the debt, in caſe the Creditor refuſes his payment.*
9. *One cannot pay one thing for another.*
10. *A Work which ought to be made by the hand of a certain Workman.*
11. *The Ceſſion of Goods makes a payment in another thing than what was due.*
12. *If one gives in payment of a Sum of Money, another thing than Money.*
13. *If a part of the Land given in payment, is evicted from the Creditor.*
14. *Payment made in a Species of Money that is juſt going to be cried down.*

I.

1. *Diverſe manners of Payment.* THE moſt natural way of paying a debt, is to pay the ſame thing in kind which one owes, as Money for Money, Corn for Corn. But in what other manner ſoever it happen that the Creditor be ſatisfied, or ought to be ſatisfied, we conſider as a Payment every thing that is inſtead of it, and which extinguiſhes the debt[a]. Thus, for example, a Compenſation acquits on both ſides that which is compenſated, as ſhall be explained in the following Title.

[a] Satisfactio pro ſolutione eſt. *l.* 52. *ff. de ſolut.* Solutionis verbum pertinet ad omnem liberationem quoquo modo factam. *l.* 54. *eod.* See the ſecond Article of the firſt Section.

II.

2. *Delegation is a Payment.* If a Debtor delegates his Debtor to his Creditor, that is, if he ſubſtitutes in his place his Debtor, who obliges himſelf to the Creditor for the ſame thing, and in ſuch a manner that the Creditor is contented with this new Debtor, and diſcharges the other, this Delegation will acquit the firſt Debtor[b].

[b] Solvit qui reum delegat. *l.* 8. §. 3. *ff. ad Vell.* Qui debitorem ſuum delegat, pecuniam dare intelligitur, quanta ei debetur. *l.* 18. *ff. de fidejuſſ.* See the Title of Delegations.

III.

3. *An Aſſignment of a Debt, without Warranty, in order to be diſcharged, is a Payment.* If a Creditor accepts from his Debtor an Aſſignment to a debt, without Warranty, and delivers up to the Debtor his Bond, or gives a diſcharge of it; this Aſſignment will be inſtead of a Payment, which will annul the debt, although it ſhould happen that the Creditor ſhould recover no part thereof[c].

[c] Satisfactio pro ſolutione eſt. *l.* 52. *ff. de ſolut.*

IV.

4. *Novation is a Payment.* If the Creditor and Debtor agree to innovate the debt, that is, if inſtead of the firſt Obligation the Debtor obliges himſelf by another of another nature, as if he who owed the Price of a Sale, or the Rent of a Houſe, gives a Bond for it as for borrowed Money, the Creditor making no reſervation of the firſt debt; the ſecond Obligation will be inſtead of a Payment of the firſt, which by this Novation will be acquitted and annulled[d].

[d] Novatio eſt prioris debiti, in aliam obligationem vel civilem vel naturalem, transfuſio atque tranſlatio. Hoc eſt, cùm ex præcedenti cauſa ita nova conſtituatur, ut prior perimatur. *l.* 1. *ff. de novat.* See the Title of Novations. See the ſixth Article of the firſt Section of the Loan of Money.

V.

5. *The Oath of the Debtor, when the Debt is referred to it, or a Sentence, are inſtead of Payment.* The Debtor to whoſe Oath the debt has been referred, and who has ſworn either that he owed nothing, or that he has paid the debt, is quit in the ſame manner as if he had actually paid it[e]. And if without making Oath he is diſcharged by a Decree, or Sentence from which there lies no Appeal, the Sentence or Decree will be inſtead of an Acquittance[f].

[e] Jusjurandum loco ſolutionis cedit. *l.* 27. *ff. de jurejur.* Eſt acceptilationi ſimile. *l.* 40. *eod.* See the tenth and eleventh Articles of the ſixth Section of Proofs.

[f] Res judicata dicitur, quæ finem controverſiarum pronuntiatione judicis accipit. Quod vel condemnatione, vel abſolutione contingit. *l.* 1. *ff. de re jud.*

VI.

6. If the thing that is due periſhes, the Debtor is acquitted.

If the thing that was due chances to periſh without the fault of the Debtor, the debt is acquitted. Thus, for example, if the thing ſold periſhes in the hands of the Seller who was not in fault that it was not delivered, he is free from his Obligation [g]. But this Rule is not to be underſtood of thoſe kinds of things which being lent are paid back in Kind and not in Specie, ſuch as Money, Corn, Wine, and other things of the like nature. For thoſe who borrow Things of this kind, are not bound to reſtore the ſame individual Thing which they have borrowed, but they are indebted for as much of the ſame Kind [h].

[g] Naturaliter (reſolvitur obligatio) cùm res in ſtipulationem deducta, ſine culpa promiſſoris, in rebus humanis eſſe deſiit. *l.* 107. *ff. de ſol.*

Si Stichus certo die dari promiſſus ante diem moriatur, non tenetur promiſſor. *l.* 33. *ff. de verb. obl. l.* 23. *eod. l.* 5. *ff. de reb. cred.* See the ſecond Article of the ſeventh Section of the Contract of Sale.

[h] *See the fourth Article of the firſt Section of the Loan of Money.*

If the Debtor owed one of two Things, and one of the two happens to periſh, he will continue Debtor of that which remains. Concerning which, See the ſeventh Article of the ſeventh Section of the Contract of Sale. *V. l.* 95. *ff. de ſolut.*

VII.

7. If the Creditor ſucceeds to the Surety, or the Surety to the Creditor.

If the Creditor ſucceeds as Heir to him who was Surety for his Debtor, or the Surety ſucceed to the Creditor, the Obligation of the Surety is annulled; but the Debtor neverthleſs remains ſtill obliged. For the Surety's Obligation, which is extinguiſhed by this change, was only acceſſory to the principal Obligation [i]. And if there were more Debtors, or more Creditors for one and the ſame Sum, and if one of the Debtors ſhould ſucceed to one of the Creditors, or one of the Creditors to one of the Debtors; the confuſion which would be made in the perſon of the ſaid Heir being limited to one portion of the debt, would make no manner of change with reſpect to the others.

[i] Inter creditorem & adpromiſſores confuſione facta, reus non liberatur. *l.* 42. *ff. de ſolut.* See the eighth and ninth Articles of the fifth Section of Cautions or Sureties.

VIII.

8. Conſignment of the debt, in caſe the Creditor refuſes his payment.

When a Debtor, offering to pay all he owes, and in the place where he ought to pay it, the Creditor refuſes to receive it, it is lawful for the Debtor to conſign the Money: And if the conſignment is made according to form, it will be held as a payment of the debt, and will put a ſtop to the Rent, or Intereſt, if it is a Debt that bears Intereſt [l].

[l] Obligatione totius debitæ pecuniæ ſolemniter facta, liberationem contingere manifeſtum eſt. Sed ita demùm oblatio debiti liberationem parit, ſi eo loco quo debetur ſolutio fuerit celebrata. *l.* 9. *C. de ſolut.* Acceptam mutuò ſortem cum uſuris licitis creditoribus poſt conteſtationem offeras, ac ſi non ſuſcipiant, conſignatam in publico depone, ut curſus legitimarum uſurarum inhibeatur. In hoc autem caſu publicum intelligi oportet, vel ſacratiſſimas ædes, vel ubi competens judex ſuper ea re aditus deponi eas diſpoſuerit. Quo ſubſecuto, etiam periculo debitor liberabitur, & jus pignorum tolletur. *l.* 19. *C. de uſur.*

Seeing the Debtor is not permitted to conſign the debt, unleſs it appear that the Creditor has refuſed to receive payment of it, and ſeeing it may happen that the Creditor may have ſome juſt cauſe to refuſe it; the Debtor cannot ſafely conſign the debt, unleſs he does it by Order *of the Court.*

IX.

9. One cannot pay one thing for another.

Payments ought to be made of that which is due, and the debtor cannot, againſt the will of his Creditor, pay him another thing than what he owes, although the value of what he ſhould offer to give were equal, or even ſhould exceed the value of the thing due. Thus he who owes Money, cannot give in payment Lands or Houſes, or Debts, unleſs the Creditor conſent to it [m].

[m] Aliud pro alio invito creditori ſolvi non poteſt. *l.* 2. §. 1. *in f. ff. de reb. cred.* Eum à quo mutuam ſumpſiſti pecuniam, in ſolutum nolentem ſuſcipere nomen debitoris tui, compelli juris ratio non permittit, *l.* 16. *C. de ſolut.*

Manifeſti juris eſt, tam alio pro debitore ſolvente, quàm rebus pro numerata pecunia, conſentiente creditore, datis, tolli paratam obligationem. *l.* 17. *C. eod.*

By the third chapter of the fourth Novel, the Emperor Juſtinian *ordained, that Debtors who owed Sums of Money, and had only Lands or Houſes for which they could find no Purchaſers, ſhould be admitted to give in payment Houſes or Lands at a reaſonable valuation, with the Warranty which they were able to give, leaving to their Creditors the moſt valuable Houſes and Lands which they had. This Law was founded on a Motive of Humanity towards the Debtors, and even on the Intereſt of the Creditors themſelves, who could not hinder their Debtors, when reduced to the laſt neceſſity, from being admitted to ſurrender their Lands and Houſes for the payment of their Creditors. But the difficulties and inconveniencies that attended the execution of this Law brought it ſoon into diſuſe: and it were to be wiſhed that proviſion were made in this matter, as well as againſt the many abuſes committed in the Seizure and Sale of the Eſtates of Debtors.*

X.

10. A Work which ought to be made by the hand of a certain Workman.

Seeing Undertakers and Artiſans are Debtors for the Works which they undertake to make, and that there are Works of ſuch a nature, that it is of importance to have them made by the hand of the Undertaker or Workman himſelf who undertook them; thoſe who are obliged to make with their own hand Works of this nature, cannot diſcharge themſelves of their Obligation by delivering the Work of another perſon[n].

[n] Inter artifices longa differentia eſt & ingenii, & naturæ, & doctrinæ, & inſtitutionis. Ideo ſi *navem à ſe fabricandam* quis promiſerit, *vel inſulam ædificandam, foſſamve faciendam*, & hoc ſpecialiter actum eſt, *ut ſuis operis id perficiat*, fidejuſſor ædificans, vel foſſam fodiens, non conſentiente ſtipulatore, non liberabit reum. *l. 31. ff. de ſolut.* See the ninth Article.

XI.

11. *The Ceſſion of Goods makes a payment in another thing than what was due.*

The Debtors who are allowed to ſurrender their Goods for the ſatisfaction of their Creditors, give in payment another thing than what they owe. And this is likewiſe another manner of Payment, which ſhall be ſpoken to in its proper place[o].

[o] *See the Title of the Ceſſion of Goods.*

XII.

12. *If one gives in payment of a Sum of Money, another thing than Money, it is a Sale.*

If a Creditor of a Sum of Money ſhould conſent to take in payment Houſes, Lands, or other thing, it would be a Sale, of which the Sum that is due would make the Price. Thus the Debtor would remain Guarantee againſt all Evictions, and he would be diſcharged from the debt, only on condition of his warranting the poſſeſſion of the Thing to the Creditor, and the Payment would be altogether without effect if the Creditor ſhould be evicted of the Eſtate which he had received in payment[p], unleſs it had been otherwiſe agreed between the parties. And as the diminutions which might happen to the Thing given in payment would fall upon the Creditor, ſo likewiſe he would reap the profit of all that might render the Thing better or more valuable[q].

[p] Si quis aliam rem pro alia volenti ſolverit, & evicta fuerit (res) manet priſtina obligatio. *l. 46. ff. de ſolut. V. l. 24. ff. de pign. act.*

[q] Cùm pro pecunia quam mutuò acceperas, ſecundùm placitum Evandro te fundum dediſſe profitearis: ejus induſtriam, vel eventum meliorem tibi, non ipſi prodeſſe, contrarium non poſtulaturus, ſi minoris diſtraxiſſet, non juſtè petis. *l. 24. C. de ſolut.*

XIII.

13. *If a part of the Land given in payment, is evicted from the Creditor.*

If in the caſe of the preceding Article, the Creditor having taken Lands in payment, a part of them were evicted from him, he might oblige the Debtor to take back the reſt. For it might ſo happen that becauſe of the Eviction of that part, the reſt of the Land might be a burden to him, and that he took the Land in payment, only that he might have it whole and entire[r].

[r] Si quis aliam rem pro alia volenti ſolverit, & evicta fuerit (res) manet priſtina obligatio. Et ſi pro parte fuerit evicta, tamen pro ſolido durat obligatio. Nam non accepiſſet re integra creditor, niſi pro ſolido ejus fieret. *l. 46. ff. de ſolut.*

XIV.

14. *A Payment made in a Species of Money that is juſt going to be cried down.*

Payments of Money ought to be made in Species which are neither cried down, nor ſuſpected[s]. But if the Creditor having delayed to receive his payment, the Money ſhould chance to be cried down, before the Debtor had actually made a Tender of the Money to his Creditor, the loſs which would be occaſioned by crying down the Species that remained ſtill in the hands of the Debtor, would fall upon the Debtor. For he was ſtill Maſter of them while they were in his hands[t].

[s] Non eſſe cogendum (creditorem) in aliam formam nummos accipere ſi ex ea re damnum aliquod paſſurus ſit. *l. 99. ff. de ſolut.*

[t] Creditor oblatam à debitore pecuniam, ut alià die accepturus, diſtulit; mox pecunia qua illa reſpublica utebatur, quaſi ærosa, juſſu præſidis ſublata eſt: item pupillaris pecunia, ut poſſit idoneis nominibus credi ſervata, ira intercempta eſt. Quæſitum eſt cujus detrimentum eſſet? reſpondi ſecundùm ea quæ proponerentur, nec creditoris, nec tutoris detrimentum eſſe. *l. 102. eod.*

SECT. III.

Who may make a Payment, or receive it.

The CONTENTS.

1. *Perſons who are jointly bound for the ſame debt, and Sureties, may pay for the Debtor.*
2. *Any perſon may pay for another.*
3. *Of the Debtor who with the Money of another perſon pays their common Creditor his own debt.*
4. *The Attorney of a perſon may make a Payment, and receive it.*
5. *Payment to him who has not power to give an Acquittance.*
6. *Tutors and Curators may make and receive Payments.*
7. *Payment to one of more Creditors, each of whom has a right to receive the whole.*
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9. Payment made to one who lies under an Accuſation of a Crime.

I.

1. Perſons who are jointly bound for the ſame debt, and Sureties, may pay for the Debtor.

PErſons who have intereſt that a debt be acquitted, may pay it. Thus, thoſe who are jointly bound together each of them for the whole debt, may pay one for the other: Thus, Sureties may acquit what they are bound to pay for others. And the Payments which theſe perſons make, diſcharge the Debtors for whoſe behoof they make them, and annul their Obligation to the Creditor. But the ſaid Debtors remain obliged to him who acquits their debt[a].

[a] Si ex pluribus obligatis uni accepto feratur, non ipſe ſolus liberatur, ſed & hi qui ſecum obligantur. Nam cùm ex duobus, pluribuſque ejuſdem obligationis participibus uni accepto fertur, cæteri quoque liberantur: non quoniam ipſis acceptò latum eſt, ſed quoniam velut ſolviſſe videtur is qui acceptilatione ſolutus eſt. *l.* 16. *ff. de acceptil.*

Creditor prohiberi non poteſt exigere debitum, cùm ſint duo rei promittendi ejuſdem pecuniæ, à quo velit: & ideò ſi probaveris te conventum in ſolidum exolviſſe, rector provinciæ juvare te adverſùs eum cum quo communiter mutuam pecuniam accepiſti non cunctabitur. *l.* 2. *C. de duob. reis.*

II.

2. Any perſon may pay for another.

Payment may be made not only by a perſon who is intereſted with the Debtor, but alſo by other perſons who have no concern in the debt. And he for whom another has paid is acquitted, whether he knows, or is ignorant of the Payment, and even altho' he ſhould not agree to it. For the Creditor may receive that which is due to him: and he who pays for another, may do that favour, either to the Creditor, or to the Debtor, or may have other juſt cauſes for doing it[b].

[b] Solvendo quiſque pro alio, licet invito & ignorante, liberat eum. *l.* 39. *ff. de neg. geſt.*

Repetitio nulla eſt ab eo qui ſuum recepit: tametſi ab alio quam vero debitore ſolutum eſt. *l.* 44. *ff. de cond. indeb.*

Solutione pro nobis, & inviti & ignorantes liberari poſſumus. *l.* 23. *ff. de ſolut.*

Solvere pro ignorante & invito cuique licet: cùm ſit jure civili conſtitutum, licere etiam ignorantis invitique meliorem conditionem facere. *l.* 53. *eod. l.* 17. *C. eod.*

Altho' it be permitted that one perſon may pay for another, yet this Rule is to be underſtood of debts that are legally due, and of perſons who acquit them with an honeſt and fair intention. For it is not allowed, that one under pretext of paying for another, ſhould make payment of a debt which the debtor pretends he does not owe. And it is ſtill leſs allowable to pay in order to purchaſe litigious Rights, and to vex thoſe who are pretended to be the Debtors thereof. The Emperor Anaſtaſius *prohibited this Commerce by a Law, which is the* 22d Cod. de mand. *And ſeeing litigious Rights are never aſſigned over to others except for leſſer Sums than thoſe which are pretended to be due, he ordained that the Aſſignee ſhould recover only the ſame Sum which he had really and truly paid. But becauſe many perſons eluded theſe Prohibitions, by making mixed Conveyances, which conſiſted of a Sale of one part for a certain price, and of a Donation of the Overplus;* Juſtinian *by another Law,* which is the twenty third of the ſame Title, *prohibited this mixture of Sale and Donation together, allowing theſe Conveyances when they were made purely on the ſcore of Donation: and as for the others which ſhould happen to be made for a certain price, he left the Debtor at liberty to acquit them, by paying only the real price which the Purchaſer had diſburſed. But all theſe precautions not being ſufficient to hinder perſons from counterfeiting a Donation inſtead of a Sale, nor from mentioning in the Conveyance a greater price than what was actually paid, it was no difficult matter to elude theſe Laws. And beſides, there are many occaſions in which the Aſſignments of controverted debts may be lawful. For beſides the exceptions which this Law of* Anaſtaſius *makes of Aſſignments among Co-heirs in relation to the Rights of the Succeſſion, and of ſome other caſes where they who accept of ſuch Aſſignments are thereby obliged for ſome lawful intereſt; it may happen, and it often does happen, that a debt is rendered litigious by an unjuſt oppoſition from the Debtor. It may likewiſe ſo fall out, that a Creditor of a lawful debt, although it be doubtful and controverted, may not have any other Fund whereupon to ſubſiſt, or wherewithal to pay a Creditor: and in theſe and other the like caſes, the Aſſignments of conteſted Rights may not be altogether unjuſt. For which reaſon, the putting theſe Laws of* Anaſtaſius *and* Juſtinian *in execution, ought to be left to the diſcretion of the Judge, according to the quality of the Facts, and the circumſtances which may help him to judge whether the Aſſignments be juſt or unjuſt, and whether they ought to have their entire effect, or if the Debtor may be admitted to reimburſe the perſon to whom the Aſſignment is made of the Sum which he has actually paid to the Creditor, or even whether he who has accepted of the Aſſignment ought not to be puniſhed for it, if on his part there were any miſdemeanour which might deſerve it. It is becauſe of theſe different effects of the Aſſignments of Litigious Rights, that ſome Authors have been of opinion, that theſe Laws are not at preſent obſerved in* France, *becauſe they have ſeen that they have not been followed in many caſes, which were excepted for particular reaſons; whereas others are of opinion, that they are ſtill in force here, becauſe in reality there are many caſes where they are obſerved, and becauſe it is juſt to reſtrain the commerce of Aſſignments of Litigious Rights, on all occaſions wherever Equity may ſeem to demand it.* As to the Aſſignments of Litigious Rights, the Reader may conſult the Remarks at the end of the Preamble to the eighth Section of the Contract of Sale.

III.

3. Of the Debtor who with the Money of another perſon pays their common Creditor his own debt.

If a Debtor having given his Money to another perſon to pay the ſame for him to his Creditor, the ſaid third perſon being indebted to the ſame Creditor, gives him that Money in payment of what he himſelf owes him; this Payment would ſeem to be uſeleſs both for the one and the other of theſe Debtors. For he who carried the Money had no power to imploy it in the diſcharge of his own debt: and he who gave it is not diſcharged by a Payment that was not made for his account. Thus, whilſt things remained entire, and the effect of the ſaid Fraud could be repaired, the Payment would be rectified, and placed to the account of him who had given the Money. But if the Creditor being ignorant of the knavery of him who carried the Money, had delivered him up his Bond, and had diſpoſed of the Money, there would remain nothing for him who gave the Money, except his Action againſt the perſon who had undertaken to deliver it to the Creditor. But if, on the contrary, in the ſame caſe the Creditor who had delivered up the Bond, had ſtill the Money in his hands, he could not keep it, no more than a thing that were ſtolen, which he would be obliged to reſtore to the Owner[c]. But he who had given the Money, could not oblige the Creditor to reſtore it, unleſs he procured the Bond to be given back to the Creditor, which he delivered up to the bearer of the Money, that all things might be in the ſame ſtate and condition they were in before the Payment. For otherwiſe he who ſent the Money by another, ought to impute to himſelf this conſequence of his imprudent choice of the perſon. And there would remain nothing to him but his Action againſt the perſon whom he had intruſted with the Money. But the bearer of the Money would be anſwerable to both the other perſons for Coſts and Damages, and be liable to the other Penalties which his knaviſh dealing might deſerve.

[c] Caſſius ait, ſi cui pecuniam dedi ut eam creditori meo ſolveret: ſi ſuo nomine dederit, neutrum liberari: me, quia non meo nomine data ſit: illum, quia alienam dederit. Cæterum mandati eum teneri. Sed ſi creditor eos nummos ſine dolo malo conſumpſiſſet, is qui ſuo nomine eos ſolviſſet, liberatur. Ne ſi aliter obſervaretur, creditor in lucro verſaretur. *l.* 17. *ff. de ſolut. v. l.* 94. *d. l.* §. 2. *V.* §. 6. *&* §. *ult. Inſt. de obl. quæ ex del.*

The Obligation of this Creditor to give back the Money, if it is in being, or to place it to the Accompt of the Owner of the Money, reſults from the terms of this Law, which ordains, that if the Money is no more in being, the perſon who delivered it to the Creditor be acquitted; from whence it follows, that it would be otherwiſe, if the Monies were ſtill extant in the hands of the Creditor. For in this caſe the Owner would claim them as a Thing ſtolen; the Laws reckoning in the number of Thefts facts of ſuch a quality as this of the bearer of the Money, and giving to the Maſter of the Thing ſtolen, the Right of challenging it, in whoſe hands ſoever it is. V. d. §. 6. & §. ult. Inſt. de obl, quæ ex del. l. 54. ff. de furt. d. l. §. 1.

IV.

4. *The Attorney of a perſon may make a payment, and receive it.*

Thoſe who are appointed Agents, or Attorneys for others, may equally make payments for Debtors, and receive them for Creditors, if they have a ſpecial Power, or Letter of Attorney, impowering them ſo to do; or if they have a general Letter of Attorney, by which they are intruſted with the Adminiſtration of all the Affairs of any perſon: for their Act and Deed is the ſame as that of the perſons who have given them the charge of their concerns[d].

[d] Vero procuratori rectè ſolvitur. Verum autem accipere debemus eum cui mandatum eſt vel ſpecialiter, vel cui omnium negotiorum adminiſtratio mandata eſt. *l.* 12. *ff. de ſolut.* See the tenth Article of the third Section of Proxies.

V.

5. *Payment to him who has not power to give an Acquittance.*

If a Debtor pays to him whom he believed to be the Creditor's Factor or Attorney, and who was not ſo, the ſaid payment will not acquit him[e]. But if the Creditor who had given order to a perſon to receive the Money for him, revokes the ſaid Order, and the Debtor, being ignorant of the revocation, pays the Money to the ſaid perſon, the Payment will be good, and the Debtor will be thereby diſcharged; as on the contrary, the Payment would not avail the Debtor, if he had made it after he knew of the revocation[f].

[e] Procuratori qui ſe ultrò alienis negotiis offert ſolvendo, nemo liberabitur. *l.* 34. §. 4. *ff. de ſolut.*

Si quis offerenti ſe negotiis alienis bona fide ſolverit, quando liberetur? & ait Julianus, cùm dominus ratum habuerit, tunc liberari. *l.* 58. *eod.*

[f] Sed & ſi quis mandaverit ut Titio ſolvam, deinde vetuerit eum accipere, ſi ignorans prohibitum eum accipere ſolvam liberabor: ſed ſi ſciero, non liberabor. *l.* 12. §. 2. *eod. l.* 34. §. 3. *eod.*

VI.

6. *Tutors and Curators may make and receive Payments.*

Tutors, and Curators may make and receive Payments for perſons who are under their charge[g].

[g] Tutori rectè ſolvitur. *l.* 14. §. 1. *ff. de ſolut.* Curatori quoque furioſi rectè ſolvitur; item curatori ſibi non ſufficientis vel per ætatem vel per aliam juſtam cauſam: ſed & pupilli curatori rectè ſolvi conſtat. *d. l.* 14. §. 7. See the fourth Article of the ſecond Section of Tutors.

VII.

7. *Payment to one of more Creditors, each of whom has a right to receive the Whole.*

If a thing is due to two or more Creditors ſolidly, that is, in ſuch a manner that every one of them have full and ample Right to receive the Whole, the Payment that is made to one of them, will diſcharge the Debtor from all the others[h].

[h] Ex pluribus reis ſtipulandi, ſi unus acceptum fecerit, liberatio contingit in ſolidum. *l.* 13. § *ult. ff. de acceptil.* See the ſecond Section of Solidity among two, *&c.*

VIII.

8. *One of many Heirs can receive*

If there be no Solidity among ſeveral Creditors for one and the ſame Thing, that *only his own portion.* that is, if each of them has not a right to receive the whole thing, but only his portion of it, ſuch as Co-heirs, none of them can receive the Whole for the others, unleſs they all conſent to it[l].

[l] *This is a conſequence of the preceding Article.* See the eleventh and twelfth Articles of the firſt Section of a Depoſitum. *V. l.* 81. §. 1. *ff. de ſolut.*

IX.

9. Payment made to one who lies under an Accuſation of a Crime.

Perſons accuſed of Crimes which are liable to be puniſhed with Confiſcation of Goods, may before their Condemnation receive what is due to them, and pay what they owe. For otherwiſe innocent perſons who chance to be accuſed, would be unjuſtly deprived of the uſe of their Goods[l]. But this liberty of receiving and making Payments, ought to be underſtood in ſuch a manner, as that there be no fraud to elude the Confiſcation of Goods, and that the perſon who is accuſed give no Acquittance without receiving real Payment, and that he do not pay but what he lawfully owes[m].

[l] Reo criminis poſtulato, interim nihil prohibet rectè pecuniam à debitoribus ſolvi, alioquin plerique innocentium neceſſario ſumptu egebunt: ſed nec illud prohibitum videtur, ne à reo creditori ſolvatur. *l.* 41. & 42. *ff. de ſolut.*

[m] *V. l.* 15. *ff. de donat.*

SECT. IV.

Of the imputation of Payments.

The CONTENTS.

1. *The Debtor of ſeveral debts acquits whichſoever of them he pleaſes.*
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3. *The payment is applied to the debt which it is moſt advantageous for the Debtor to acquit.*
4. *The Overplus of a Payment, after the diſcharge of one debt, is to be applied to the others.*
5. *A Payment is firſt applied to the diſcharge of the Intereſt.*
6. *And that even altho' the Acquittance ſhould mention both Principal and Intereſt.*
7. *How the price of what is pawned or mortgaged for ſeveral debts, is to be applied.*

I.

1. The Debtor of ſeveral debts, acquits whichſoever of them he pleaſes.

IF a Debtor who owes to a Creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichſoever of them he pleaſes, and the Creditor cannot refuſe to receive payment of it[a]. For there is not any one of them which the Debtor may not acquit, although he pay nothing of all the other debts; provided he acquit intirely the debt which he offers to pay[b].

[a] Quoties quis debitor ex pluribus cauſis unum debitum ſolvit, eſt in arbitrio ſolventis dicere quod potius debitum voluerit ſolutum: & quod dixerit, id erit ſolutum. Poſſumus enim certam legem dicere ei quod ſolvimus. *l.* 1. *ff. de ſolut.*

[b] *See the ſixth Article of the firſt Section.*

II.

2. Payments are applied to the debts at the choice of the Debtor, and in his favour.

If in the ſame caſe of a Debtor who owes ſeveral debts to one and the ſame Creditor, the ſaid Debtor makes a payment to him, without declaring at the ſame time which of the debts he has a mind to diſcharge, whether it be that he gives him a Sum of Money indefinitely in part of payment of what he owes him, or that there be a Compenſation of debts agreed on between the Creditor and Debtor, or in ſome other manner; the Debtor will have always the ſame liberty of applying the payment to whichſoever of the debts he has a mind to acquit. But if the Creditor were to apply the payment, he could apply it only to that debt which he himſelf would diſcharge in the firſt place, in caſe he were the Debtor. For Equity requires that he ſhould act in the Affair of his Debtor, as he would do in his own. And if, for example, in the caſe of two debts one of them were controverted, and the other clear, the Creditor could not apply the payment to the debt which is conteſted by the Debtor[c].

[c] Quoties verò non dicimus id quod ſolutum ſit, in arbitrio eſt accipientis cui potiùs debito acceptum ferat: dummodò in id conſtituat ſolutum, in quod ipſe, ſi deberet, eſſet ſoluturus, quoque debito ſe exoneraturus eſſet, ſi deberet, id eſt, in debitum quod non eſt in controverſia. *l.* 1. *ff. de ſolut.*

Æquiſſimum enim viſum eſt, creditorem ita agere rem debitoris, ut ſuam ageret. *d. l.* 1. In duriorem cauſam ſemper videtur (creditor) ſibi debere accepto ferre: ita enim & in ſuo conſtitueret nomine. *l.* 3. *eod.*

III.

3. The payment is applied to the debt which

In all the caſes where a Debtor, owing ſeveral debts to one and the ſame Creditor, is found to have made ſeveral payments, *it is moſt advantageous for the Debtor to acquit.*

payments, of which the application has not been made by the mutual conſent of the parties, and where it is neceſſary that it be regulated either by a Court of Juſtice, or by Arbitrators; the payments ought to be applied to the debts which lie heavieſt on the Debtor, and which it concerns him moſt to diſcharge. Thus, a Payment is applied rather to a debt of which the non-payment would expoſe the Debtor to ſome Penalty, and to Coſts and Damages, or in the payment of which his honour might be concerned, than to a debt of which the non-payment would not be attended with ſuch conſequences. Thus a Payment is applied to the diſcharge of a debt for which a Surety is bound, rather than to acquit what the Debtor is ſingly bound for without giving any Security; or to the diſcharge of what he owes in his own name, rather than of what he ſtands engaged for as Surety for another. Thus, a Payment is applied to a debt for which the Debtor has given Pawns and Mortgages, rather than to a debt due by a ſimple Bond, or Promiſe: rather to a debt of which the term is already come, than to one that is not yet due: or to an old debt, before a new one: and rather to a debt that is clear and liquid, than to one that is in diſpute: or to a pure and ſimple debt, before one that is conditional[d].

[d] Quod ſi fortè à neutro dictum ſit, in his quidem nominibus quæ diem vel conditionem habuerant, id videtur ſolutum cujus dies venit, & magis quod meo nomine, quàm quod pro alio fidejuſſoris nomine debeo: & potius quod cum pœna, quàm quod ſine pœna debetur: & potius quod ſatiſdato, quam quod ſine ſatiſdato debeo. *l.* 3. §. 1. *&* *l.* 4. *ff. de ſolut.*

Cùm ex pluribus cauſis debitor pecuniam ſolvit, utriuſque demonſtratione ceſſante, potior habebitur cauſa ejus pecuniæ quæ ſub infamia debetur: mox ejus quæ pœnam continet: tertio quæ ſub hypotheca, vel pignore contracta eſt: poſt hunc ordinem potior habebitur propria, quam aliena cauſa, veluti fidejuſſoris. Quod veteres ideò definierunt, quod veriſimile videretur diligentem debitorem admonitu ita negotium ſuum geſturum fuiſſe. Si nihil eorum interveniat, vetuſtior contractus ante ſolvetur. *l.* 97. *eod.* In debitum quod non eſt in controverſia. *l.* 1. *eod.* In his quæ præſenti die debentur, conſtat quoties indiſtinctè quid ſolvitur, in graviorem cauſam videri ſolutum. Si autem nulla prægravaret, id eſt, ſi omnia nomina ſimilia fuerint, in antiquiorem. Gravior videtur quæ & ſub ſatiſdatione videtur, quàm ea quæ pura eſt. *l.* 5. *eod.*

IV.

4. The Overplus of a Payment, after the diſcharge of one debt, is to be applied to the others.

When a payment made to a Creditor to whom ſeveral debts are due, exceeds the debt to which it ought to be applied, the Overplus ought to be applied to the diſcharge of the debt which follows, according to the order explained in the preceding Article, unleſs the Debtor makes another choice[e].

[e] Si major pecunia numerata ſit quàm ratio ſingulorum (contractuum) expoſcit, nihilominus primo contractu ſoluto qui potior erit, ſuperfluum ordini ſecundo, vel in totum, vel pro patre minuendo, videbitur datum. *l.* 97. *in f. ff. de ſolut.*

V.

5. A Payment is firſt applied to the diſcharge of the Intereſt.

If a Debtor makes a payment to diſcharge Debts which of their nature bear intereſt, ſuch as that of a Marriage Portion, or what is due by vertue of a Contract of Sale, or that the ſame be due by a Sentence of a Court of Juſtice, and the Payment be not ſufficient to acquit both the Principal and the Intereſt due thereon; the payment will be applied in the firſt place to the diſcharge of the Intereſt, and the Overplus to the diſcharge of a part of the Principal Sum[f].

[f] Quod generaliter conſtitutum eſt priùs in uſuras nummum ſolutum accepto ferendum, ad eas uſuras videtur pertinere quas debitor exolvere cogitur. *l.* 5. §. 2. *in f. ff. de ſolut.*

Si fortè uſurarum rationem arbiter dotis recuperandæ habere debuerit, ita eſt computandum, ut prout quidque ad mulierem pervenit non ex univerſa ſumma decedat, ſed priùs in eam quantitatem quam uſurarum nomine mulierem conſequi oportebat: quod non eſt iniquum. *l.* 48. *eod.*

Quæri poterit an in vicem uſurarum hi fructus cedant, quæ in fideicommiſſis debentur. Et cùm exemplum pignorum ſequimur, id quod ex fructibus percipitur, primum in uſuras, mox, ſi quid ſuperfluum eſt, in ſortem debet imputari. *l.* 5. §. 21. *ff. ut in poſſeſſ. legat. vel fideic. ſerv. cauſ. eff. lic.*

VI.

6. And that even altho' the Acquittance ſhould mention both Principal and Intereſt.

If in the caſes of the foregoing Article the Creditor had given an Acquittance in general for Principal and Intereſt, the Payment would not be applied in an equal proportion to the diſcharge of a part of the Principal, and of a part of the Intereſt; but in the firſt place, all the Intereſt due would be cleared off, and the Remainder would be applied to the diſcharge of the Principal[g].

[g] Apud Marcellum quæritur, ſi quis ita caverit debitori *in ſortem & uſuras* ſe accipere, utrùm pro rata & ſorti & uſuris decedant, an verò priùs in uſuras, & ſi quid ſupereſt, in ſorte. Sed ego non dubito quin hæc cautio *in ſorte & in uſuras* priùs uſuras admittat: tunc deinde, ſi quid ſuperfuerit, in ſortem cedat. *l.* 5. §. *ult. ff. de ſolut.*

VII.

7. How the price of what is pawned or mortgaged for ſeveral debts, is to be applied.

When a Debtor obliging himſelf to a Creditor for ſeveral Cauſes at one and the ſame time, gives him Pawns or Mortgages which he engages for the ſecurity of all the debts; the Money which is raiſed by the Sale of the or Mortgages, will be applied in an equal proportion to the diſcharge of every one of the debts. But if the debts were contracted at divers times upon the Security of the ſame Pawns and Mortgages, ſo as that the Debtor had mortgaged for the laſt debts what ſhould remain of the Pledge, after Payment of the firſt; the Monies ariſing from the Pledges would in this caſe be applied in the firſt place to the diſcharge of the debt of the oldeſt ſtanding[h]. And both in the one and the other caſe, if any Intereſt be due on account of the debt which is to be diſcharged by the payment, the ſame will be paid before any part thereof be applied to the diſcharge of the Principal[i].

[h] Cùm eodem tempore pignora duobus contractibus obligantur, pretium eorum pro modo pecuniæ cujuſque contractus creditor accepto facere debet. Nec in arbitrio ejus electio erit, cùm debitor pretium pignoris conſortioni ſubjecerit. Quòd ſi temporibus diſcretis ſuperfluum pignorum obligari placuit, priùs debitum pretio pignorum jure ſolvetur, ſecundùm ſuperfluo compenſabitur. *l.* 96. §. 3. *ff. de ſolut.*

[i] Cùm & ſortis nomine, & uſurarum aliquid debetur ab eo qui ſub pignoribus pecuniam debet quidquid ex venditione pignorum recipiatur, primùm uſuris quas jam tunc deberi conſtat, deinde ſi quid ſuperfluum eſt ſorti accepto ferendum eſt: nec audiendus eſt debitor, ſi cùm parum idoneum ſe eſſe ſciat, eligit quo nomine exonerari pignus ſuum malit. *l.* 35. *ff. de pign. act.* See the fifteenth Article of the third Section of Pawns and Mortgages.

TITLE II.

Of COMPENSATIONS.

The ſubject matter of this Title.

IT often happens that the ſame perſon is at the ſame time both Creditor and Debtor to another; as if an Executor is charged with a Legacy to a Legatee who was his Debtor: if two perſons are reciprocally indebted to one another for Money lent: if one has received and laid out Money for another: and two perſons may be mutually indebted to one another, ſo as that one of them alone may owe different debts, or likewiſe both of them. In theſe and other the like caſes, which are infinite in number, it is natural not to make ſo many payments as there are debts, ſo as for one of the two to pay to the other what he owes him, and to receive back again that which is due to him; but ſuch debts are compenſated, that is, every one retains in payment of what is due to him, that which he owes to the other, whether it be for the whole debt, if the Sums are equal, or by deducting a leſſer debt out of a greater. So that Compenſations are nothing elſe but two reciprocal Payments which are made at the ſame time, the Debtors giving to one another no other thing but their bare Acquittances, the debts being annulled for ſo much as ſhall be found to be acquitted by the Compenſation.

There are ſome debts which are not to be compenſated.

Altho' it ſeems natural that every Debtor who is on his part Creditor to the perſon to whom he is indebted may compenſate; yet the uſe of Compenſation is not extended indifferently to all ſorts of debts. For there are ſome debts which the Debtors are bound to acquit to thoſe who are in other reſpects indebted to them, without inſiſting on Compenſation, as ſhall be ſhewn in the ſecond Section.

[*By the Common Law of* England, *no Compenſation, or Stoppage, is allowed for Payment.*]

SECT. I.

Of the nature of Compenſations, and of their effect.

The CONTENTS.

1. *Definition of Compenſation.*
2. *Compenſation prevents the circuit of two Payments.*
3. *It takes place altho' the debts to be compenſated be not equal in quantity.*
4. *Compenſation hath its effect of it ſelf, and by virtue of the Law.*
5. *The Accompt ought to be ſtated year by year, that the Compenſations may be made at the time that the Sums became due.*
6. *The Judge may compenſate by vertue of his Office.*

I.

1. Definition of Compenſation.

COmpenſation is a reciprocal Acquittal of debts between two perſons who are indebted the one to the other[a].

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[a] Compenſatio eſt debiti & crediti inter ſe contributio. *l.* 1. *ff. compenſ.*

II. The

II.

2. Compenſation prevents the circuit of two Payments.

The uſe of Compenſations is neceſſary to avoid the circuit of two Payments, which would happen, if each of the two perſons who compenſate ſhould be obliged firſt to pay what he owes, and then to receive back again what is due to himſelf. And it is natural, without ſetching this compaſs, for every one to retain in payment of what is due to him that which he owes on his part. Thus every Compenſation implies two Payments[b].

[b] Compenſatio neceſſaria eſt: quia intereſt noſtra potiùs non ſolvere, quàm ſolutum petere. *l.* 3. *ff. de compenſ.*

Unuſquiſque creditorem ſuum eundemque debitorem petentem ſummovet, ſi paratus eſt compenſare. *l.* 2. *eod.*

Nec enim intereſſe ſolvèrit, an penſaverit. *l.* 4. *in f. ff. qui potior.*

III.

3. It takes place, altho' the debts to be compenſated be not equal in quantity.

Although the reciprocal debts be not equal ſo as to compenſate the whole, yet nevertheleſs the Compenſation takes place in a ſmaller debt againſt a greater, ſo that the greateſt debt is thereby acquitted for ſo much as the leaſt debt amounts to[c].

[c] Si quid invicem præſtare actorem oporteat, eo compenſato in reliquum is cum quo actum eſt debeat condemnari. §. 30. *inſt. de action.* Quoad concurrentes quantitates. *l.* 4. *C. de compenſ.*

IV.

4. Compenſation hath its effect of it ſelf, and by virtue of the Law.

Compenſation being natural, it has of it ſelf, and by virtue of the Law, its effect, although the perſons who have right to compenſate do not think of it, and even altho' both the one and the other ſhould be ignorant of the debts they have to compenſate. For each of them being at the ſame time both Creditor and Debtor to the other, theſe qualities are in Equity and in Truth confounded together, and annulled. Which hath this effect, that if, for example, two Heirs of two Inheritances, the Goods and Effects whereof were not yet fully known to them, ſhould be found in this quality of Heir to be reciprocally indebted to one another, the one for a Sum bearing Intereſt, and the other for a Sum bearing no Intereſt; the Intereſt would ceaſe to run, either in the whole, if the debts were equal, or to the amount of the leſſer debt, and that from the day that the laſt debt ſhould appear to be due[d].

[d] Placuit inter omnes id quod debetur ipſo jure compenſari. *l.* 21. *ff. de compenſ. l. ult. C. eod.*

Si conſtat pecuniam invicem deberi ipſo jure pro ſoluto compenſationem haberi oportet, ex eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius quod amplius apud alterum eſt uſuræ debentur: ſi modo petitio earum ſubſiſtit. *l.* 4. *C. eod.*

Ejus quantitatis, cujus petitionem ratio compenſationis excludit, uſuras non poſſe repoſci manifeſtum eſt. *l.* 7. *C. de ſolut.*

Cùm alter alteri pecuniam ſine uſuris, alter uſurariam debet, conſtitutum eſt à Divo Severo, concurrentis apud utrumque quantitatis uſuras non eſſe præſtandas. *l.* 11. *ff. de compenſ.*

V.

5. The Accompt ought to be ſtated year by year, that the Compenſations may be made at the time that the Sums became due.

It follows from the preceding Rule, that between perſons who are reciprocally indebted to one another, as between a Tutor and his Minor, between Co-heirs, Co-partners, and others, if there be Sums owing which bear Intereſt, the Accompts and Computations ought to be ſtated year by year, and in ſuch a manner that the Compenſations and Deductions be made at the times that the Sums to be compenſated fall due, that the Intereſt may run, or ceaſe to run, according to the changes which the Compenſations and Deductions may make therein[e].

[e] Compenſationem haberi oportet ex eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius quod ampliùs apud alterum eſt uſuræ debentur, ſi modò petitio earum ſubſiſtit. *l.* 4. *C. de compenſ. l.* 7. *C. de ſolut.*

VI.

6. The Judge may compenſate, by vertue of his Office.

Seeing Compenſation is made by the authority of the Law, it is in the power of the Judge, and it is likewiſe his duty, in the caſes where there are mutual demands between Parties, to compenſate of his own free motion, the reciprocal debts in which Compenſation may take place; whether it be that the Compenſation have this effect, as to acquit totally the Parties, or that after the Compenſation is made, one of the Parties ought to be condemned to pay ſome Overplus to the other.

[f] In bonæ fidei judiciis libera poteſtas permitti videtur judici ex bono & æquo æſtimandi quantùm actori reſtitui debeat. In quo & illud continetur, ut ſi quid invicem præſtare actorem oporteat, eo compenſato, in reliquum is cum quo actum eſt debeat condemnari. Sed & in ſtricti juris judiciis, ex reſcripto Divi Marci, oppoſita doli mali exceptione compenſatio inducebatur. Sed noſtra conſtitutio eaſdem compenſationes quæ aperto jure nituntur latiùs introduxit, ut actiones ipſo jure minuant, ſive in rem, ſive in perſonam, ſive alias quaſcunque. §. 30. *inſt. de action.*

SECT. II.

Among what perſons Compenſation takes place, and in what debts.

The CONTENTS.

1. *One compenſates only in his own right.*
2. *To compenſate, it is neceſſary that the debts be clear and liquid.*
3. *And that there be no exception to annul the debt.*
4. *Debts which are not as yet become due, cannot be compenſated.*
5. *There is no Compenſation againſt Debts of Publick Taxes.*
6. *There is no Compenſation in a Thing depoſited, or lent.*
7. *Compenſation in Crimes and Offences, in what reſpect it takes place, and what not.*
8. *If Compenſation is made of two debts equal in the Sums, but unequal in other reſpects.*
9. *One can compenſate only that which may be given in payment.*

I.

1. One compenſates only in his own right.

COmpenſation can only be made between perſons who have in their own names the double quality of Creditor and Debtor: And if a Debtor exerciſes againſt his Creditor a Right which is not his own, as a Tutor does who demands a debt due to his Minor; or an Attorney who ſues the debtor of the perſon who has given him a Power ſo to do; there will be no Compenſation made of what the ſaid Tutor or Attorney may owe in their own names to the ſaid Debtors[a].

II.

2. To compenſate, it is neceſſary that the debts be clear and liquid.

It is not enough to make a Compenſation, that there be a debt on the one ſide and the other, but it is moreover neceſſary that both the debts be clear and liquid, that is, certain and not liable to diſpute. Thus one cannot compenſate with a clear and liquid debt, a debt that is litigious, nor a pretenſion that is not ſettled. But it depends on the prudence of the Judge, to diſcern which debt is clear and liquid, and which is not. And as he ought not to defer giving Sentence for a Debt that is clear and evident, becauſe of a demand of a Compenſation which would require a long diſcuſſion, and that ſuch Demand ought to be reſerved to be judged afterwards; ſo neither ought he to refuſe a ſhort delay for ſuch a diſcuſſion, if it can be done eaſily, and in a ſhort time[b].

III.

3. And that there be no exception to annul the debt.

We muſt reckon among the debts which do not enter into Compenſation, thoſe which, altho' clear and evident in themſelves, may be annulled by ſome Exception which the Debtor may have againſt them[c]. Thus he who is indebted to a Minor, cannot compenſate what the ſaid Minor owes him by virtue of an Obligation againſt which he may be relieved.

IV.

4. Debts which are not as yet become due, cannot be compenſated.

The debts of which the term of payment is not yet come, are not compenſated with thoſe which are due without any term, or of which the term is already come[d]. And conditional debts, the effect whereof depends on the event of a condition, cannot be compenſated till after the condition has happened.

V.

5. There is no Compenſation againſt debts of Publick Taxes.

Thoſe who are indebted on account of the Publick Taxes, ſuch as the Land-Tax, Exciſe, Cuſtoms, and other Subſidies, cannot compenſate with theſe ſorts of Charges that which the Prince may owe them on other accounts. For the nature and uſe of theſe Contributions is ſuch, that nothing can retard the payment of them. And much leſs can they compenſate that which may be due to them from the perſons who are imployed in collecting the Taxes. Thus, a private perſon who is aſſeſſed to the Land-Tax, cannot compenſate the Sum at which he is aſſeſſed with what may be owing to him by the Collector. Thus, a Receiver of the Land-Tax cannot compenſate with the publick Monies which he has received, that which the Receiver General may be indebted to him. But the other debts which are not privileged, and which one owes to the Exchequer, may be compenſated with what the Exchequer owes to the ſame perſon. Thus, for Example, if in an Eſtate fallen to the Crown by Confiſcation, by default of Heirs, or by the death of an Alien, there be ſome of the Effects conſiſting in debts, the Debtors whereof are found to be likewiſe Creditors to the perſon to whom the Eſtate did belong, Compenſation of thoſe debts will be allowed[e].

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[a] Id quod pupillorum nomine debetur, ſi tutor petat, non poſſe compenſationem objici ejus pecuniæ, quam ipſe tutor ſuo nomine adverſario debet. *l. 23. ff. de compenſ.*

[b] Ita compenſationes objici jubemus, ſi cauſa ex qua compenſatur liquida ſit, & non multis ambagibus innodata: ſed poſſit judici facilem exitum ſui præſtare. *l. ult. C. de compenſ.*

Hoc itaque judices obſervent, & non procliviores ad admittendas compenſationes exiſtant: nec molli animo eas ſuſcipiant, ſed jure ſtricto utentes, ſi invenerint eas majorem & ampliorem expoſcere indaginem, eas quidem alii judicio reſervent: litem autem priſtinam jam pene expeditam ſententiâ terminali componant. *d. l. ult.*

[c] Quæcumque per exceptionem perimi poſſunt, in compenſationem non veniunt. *l. 14. ff. de compenſ.*

[d] Quod in diem debetur non compenſabitur antequàm dies venit, quamquàm dari oporteat. *l. 7. ff. de compenſ.*

[e] In ea quæ reipublicæ te debere fateris compenſari ea quæ invicem ab eadem tibi debentur, is cujus de ea re notio eſt, jubebit: ſi neque ex Kalendario, neque ex vectigalibus, neque ex frumenti vel olei publici pecunia, neque tributorum, neque alimentorum, neque ejus qui ſtatutis ſumptibus ſervit, neque fideicommiſſi civitatis debitor ſis. *l.* 3. *C. de compenſ. l.* 20. *ff. eod. l.* 46. §. 5. *ff. de jure fiſci.*

VI.

6. There is no Compenſation in a Thing depoſited, or lent.

The Depoſitary of a Thing, and he who has borrowed a Thing for uſe, cannot compenſate what they have by vertue of any of theſe Titles, with a debt which the Maſter of the Thing depoſited, or lent, may owe to them. And if two perſons had reciprocally Things belonging to another depoſited in their hands, there would be no Compenſation between them in this caſe, but each of them would be obliged to reſtore the Thing which had been depoſited in his hands[f].

[f] Exceptâ actione depoſiti, ſecundùm noſtram ſanctionem in qua nec compenſationi locum eſſe diſpoſuimus. *l. ult. in f. C. de compenſ.*

Si quis vel pecunias, vel res quaſdam per depoſitionis acceperit titulum, eas volenti ei qui depoſuit reddere, illicò modis omnibus compellatur: nullamque compenſationem, vel deductionem, vel doli exceptionem opponat. *l.* 11. *C. depoſ.*

Sed etſi ex utraque parte aliquid fuerit depoſitum, nec in hoc caſu compenſationis præpeditio oriatur: ſed depoſitæ quidem res, vel pecuniæ ab utraque parte quam celerrimè, ſine aliquo obſtaculo, reſtituantur. *d. l.*

Prætextu debiti, reſtitutio commodati non probabiliter recuſatur. *l. ult. C. de commod. V. l.* 18. §. *ult. ff. commod.* See the laſt Article of the third Section of a Depoſitum, and the thirteenth Article of the firſt Section of the Loan of Things to be reſtored in Specie.

VII.

7. Compenſation in Crimes and Offences, in what reſpect it takes place, and what not.

In Crimes and Offences one does not compenſate neither the Accuſations, nor the Puniſhments[g]. But when the matter relates only to Coſts and Damages, or to the Civil Intereſt of the Party, if the perſon accuſed be found to be a Creditor of the Accuſer's, he may compenſate[h].

[g] Non eſt ejuſmodi compenſatio admiſſa. *l.* 2. §. 4. *ff. ad leg. Jul. de adult.*

[h] Quoties ex maleficio oritur actio: ut putà ex cauſa furtiva, cæterorumque maleficiorum, ſi de ea pecuniariè agitur, compenſatio locum habet. *l.* 10. §. 2. *ff. de compenſ.*

VIII.

8. If Compenſation is made of two debts equal in the Sums, but unequal in other reſpects.

If one compenſates two debts, which, although equal in the Sums, are diſtinguiſhed by ſome difference which may be eſtimated; the ſame may be conſidered in making the Compenſation. Thus, for example, if he who was to pay a Sum of Money in a certain place where it was the Creditor's intereſt to have it paid, compenſates it in another place, and is by that means freed from the charges it would have coſt to have remitted the Money to the place where it was to have been paid; in making the Compenſation the value of the ſaid Remittance may be eſtimated[i].

[i] Pecuniam certo locò à Titio dari ſtipulatus ſum: is petit à me quam ei dabo pecuniam: quærò, an hoc quoque penſandum ſit, quanti mea interfuit certo hoc loco dari? Reſpondit, ſi Titius petit, eam quoque pecuniam quam certo loco dare promiſit, in compenſationem deduci oportet: ſed cum ſua cauſa, id eſt, ut ratio habeatur, quanti Titii interfuerit, eo loco quo convenerit, pecuniam dari. *l.* 15. *ff. de compenſ.*

IX.

9. One can compenſate only that which may be given in payment.

Since Compenſations are Payments[l], and that we cannot pay one thing for another againſt the will of the Creditor[m]; ſo neither can we compenſate any thing but what may be given in payment. Thus, an Heir or Executor who had been charged by the Teſtator to give certain Lands to a Legatee, could not oblige him to compenſate with the ſaid Lands a Sum of Money which the ſaid Legatee might happen to owe him. Thus, he who ſhould owe a Ground-Rent that could not be redeemed, could not extinguiſh it by a Compenſation of a Sum of Money which the Creditor of the Ground-Rent might be indebted to him. But he could only compenſate the Arrears of the ſaid Rent that ſhould be due.

[l] Nec intereſſe ſolverit, an penſaverit. *l.* 4. *in f. ff. qui pot.* See the ſecond Article of the firſt Section.

[m] Aliud pro alio invito creditori ſolvi non poteſt. *l.* 2. §. 1. *in f. ff. de reb. cred.* See the ninth Article of the ſecond Section of Payments.

TITLE III.

Of NOVATIONS.

The ſubject matter of this Title.

IT has been remarked in the Preamble of this Book, that we may annul or diminiſh Engagements, by ſubſtituting a ſecond Engagement in the place of a former: ſo as that there be only the ſecond Engagement which ſubſiſts, the former being annulled; and this may happen two ways. One, without any change of the perſons, by changing only the nature of the Obligation: And the other, by a change of the Debtor; whether it be that the firſt Obligation ſubſiſts, the ſecond Debtor charging himſelf therewith inſtead of the former, who is diſcharged from it, or that the new Debtor makes a new Obligation. Thus, for an example of the firſt of theſe two ways, if an Executor who is charged with a Legacy agrees with the Legatee to give him a Bond as for Money lent, amounting to the ſame Sum with that which has been bequeathed to him, without making any mention of the Legacy in the Bond, and the ſaid Legatee gives the Executor an Acquittance for the Legacy; in this tranſaction there will be no change of the perſons, but only a change in the nature of the Engagement, an Obligation for Money lent being ſubſtituted in the place of a Legacy due by a Teſtament. And it is this firſt way which we call Novation, and which ſhall be the ſubject matter of this Title. Thus, for an example of the ſecond way by the change of the perſon of the Debtor, if he who is indebted for Money lent, ſubſtitutes in his place another Debtor, who obliges himſelf for the ſame Sum to the Creditor, ſo that the firſt Debtor be diſcharged, the firſt Engagement will be annulled in regard of the firſt Debtor, who will be no longer bound for the Money, and he who is ſubſtituted, will become Debtor in the place of the other. And it is this ſecond way which is called Delegation, whether the new Debtor take upon him to acquit the firſt Obligation which is ſuffered to remain in force, or whether the firſt Obligation is ſuppreſſed, and the new Debtor obliges himſelf by ſome other Title; but always in ſuch a manner that the Engagement of the firſt Debtor be annulled by that of the new Debtor, who ſucceeds in his place: and this ſhall be the ſubject matter of the following Title.

[*This method of annulling prior Engagements, by ſubſtituting new ones in their room, is in the ancient Books of the Common Law of* England *deſcribed by the ſame name of Novation.* Bracton lib. 3. cap. 2. num. 13. Fleta lib. 2. cap. 60.]

SECT. I.

Of the nature of Novation, and of its effect.

The CONTENTS.

1. *Definition of Novation.*
2. *Novation is not preſumed, if it do not appear.*
3. *The alterations made in a former Obligation, do not innovate it.*
4. *Novation of ſeveral debts into one.*
5. *The Novation annuls the Mortgages, and other Acceſſories of the Obligation.*

I.

NOvation is the change which the Creditor and Debtor make, who in the place of one debt ſubſtitute another; ſo that the firſt Obligation ſubſiſts no longer, and the Debtor remains obliged only by the ſecond[a]. Thus, for example, if after a Contract of Sale, the Price not being yet paid, the Seller takes a Bond from the Buyer as for Money lent, for the ſame Sum which the Price of the Sale amounts to, ſo as that the Contract of Sale be diſcharged, and no reſervation made thereof in the new Obligation, the Seller will have innovated his debt. *1. Definition of Novation.*

[a] Novatio eſt prioris debiti in aliam obligationem, vel civilem, vel naturalem transfuſio, atque tranſlatio. Hoc eſt cùm ex præcedenti cauſa ita nova conſtituatur, ut prior perimatur. Novatio enim à novo nomen accipit, & à nova obligatione. *l. 1. ff. de novat. & deleg.*

II.

There is never any Novation produced by the bare effect of a ſecond Obligation, unleſs it appear that the Creditor and Debtor have had an intention to extinguiſh the firſt. For otherwiſe both Obligations will ſubſiſt[b]. *2. Novation is not preſumed, if it do not appear.*

[b] Novatio ità demum fit ſi hoc agatur, ut novetur obligatio. Cæterùm ſi non hoc agatur, duæ erunt obligationes. *l. 2. in f. ff. de nov. & deleg.*

Niſi ipſi ſpecialiter remiſerint quidem priorem obligationem, & hoc expreſſerint, quod ſecundam magis pro anterioribus elegerint. *l. ult. C. eod.* See the following Article.

III.

3. The alterations made in a former Obligation, do not innovate it.

If the Creditor and Debtor agree to make ſome changes in a former Obligation, whether it be by adding to it a Mortgage, a Surety, or ſome other Security, or by taking the ſame away: whether it be by augmenting or diminiſhing the debt, or by fixing a longer or ſhorter term of payment, or by making the debt conditional if it was pure and ſimple, or pure and ſimple if it was conditional; all theſe changes, and others of the like nature, do not make any Novation, becauſe they do not extinguiſh the firſt debt, unleſs it were expreſſly ſaid that it ſhould be null. And the firſt Obligation ſubſiſts, although it be not particularly mentioned that it is reſerved, or that the ſaid changes are made without an intention to innovate[c].

[c] Novationum nocentia corrigentes volumina, & veteris juris ambiguitates reſecantes, ſancimus, ſi quis vel aliam perſonam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam, vel minuendam eſſe crediderit, vel conditionem, ſeu tempus addiderit vel detraxerit, vel cautionem minorem acceperit, vel aliquid fecerit ex quo veteris juris conditores introducebant novationes: nihil penitùs prioris cautelæ innovari. Sed anteriora ſtare & poſteriora incrementum illis accedere: niſi ipſi ſpecialiter remiſerint quidem priorem obligationem, & hoc expreſſerint quod ſecundam magis pro anterioribus elegerint. Et generaliter definimus: voluntate ſolùm eſſe, non lege novandum. Etſi non verbis exprimatur, ut ſine Novatione (quod ſolito vocabulo, ἄνευ καινότητος Græci dicunt,) cauſâ procedat. Hoc enim naturalibus ineſſe rebus volumus, & non verbis extrinſecùs ſupervenire. *l. ult.* C. *de novat. & deleg.*

Si ità fuero ſtipulatus, *Quanto minùs à Titio debitore exegiſſem, tantum fidejubes?* Non fit novatio: quia non hoc agitur, ut novetur. *l.* 6. *ff. eod.*

IV.

4. Novation of ſeveral debts into one.

One may innovate ſeveral debts by reducing 'em into one ſingle debt, which may comprehend and extinguiſh all the others[d]. Thus he to whom ſeveral debts are due for ſeveral cauſes, may reduce to one Sum all that is due to him, and take one ſingle Bond for the ſame as for Money lent, which Bond may comprehend all the other debts, and annul them.

[d] In ſumma admonendi ſumus, nihil vetare una ſtipulatione plures obligationes novari. *l. ult.* §. 2. *ff. de novat. & deleg.*

V.

5. The Novation annuls the Mortgages, and other Acceſſories of the Obligation.

Seeing the effect of Novation is to annul the former Obligation; the Mortgages, the Sureties, and the other Acceſſories of the firſt Obligation do not ſubſiſt any longer; and the Intereſt, if the ſaid Obligation carried any, ceaſes to run[e].

[e] Ut prior perimatur. *l.* 1. *ff. de novat.* See the firſt Article.

Novatione legitimè factâ liberantur hypothecæ & pignus, uſuræ non currunt. *l.* 18. *eod.*

SECT. II.

What perſons have power to make Novations, and of what debts.

The CONTENTS.

1. *Who may innovate.*
2. *A Tutor may innovate for the advantage of his Minor.*
3. *An Attorney may innovate, if he has a Warrant ſo to do.*
4. *Any one of the Creditors who has power to receive payment, may innovate.*
5. *Novation by another perſon than the Debtor.*
6. *All debts whatſoever may be innovated.*

I.

1. Who may innovate.

ALL perſons who are capable of contracting, may innovate both what they owe, and what is owing to them. And thoſe who cannot oblige themſelves, ſuch as Prodigals who are interdicted, cannot make any Novation, unleſs thereby they better their condition[a].

[a] Cui bonis inderdictum eſt novare obligationem ſuam non poteſt, niſi meliorem ſuam conditionem fecerit. *l.* 3. *ff. de novat. & deleg.*

II.

2. A Tutor may innovate for the advantage of his Minor.

Tutors and Curators may make Novations for thoſe who are under their charge, provided it be for their advantage[b].

[b] Tutor (novare) poteſt, ſi hoc pupillo expediat. *l.* 20. §. 1. *ff. de novat. & deleg.* Agnatum furioſi, aut prodigi curatorem novandi jus habere minimè dubitandum eſt: ſi hoc furioſo vel prodigo expediat. *l. ult.* §. 1. *eod.*

III.

3. An Attorney may innovate, if he has a Warrant ſo to do.

Attorneys who have a Special Power to innovate, or who have a general Letter of Attorney impowering them to take care of all the Goods and all the Affairs of the perſon who conſtitutes them, may innovate for the ſaid perſon[c].

[c] Novare poſſumus, aut ipſi, ſi ſui juris ſumus: aut per alios qui voluntate noſtra ſtipulantur. *l.* 29. *ff. de novat.* Procurator omnium bonorum (novare poteſt.) *d. l.* §. 1.

IV.

4. Any one of the Creditors who has power to receive payment, may innovate.

If two perſons are Creditors for the ſame debt ſolidly, that is, in ſuch a manner that each of them alone has right to demand it, and to diſcharge the Debtor, any one of them may innovate the debt[d].

[d] Si duo rei ſtipulandi ſint, an alter jus novandi habeat: & quid juris unuſquiſque ſibi acquiſierit? Ferè autem convenit, & uni rectè ſolvi: & unum judicium petentem totam rem in litem deducere: item unius acceptilatione perimi utriuſque obligationem. Ex quibus colligitur, unumquemque perinde ſibi acquiſiſſe, ac ſi ſolus ſtipulatus eſſet, excepto eo quòd etiam facto ejus, cum quo commune jus ſtipulantis eſt, amittere debitorem poteſt. Secundùm quæ, ſi unus ab aliquo ſtipuletur novatione quoque liberare eum ab altero poterit, cùm id ſpecialiter agit. *l.* 31. §. 1. *ff. de novat. & deleg.* See the ſeventh Article of the third Section of Payments, and the ſecond Section of the Solidity among two, *&c.*

V.

5. Novation by another perſon than the Debtor.

As a third perſon who is no ways intereſted with the Debtor may pay for him, ſo likewiſe he may innovate his debt without him, he obliging himſelf in the Debtor's place to the Creditor, with an intention to innovate the ſaid debt, and to annul it[e].

[e] Quod ego debeo, ſi alius promittat, liberare me poteſt, ſi novationis causâ hoc fiat. *l.* 8. §. 1. *ff. de novat.* Liberat me is, qui quod debeo promittit, etiam ſi nolim. *d. l.* 8. *in. f.* See the ſecond Article of the third Section of Payments.

VI.

6. All debts whatſoever may be innovated.

All ſorts of debts whatſoever without diſtinction may be innovated, in the ſame manner as they may be extinguiſhed by other ways which acquit, or annul them. Thus, one may innovate a debt which was ſubject to Reſtitution, or Reſciſſion, a Legacy, a debt due by a Tranſaction, or by a Sentence of Condemnation in a Court of Juſtice, and any other debt, from what cauſe ſoever it may proceed[f]. And the Novation ſubſiſts, although the new debt may not ſubſiſt; as if it were liable to be vacated, or that the debt ſubſiſting it ſhould prove to be uſeleſs, the new debtor being inſolvent. For theſe events would not make the firſt Obligation to revive, which was extinguiſhed by the Novation[g].

[f] Illud non intereſt qualis proceſſit obligatio, utrùm naturalis an civilis, an honoraria: & utrùm verbis, an re, an conſenſu. Qualiſcumque igitur obligatio ſit quæ præceſſit, novari verbis poteſt: dummodò ſequens obligatio aut civiliter teneat, aut naturaliter, ut putà ſi pupillus ſine tutoris auctoritate promiſerit. *l.* 1. §. 1. *ff. de novat.* Legata vel fideicommiſſa ſi in ſtipulationem fuerint deducta, & hoc actum ut novetur, fiet novatio. *l.* 8. §. 1. *eod.*

[g] *See the firſt Article of the firſt Section.*

TITLE IV.

Of DELEGATIONS.

The ſubject matter of this Title.

THE nature of Novations and Delegations, with the difference that is between them, has been explained in the Preamble of the foregoing Title. And it has been there obſerved, that Delegation may be made in two manners. For one may delegate ſo as that the Obligation of him who delegates or appoints another Debtor in his place, be annulled, and do not any longer ſubſiſt; as if it was a Bond which was cancelled, the new Debtor binding himſelf by another Obligation, either of the ſame nature, or of a different kind. And one may likewiſe ſo delegate, as that the firſt Obligation ſtill ſubſiſting, the firſt Debtor be diſcharged from it, and that there remain no other Debtor beſides the perſon who is delegated. And in both theſe manners of Delegation, it is always certain that the Obligation of the firſt Debtor is annulled, ſince he remains no longer bound, and the Delegation making a new Debtor, makes likewiſe for this reaſon a new Obligation.

We make here this remark, becauſe although this diſtinction of the two manners of Delegation be not expreſſly and preciſely marked in the Texts which are quoted upon the Articles of this Title, yet it is a natural conſequence of what they contain of the nature and effects of Delegation.

It follows from theſe Remarks on the nature of Novation, and that of Delegation, that all Delegations imply a Novation, ſince in the place of a former Obligation a new one is ſubſtituted, But every Novation does not imply a Delegation, ſeeing the Debtor may innovate his firſt Obligation by a new one, in which he may oblige himſelf alone, without ſubſtituting any other new Debtor in his ſtead.

[*What is here explained under the Title of Delegation, is by the antient Authors who treat of the Law of* England, *comprehended under the general name of Novation.* Bracton lib. 2. cap. 2. num. 13. Fleta lib. 2. cap. 60.]

The CONTENTS.

1. *Definition of Delegation.*
2. *Delegation requires the conſent of all parties concerned.*
3. *Difference between Aſſignment of a debt, and Delegation.*

4. *Another difference.*
5. *Neither the Aſſignment of a debt, nor the Obligation of a third perſon for the Debtor, make a Delegation.*
6. *Delegation to the Creditor, or to another by his order.*
7. *Delegation is a kind of Novation.*
8. *The perſon delegated cannot revive the former Obligation.*
9. *The perſon delegated cannot make uſe of the exceptions which he had againſt him who delegated him.*

I.

1. Definition of Delegation. Delegation is the change of one Debtor for another, when he who is indebted ſubſtitutes a third perſon who obliges himſelf in his ſtead to the Creditor; ſo that the firſt Debtor is acquitted, and his Obligation extinguiſhed, and the Creditor contents himſelf with the Obligation of the ſecond Debtor[a].

II.

2. Delegation requires the conſent of all parties concerned. There is this difference between Novation and Delegation, that whereas a third perſon may innovate the debt of the Debtor without his conſent[b]; Delegation is not made but by the conſent both of the Debtor who delegates another in his place, of the perſon who is delegated, and of the Creditor who accepts the Delegation, and who contents himſelf with the new Debtor[c].

III.

3. Difference between Aſſignment of a debt, and Delegation. We muſt not confound Delegation with the Aſſignment which a Debtor makes to his Creditor of what is owing to him by another perſon. For whereas Delegation implies the will of him who obliges himſelf in the place of another, and acquits the firſt Debtor; the Aſſignment of a debt is as it were a Sale of what is owing by a third perſon, which may be made without his conſent, and it may be agreed that he who makes the Aſſignment ſhall remain obliged as before[d].

IV.

4. Another difference. There is moreover this difference between the Aſſignment of a debt and Delegation, that he who makes an Aſſignment may receive the debt which he has aſſigned, if intimation thereof has not been made to the perſon who owes the debt that is aſſigned: And the knaviſh dealing of him who receives what he had made over to another perſon, does not hinder the Debtor who has paid him from being diſcharged from the debt. But after the Delegation, the perſon who is delegated in the place of another cannot acquit his Obligation but by paying the debt to the Creditor who has accepted it[e].

V.

5. Neither the Aſſignment of a debt, nor the Obligation of a third perſon for the Debtor, make a Delegation. If a Debtor makes over to his Creditor that which a third perſon owes to him, or if the ſaid third perſon becomes bound for the ſaid Debtor to his Creditor, ſo as that both in the one and the other caſe the firſt Debtor remains obliged; it will be neither a Delegation, nor a Novation; but an additional Security which this Debtor, who remains ſtill obliged himſelf, will give to his Creditor, the firſt Obligation ſtill ſubſiſting[f].

VI.

6. Delegation to the Creditor, or to another by his order. The Creditor to whom his Debtor delegates another Debtor in his place, may either accept the Delegation himſelf in his own name, or give his order that it be accepted by another perſon. And in this ſecond caſe, the Delegation makes a change both of the Debtor, and of the Creditor[g].

VII.

7. Delegation is a kind of Novation. Delegation is a kind of Novation. For the firſt Obligation of the perſon who delegates is extinguiſhed by the Obligation of him who is delegated[h].

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[a] Delegare eſt vice ſua alium reum dare creditori. *l.* 11. *de novat. & deleg.* Solvit qui reum delegat. *l.* 8. §. 3. *ff. ad Vellеian.* Bonum nomen facit creditor qui admittit debitorem delegatum. *l.* 26. §. 2. *ff. mand.* See the ſeventh Article.

[b] *See the fifth Article of the ſecond Section of Novations.*

[c] Delegatio debiti niſi conſentiente & ſtipulante promittente debitore, jure perfici non poteſt. *l.* 1. *C. de novat. & deleg.*

[d] Delegatio debiti, niſi conſentiente promittente debitore, jure perfici non poteſt. Nominis autem venditio & ignorante, vel invito eo adverſus quem actiones mandantur contrahi ſolet. *l.* 1. *C. de novat. & deleg.*

[e] Si delegatio non eſt interpoſita debitoris tui, ac propterea actiones apud te remanſerunt, quamvis creditori tuo adverſus eum ſolutionis cauſa mandaveris actiones: tamen antequàm lis conteſtetur, vel aliquid ex debito accipiat, vel debitori tuo denuntiaverit, exigere à debitore tuo debitam quantitatem non vetaris: & eo modo tui creditoris exactionem contra eum inhibere. *l.* 3. *C. de novat. & deleg.*

[f] Si quis aliam perſonam adhibuerit, vel mutaverit——nihil penitus prioris cautelæ innovari: ſed anteriora ſtare, & poſteriora incrementum illis accedere. *l. ult. C de novat. & deleg.*

[g] Delegare eſt vice ſua alium reum dare creditori, vel cui juſſerit. *l.* 11. *ff. de novat. & deleg.*

[h] Ex contractu pecuniæ creditæ actio inefficax dirigitur, ſi delegatione perſonæ ritè facta, jure novationis vetuſtior contractus evanuit. *l.* 2. C. *de nov. & deleg.* Si delegatio non eſt interpoſita debitoris tui, ac propterea actiones apud te remanſerunt, &c. *l.* 3. *eod.* Quod ſi delegatione facta jure novationis tu liberatus es, &c. *d. l.* 3. See the firſt Article.

VIII.

8. *The perſon delegated cannot revive the former Obligation.* He who is delegated by the Debtor being obliged himſelf to the Creditor, cannot revive the firſt Obligation, which is annulled by the Delegation, nor mortgage the Eſtate which the firſt Debtor had engaged. And the Creditor on his part has no longer any recourſe againſt the perſon who has delegated; although the new Debtor ſhould become inſolvent, or even although he had been inſolvent at the time of the Delegation. For one does not any more conſider the origine of the firſt debt, but only the ſecond which has annulled the firſt. Which is to be underſtood of the caſe of a true Delegation which has innovated the debt[i].

[i] Paulus reſpondit, ſi creditor à Sempronio novandi animo ſtipulatus eſſet, ità ut à primâ obligatione in univerſum diſcederetur: rursùm eaſdem res à poſteriore debitore, ſine conſenſu prioris obligari non poſſe. *l.* 30. *ff. de novat. & deleg.*

Si delegatione factâ jure novationis tu liberatus es, fruſtra vereris ne eo quod quaſi à cliente ſuo non faciat exactionem, ad te periculum redundet: cùm per verborum obligationem, voluntate novationis interpoſita, à debito liberatus ſis. *l.* 3. *in f.* C. *eod.* Bonum nomen facit creditor qui admittit debitorem delegatum *l.* 26. §. 2. *in f. ff. mand.*

IX.

9. *The perſon delegated cannot make uſe of the exceptions which he had againſt him who delegated him.* In the ſame caſe of a true Delegation which has innovated the debt, if the perſon who is delegated had juſt exceptions againſt the firſt Debtor which he had not reſerved, he cannot make uſe of them againſt the Creditor, even although his exceptions ſhould be grounded on ſome Fraud of the perſon who has delegated him. For the firſt Obligation ſubſiſting no longer, the ſecond derives its nature from what is tranſacted in the Delegation between the perſon delegated and the Creditor, whoſe intereſt is altogether independent on what had preceded between his Debtor and the perſon who is delegated. Thus, for example, if he who is delegated was indebted to the perſon who delegated him only on the account of a Donation which he had made him; the perſon delegated cannot make uſe of the exceptions which Donors have againſt the Donees, ſuch as the Right of revoking the Donation becauſe of the ingratitude of the Donee, or of having ſome favour and indulgence in the payment of a Sum which was given as a meer Bounty. Thus, for another example, if the perſon delegated was indebted to him who delegated him by virtue of an Obligation againſt which he might have been relieved, having granted it during his Minority for Money which he borrowed and ſquandered away idly, he could have no relief againſt the Creditor, if at the time of the Delegation he was of age[l].

[l] Doli exceptio quæ poterat deleganti opponi, ceſſat in perſona creditoris cui quis delegatus eſt, & in cæteris ſimilibus exceptionibus. *l.* 19. *ff. de novat. & deleg.* (Qui) jam exceſſit ætatem vigintiquinque annorum, quamvis adhuc poſſit reſtitui adverſus priorem creditorem (delegatione exceptionem amittit.) Ideo autem denegantur exceptiones adverſus ſecundum creditorem, quia in privatis contractibus, & pactionibus non facilè ſcire petitor poteſt, quid inter eum qui delegatus eſt, & debitorem actum eſt: aut etiam ſi ſciat, diſſimulare debet nec curioſus videatur. Et ideò merito denegandum eſt adverſus eum exceptionem ex perſona debitoris. *d. l.* 19.

Si Titius donare mihi volens, delegatus à me creditori meo ſtipulanti ſpopondit, non habebit adverſus eum illam exceptionem, ut quatenus facere poteſt condemnetur. Nam adverſus me tali defenſione merito utebatur, quia donatum ab eo petebam: creditor autem debitum perſequitur. *l.* 33. *eod.* See the ſixth Article of the ſecond Section of Donations, and the ſecond Article of the third Section of the ſame Title.

TITLE V.

Of the CESSION *of* GOODS, *and of* DISCOMFITURE.

Connexion between theſe two matters. THE Ceſſion of Goods, and Diſcomfiture, are two conſequences of the inſolvency of Debtors, whoſe Goods and Effects are not ſufficient to pay their Creditors. And it is becauſe of this connexion between theſe two matters, that they are here placed under one and the ſame Title. We ſhall find in the firſt Section what relates to the Ceſſion of Goods, and the matter of Diſcomfiture ſhall be treated of in the ſecond Section.

◆

SECT. I.

Of the Ceſſion of Goods.

The ſubject matter of this Section. THE Ceſſion of Goods which ſhall be treated of in this Section, is a benefit which the Laws have granted to Debtors, that they may deliver their Bodies from Impriſonment, by ſurrendring and yielding up all their Goods and Effects to their Creditors.

It is to be remarked touching this matter, that whereas in the *Roman* Law the Ceſſion of Goods might be made not only in a Court of Juſtice, but alſo in private, either by the Debtor himſelf, or by ſome other perſon having authority from him[a]; the Ordinances of *France* have prohibited the receiving the Ceſſion of Goods otherwiſe than by the Debtor in perſon, before the Judge, in open Court, with the Formalities which they have preſcribed[b], that the Ceſſion of Goods may be attended with ſhame and confuſion, in order to reſtrain the too great facility and frequency of them. And altho' it might ſeem reaſonable to exempt from this diſgrace thoſe who are reduced to make a Ceſſion of their Goods by reaſon of loſſes happened to them without their fault, which ought to diſtinguiſh their condition from that of Debtors who are reduced to that ſtate by their own Knavery, or bad Conduct[c]; yet the Ordinance has not made this diſtinction, that there might be no gap left open for the encouragement of perſons to make a Ceſſion of their Goods.

Beſides the benefit of the Ceſſion of Goods, the Laws of *France* have granted to Debtors that of Reſpites or Delays of one year, or of five years, which the Ordinances impower the Judges to grant to Debtors, upon a Judicial enquiry into the reaſons they have to offer for deſiring the ſame, the Creditors being called to make their exceptions againſt it[d].

The Reſpites in the *Roman* Law depended on the Creditors themſelves, who had it in their choice either to oblige the Debtor to make Ceſſion of his Eſtate, or to grant him a delay of five years. And it was by the plurality of voices among the Creditors that this choice was regulated, reckoning the plurality, not by the number of the Creditors, but by the ſtrength and force of their Credits; ſo that one ſingle Creditor, whoſe Credit was more than that of all the others, was Maſter of this choice[e]. And the Debtor was obliged to give Security, in order to obtain a delay[f].

All Debtors are not received alike to make Ceſſion of their Goods, nor to have the benefit of a Reſpite; but there are many cauſes which may hinder their obtaining theſe Favours, as well on the part of the Debtor who is found to be unworthy of them, as on the part of the Creditor to whom this prejudice cannot be done, either becauſe of the privilege of his Debt, or for other cauſes. Thus, they do not allow the benefit of a Ceſſion of Goods to one who owes a Civil Intereſt adjudged for a Crime: Thus a Farmer who has enjoyed the Fruits of his Farm is not allowed this benefit: Thus, the Ceſſion of Goods does not take place againſt a Creditor who is poſſeſſed of a Pledge, and does not deprive him of the Security he has on the Thing which the Debtor had parted with for his advantage. Thus, the Cuſtoms in ſeveral parts of *France* have differently regulated many caſes in which the Reſpite, or Delay does not take place; as in a Depoſitum, in a Debt adjudged by a Sentence after hearing both parties, for Rents of Houſes, or of Farms, Penſions, Coſts taxed, a Sale in the publick Market, a Sale of Lands or Houſes, Alimony, Medicines, Funeral Charges, the Wiſe's Marriage Portion demanded by the Huſband, or the Wiſe's Jointure demanded by the Widow, Arrears of Rents, which ſome Cuſtoms reſtrain to Ground-Rents, Salaries and Wages of Servants and Day-Labourers, debts owing to poor perſons who cannot conveniently lie out of their Money, debts due to Minors, contracted during their Minority, Monies remaining in the hands of perſons who have been intruſted with the Adminiſtration of Goods belonging to the Church, or to the Publick, or who have been Tutors or Curators, upon the balance of their reſpective Accompts.

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[a] Bonis cedi non tantum in jure, ſed etiam extra jus poteſt, & per nuntium, vel per epiſtolam id declarari. *l. ult. ff. de ceſſ. bon.*

[b] *The Debtor in perſon, while the Court is ſitting, without a Sword, and bare-headed. Ordinance of* 1510. *Art.* 70. *and that of* 1490. *Art.* 34.

[c] Ubi enim locorum juſtum eſt, ut is qui in univerſum ex accidenti, non ſupina negligentia, res ſuas amiſiſſe traditus eſſet, denuò per vim ad ignominioſam vitam tranſponatur. *Novel.* 135. *in præfatione.*

[d] *Ordinance of* Orleans, *Art.* 61.

[e] Majorem eſſe partem, pro modo debiti, non pro numero perſonarum placuit. *l.* 8. *ff. de pactis. Vid. l. ult. Cod. qui bon ced. poſſ.*

[f] *V. l.* 4. *C. de precib. imp. off.*

All theſe ſeveral Caſes are thoſe which the Cuſtoms of *France* have ſpecified, although not any one of them comprehends them all. And one may perceive this to be common to them all, that the Ceſſion of Goods, and the Reſpite, are refuſed, either becauſe the Debtor has rendred himſelf unworthy of this benefit, as in the caſe of debts ariſing from Crimes and Offences, in a Depoſit, and in ſome others: or becauſe of the privilege of the debt, as in debts of Alimony, and Servants Wages: or by reaſon of the quality of the Creditor, as in debts owing to Minors, and to poor perſons who cannot wait for their Money.

It may be eaſily judged from theſe different Cauſes which exclude Debtors from the benefit of the Ceſſion of Goods, and of the Reſpite, that there may be ſeveral other Caſes to which the ſame Principles may be applied, according to the quality of the Credit, the Knavery of the Debtor, and the conſequences thereof with reſpect to the Publick Intereſt. And ſeeing the greateſt part of theſe Rules which except certain debts from the benefit of the Ceſſion of Goods, and of that of Reſpite, are obſerved in all the Cuſtoms of *France*, although they do not all make mention of them, and that ſeveral of them ſay nothing of any one of them, and alſo that almoſt all theſe Rules are obſerved in the Provinces which are governed by the Written Law, which is the *Roman* Law; one may in all places apply the Rules of Equity, which diſtinguiſh between the Caſes wherein the Ceſſion of Goods and the Reſpite may take place, and thoſe in which it would not be juſt or reaſonable to allow that benefit. Thus one may apply them in the Caſes where the Fraud of the Debtor may deſerve it, altho' the ſaid Caſes ſhould be different from thoſe mentioned in the Cuſtoms.

We thought it convenient to explain in this place the particular Cauſes which exclude Debtors from the benefit of the Ceſſion of Goods, and of Reſpite, becauſe the ſame being explained no where but in the Cuſtoms of *France*, it would not have been proper to ſet them down as Rules in the Articles of this Section.

It remains only that we remark on the Ceſſion of Goods, that not only it does not take place in Bankrupcies in *France*, but that by the Ordinances Fraudulent Bankrupts are puniſhed exemplarily, and even with death, and thoſe who partake in their Fraud are alſo puniſhed as their Accomplices[g].

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8. *The Ceſſion does not diſcharge the Sureties.*
9. *The Ceſſion made to ſome of the Creditors, takes place with regard to all.*

I.

1. Definition of the Ceſſion of Goods. THE Ceſſion of Goods is the ſurrender which the Debtor makes of all his Eſtate to his Creditors, that he may either get out of priſon, or avoid being caſt into it[a].

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[g] *Ordinance of* Orleans, *Art.* 143. *Of* Blois, *Art.* 205. *of* Henry IV. *in the year* 1609.

[*In* England, *the benefit of Ceſſion of Goods is allowed to no perſon by any general Law, except in the caſe of Bankrupts; who by ſurrendring themſelves, and making a full and ingenuous diſcovery of all their Goods or Eſtate, and of all Books, Papers, and Writings relating thereto, and delivering up to the Commiſſioners appointed for that purpoſe, all ſuch Goods or Eſtate, Books and Papers, as at the time of their Examination ſhall be in their power, and in all other things conform themſelves to the Act of Parliament, are diſcharged from all Debts owing by them at the time of Bankrupcy, as ſhall be farther taken notice of in the ſecond Section of this Title.* Vid. Statute 4 & 5 Annæ, cap. 17. *And ſometimes poor Priſoners are diſcharged from their Debts by particular Acts of Parliament, they complying with the conditions therein preſcribed. As by* Stat. 6 Georgii, *which diſcharges all poor Priſoners, who ſhall in open Court ſubſcribe and deliver in a Schedule of their whole Eſtates, and the Names of their Debtors, and the Sums by them owing, and the Places of their Abode, and of the Witneſſes that can prove ſuch Debts, and ſhall take the Oath in the ſaid Act preſcribed. And the Eſtate, Debts, and Effects belonging to the ſaid Priſoners, are by the ſaid Act veſted in the Clerk of the Peace, who is to make an Aſſignment thereof to ſuch of the Creditors of the ſaid poor Priſoners as the major part of them ſhall direct, in Truſt for themſelves, and the reſt of the Creditors.*]

[a] Qui bonis ceſſerint, niſi ſolidum creditor receperit, non ſunt liberati. In eo enim tantummodo hoc beneficium eis prodeſt, ne judicati detrahantur in carcerem. *l. 1. C. qui bon. ced. poſſ. l. ult. eod.*

II.

2. The Ceſſion of Goods does not wholly diſcharge the Debtor.

The Ceſſion of Goods acquits the Debtor only for ſo much as the value of the Goods which he delivers up amounts to, and does not exempt him from remaining ſtill Debtor for the Overplus[b].

[b] Niſi ſolidum creditor receperit, non ſunt liberati. *l. 1. C. qui bon. ced. poſſ.*

III.

3. The Ceſſion comprehends the Rights fallen to the Debtor.

The Goods which the Debtor was not yet in poſſeſſion of when he made the Ceſſion of his Goods to his Creditors, but to which he had then actually acquired the Right, ſuch as an Inheritance which he had not as yet entred upon, are comprehended in the Ceſſion: and the Creditors may exerciſe upon the ſaid Goods the Rights of the Debtor[c].

[c] Si qua ipſi jura lex vel ex hæreditate, vel cognatorum donatione, in rebus mobilibus præſtet, in quarum poſſeſſione nondùm conſtitutus ſit, competere tamen ipſi videantur, poſſintque creditores, vel partem ex iis, vel etiam totum colligere. *Nov. 135. c. 1.*

IV.

4. Of Goods which the Debtor acquires after the Ceſſion.

The Goods which the Debtor may chance to acquire after the Ceſſion, will be ſubject to his Creditors for what ſhall remain ſtill unpaid of their debts, but the Creditors cannot throw the Debtor into priſon for the debts contracted before the Ceſſion, nor ſtrip him ſo of his new Acquiſitions, as not to leave him any thing for his ſubſiſtence. And one ought to leave him whereupon to ſubſiſt, eſpecially if what he has newly acquired has been given him for that end, and that it yields him no more than what is barely neceſſary for his Food and Raiment[d].

[d] Si quid poſteà eis pinguius acceſſerit, hoc iterùm uſque ad modum debiti poſſe à creditoribus legitimo modo avelli. *l. 7. in f. C. qui bon. cedere poſſ.*

Si debitoris bona venierint, poſtulantibus creditoribus permittitur rursùm ejuſdem debitoris bona diſtrahi, donec ſuum conſequantur, ſi tales tamen facultates acquiſitæ ſunt debitori quibus prætor moveri poſſit. *l. 7. ff. de ceſſ. bon. l. 3. C. de bon. auth. jud. poſſ.*

Is qui bonis ceſſit ſi quid poſteà acquiſierit, in quantùm facere poteſt convenitur. *l. 4. ff. de ceſſ. bon.*

Qui bonis ſuis ceſſit, ſi modicum aliquid poſt bona ſua vendita acquiſierit, iterùm bona ejus non veneunt. Unde ergo modum hunc æſtimabimus, utrùm ex quantitate ejus quod acquiſitum eſt, an verò ex qualitate? Et putem ex quantitate id æſtimandum eſſe ejus quod quæſiit, dummodò illud ſciamus ſi quid miſericordiæ cauſa ei fuerit relictum, putà menſtruum, vel annuum alimentorum nomine, non oportere propter hoc bona ejus iterato venundari: nec enim fraudandus eſt alimentis quotidianis. Idem & ſi uſusfructus ei ſit conceſſus vel legatus, ex quo tantùm percipitur, quantùm ei alimentorum nomine ſatis eſt. *l. 6. eod.*

V.

5. The Debtor ought to make the Ceſſion of his Goods upon Oath.

The Debtor who is received to make a Ceſſion of his Goods, ought to declare upon Oath that he makes it without any fraudulent intent, and that he does not conceal any part of his Eſtate to the prejudice of his Creditors[e].

[e] Jusjurandum per adoranda præbeat eloquia, *quod nullam rerum cauſa occaſionem, aut aurum reliquum habeat, unde æris alieni ſupplementum faciat.* Novell. 135. c. 1.

This Oath ought to contain, that there has been no fraudulent Alienation of the Goods, and that the declaration which the Debtor makes of his Goods is true. It is after this manner that this Oath is explained by ſome of the Cuſtoms of France, *which require alſo, that the Debtor ſhould promiſe upon Oath, that if ever he happens to be in better circumſtances, he will faithfully pay his debts.*

VI.

6. The Ceſſion of Goods does not immediately ſtrip the debtor of the property of them.

The Ceſſion of Goods does not immediately diveſt the perſon who makes it of the property of the goods which he gives up to his creditors. But if before the Goods are ſold, he finds himſelf in a condition either to pay his creditors, or to produce ſufficient exceptions againſt their claims, he may take back his goods. This is not to be underſtood of him who, without making this Ceſſion of Goods, had given his goods in payment to his creditors[f].

[f] Is qui bonis ceſſit, ante rerum venditionem utique bonis ſuis non caret. Quare ſi paratus fuerit ſe defendere, bona ejus non veneunt. *l. 3. ff. de ceſſ. bon.*

Quem pœnitet bonis ceſſiſſe, poteſt, defendendo ſe, conſequi ne bona ejus veneant. *l. 5. eod.*

Non tamen creditoribus ſua authoritate dividere hæc bona, & jure dominii detinere: ſed venditionis remedio, quatenùs ſubſtantia patitur, indemnitati ſuæ conſulere permiſſum eſt. Cum itaque contra juris rationem res jure dominii teneas ejus qui bonis ceſſit, te creditorem dicens, longi temporis præſcriptione petitorem ſubmoveri non poſſe manifeſtum eſt. Quod ſi non bonis eum ceſſiſſe, ſed res ſuas in ſolutum tibi dediſſe monſtretur, præſes provinciæ poterit de proprietate tibi accommodare notionem. *l. 4. C. qui bon. ced. poſſ.*

VII.

7. The Ceſſion is not received, unleſs the Debtor own the debt.

To be received to make a Ceſſion of Goods, it is neceſſary that the perſon own himſelf to be Debtor[g].

[g] Qui cedit bonis antequam debitum agnoſcat, condemnetur, vel in jus confiteatur, audiri non debet. *l. 8. ff. de ceſſ. bon.*

VIII.

8. The Ceſſion does not diſcharge the Sureties.

The Ceſſion of Goods does not diſcharge the Sureties of him who has made it[h].

[h] Ubicunque reus ita liberatur à creditore ut natura debitum maneat, teneri fidejuſſorem reſpondit. *l. 60. ff. de fidejuſſ.*

Si poſſeſſio rerum debitoris data ſit creditori, æquè dicendum eſt fidejuſſorem manere obligatum. *l. 21. §. 3. in f. eod.*

IX.

9. The Ceſſion made to ſome of the Creditors, takes place with regard to all. If the Debtor hath made a Ceſſion of his Goods to ſome of his Creditors, it hath its effect with regard to the others. For it is to all the Creditors that the Goods of him who makes the Ceſſion are given up [i]

[i] Sabinus & Caſſius putabant eum qui bonis ceſſit, nequidem ab aliis quibus debet poſſe inquietari. l. 4. §. 1. *ff. de ceſſ. bon.*

SECT. II.

Of Diſcomfiture, or the Inſolvency of Debtors.

The Subject matter of this Section. TO underſtand aright this matter of Diſcomfiture, or Inſolvency, it is neceſſary to diſtinguiſh three ſorts of Creditors. Thoſe who have a Privilege; thoſe who have no Privilege, but have a Mortgage, and thoſe who have neither Privilege nor Mortgage.

Among the Creditors who are privileged, and who have Mortgages, the Goods of the Debtor are diſtributed according to the Order which they have either by the preference of their Privileges, or priority of their Mortgages, purſuant to the Rules which have been explained in the Title of Pawns and Mortgages, and of the Privileges of Creditors. And as to the Creditors who have neither Privilege nor Mortgage, there being no preference, nor priority among them, the Goods of the Debtor are for that reaſon diſtributed among them in proportion to the Sums due to them; that is, that the condition of the Creditors being equal, every one of them has his portion of the Goods of the Debtor according to the quantity of his Claim: and if, for example, all the debts amount to the double of what is to be diſtributed, each Creditor will receive only the half of the Sum that is due to him. And this is what is called Contribution, which happens in two manners, either when the Goods are of ſuch a nature that they are not capable of being mortgaged, ſnch as Moveables in *France*, or when the Creditors have neither Privilege nor Mortgage on the Immoveables. For in that caſe, if the Goods of the Debtor are not ſufficient to ſatisfy all the Creditors, they come in rateably for a proportionable ſhare of the Goods as far as they will go towards the diſcharge of the debts: And in *France* we give the name of *Diſcomfiture* to this effect of the Inſolvency of the Debtor, which makes his Goods, on which the Creditors have neither Mortgage nor Privilege, to be diſtributed after this manner.

[*It may not be amiſs to obſerve here the difference between* Diſcomfiture *and* Bankrupcy. *The former takes in all ſorts of Debtors whatſoever, whether they be Merchants or others, whoſe Affairs are ſo diſcomfited and diſordered, that they have not enough lelft to pay their Creditors. Whereas the word* Bankrupcy *relates only to ſuch Perſons as uſe the Trade of Merchandiſe, or ſeek to get their living by Buying and Selling, who prove inſolvent, and againſt whom a Commiſſion of Bankrupcy does iſſue. The manner in which the Eſtates of Bankrupts are to be applied for payment of their debts, is particularly directed by ſeveral Acts of Parliament in* England, *by which all poſſible care has been taken to prevent fraudulent Bankrupcies, by making it Felony without benefit of Clergy, in the Bankrupt who is guilty of any wilful omiſſion in making a full and ample diſcovery of all his Goods or Eſtate. See the ſeveral Statutes relating to this matter.* 13 Eliz. cap. 7. 1 Jac. I. cap. 15. 21 Jac. I. cap 19. 4 & 5 An. cap. 17. 5 An. cap. 22. 5 Georgii. *Vid.* Mr. Serjeant *Goodinge's* Treatiſe of the Law of Bankrupts, *where he has collected a great many particular Caſes relating to the Diſtribution of the Effects of Bankrupts among their Creditors.*]

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1. *Definition of Diſcomfiture.*
2. *The Creditor who is poſſeſſed of a Pledge, is preferred as to that Pledge.*
3. *As alſo the Seller on the Thing ſold.*
4. *The caſe of a conditional debt.*

I.

DIſcomfiture is the condition in which a Debtor is, when his Eſtate is not ſufficient to pay all his debts, and when he has Goods of which the Price ought to be diſtributed among the Creditors rateably, without any Privilege, and without any Mortgage; ſo as that each Creditor may have his ſhare of the Goods, in proportion to the Sum that is due to him [a]. *1. Definition of Diſcomfiture.*

[a] Tributio fit pro rata ejus quod cuique debeatur. *l. 5. §. ult. ff. de tribut. act.* See what has been ſaid in the Preamble.

II.

In the caſe of Diſcomfiture or Inſolvency, the Creditor who is in poſſeſſion of a Pledge, which the Debtor had given him for his Security, is preferred *2. The Creditor who is poſſeſſed of a Pledge, is preferred as* *to that Pledge.* upon that Pledge before the other Creditors[b].

[b] Si qui contrahebant ipſam mercem pignori acceperint, puto debere dici præferendos. *l. 5. §. 8. ff. de tribut. act.*

We muſt not extend this Rule to the caſe of a Creditor who attaches the Moveables of his Debtor, if the Diſcomfiture happens during the Attachment; for in this caſe, the firſt who attaches is not preferred before the others. And it is expreſly ſo regulated by ſome Cuſtoms in France.

III.

3. *As alſo the Seller on the Thing ſold.* The Seller who has ſold a Thing, and lies ſtill out of the Money which he was to have for it, if he finds the Thing that he ſold in the hands of the Buyer, may ſeize on it, and he is not obliged to ſhare it with the other Creditors of the Buyer. And it would be the ſame thing, nay and with much more reaſon, if the Owner of the Thing had given it to the Debtor to ſell for him[c].

[c] Si dedi mercem meam vendendam, & extat: videamus, ne iniquum ſit in tributum me vocari. Et ſi quidem in creditum ei abii, tributio locum habebit. Enimverò ſi non abii, quia res venditæ non aliàs deſinunt eſſe meæ, quamvis vendidero, niſi ære ſoluto, vel fidejuſſore dato, vel aliàs ſatisfacto, dicendum erit, vindicare me poſſe. *l. 5. §. 18. ff. de tribut. act.*

But if the Thing ſold be not any more in the poſſeſſion of the Buyer, will the Seller have the preference before the Creditors of a third perſon who ſhall have purchaſed it from the Buyer? There are ſome Cuſtoms in France *where they make a diſtinction between the condition of a Seller who has ſold without any day or term of payment, expecting ready Money for his Goods, and the condition of the Seller who has given time for payment; and they give a preference in the firſt caſe, but not in the ſecond. To which we may apply the words of the text cited upon this Article:* Si in creditum abii, ſi non abii. *See the remark on the fourth Article of the fifth Section of Pawns and Mortgages.*

IV.

4. *The caſe of a conditional debt.* If among the Creditors who come in rateably for a ſhare of the Goods of a Debtor in the caſe of Diſcomfiture or Inſolvency, there ſhould be found any one whoſe debt depended on the event of a condition, or which ought not to be paid till a long time after; it would be neceſſary either to leave ſo much of the Goods as would come to this Creditor's ſhare, or that the other Creditors who ſhould receive the ſame, ſhould bind themſelves, and give Security, if it ſhould be found neceſſary, to pay back their ſeveral proportions of this Creditor's ſhare after the condition ſhould happen, or the term of payment come[d].

[d] Illud quoque cavere debet, ſi quid aliud domini debitum emerſerit, refuſurum ſe ei pro rata. Finge enim conditionale debitum imminere, vel in occulto eſſe, hoc quoque admittendum eſt. *l. 7. ff. de trib. act.*

TITLE VI.

Of the RESCISSION *of Contracts, and* RESTITUTION *of Things to their firſt eſtate.*

Difference between the ſubject matter of this Title, and the matters treated of in the other Titles of this Book. There is this difference between all the other manners of annulling or diminiſhing Engagements which have been explained in this Book, and theſe which are the ſubject of this Title; that all the others put an end to Engagements without calling their validity in queſtion, whereas Reſciſſions and Reſtitutions of things to their firſt eſtate, reſpect the validity of the Engagements, and make them either wholly void, or make ſuch changes in them as may ſeem juſt and equitable. Thus, when a Minor is relieved againſt an Obligation which he had contracted in his Minority, this Obligation is annulled either in the whole, if none of the Money for which it was contracted was laid out to the advantage of the Minor, or for ſo much of the Money as has not been uſefully imployed, and he pays no part thereof. Thus, when a Major is relieved againſt a Contract extorted by force, his engagement is annulled.

Theſe words of Reſciſſion and Reſtitution, ſignify in reality only the ſame thing; to wit, the benefit which the Laws grant to thoſe who complain of ſome Fraud, ſome Error, ſome Surprize in Acts or Deeds to which they have been parties, that they may be reſtored to the ſame condition in which they were before the execution of the ſaid Acts or Deeds.

Although it may ſeem that the word Reſtitution is particularly applicable to Perſons, who becauſe of ſome quality are relieved from their Engagements, ſuch as Minors, and married Women who have bound themſelves without the Authority of their Huſbands; or even with their Authority, in the Provinces where they cannot bind themſelves at all: and that the word Reſciſſion belongs properly to the Act or Deed which is repealed and annulled becauſe of ſome vice therein, as if it is an Obligation which has been extorted by force; or which one has been drawn into by ſome Error, or by ſome Surprize, which is ſufficient to annul it; yet this diſtinction between Reſtitutions and Reſciſſions, does not hinder them from being often confounded together, becauſe both the one and the other tend to annul the Act or Deed that is liable to be reſcinded. And therefore in this Title we ſhall uſe both theſe words in one and the ſame ſenſe.

We muſt not confound the matter of Reſciſſions and Reſtitutions, with that which has been treated of under the Title of the Vices of Covenants. For altho' the Vices of Covenants be ſo many Cauſes of Reſciſſion, and that there is no cauſe of Reſciſſion which is not comprehended in what has been ſaid concerning the Vices of Covenants [a], yet there is this difference between the ſubject matter of this Title, and that of the Title of the Vices of Covenants; that in that Title there is explained only the nature of thoſe Vices, and their effects, and that altho' ſomething has been hinted at there, of their giving occaſion to the repealing or annulling of Covenants, yet the Rules of Reſciſſions and Reſtitutions are not explained in that Title; but in this we are to explain the ſaid Rules, ſuch as thoſe which reſpect in general the nature of Reſciſſions, their effects, their conſequences, and thoſe which particularly relate to the different kinds of Reſciſſions; the caſes in which they take place; the Reſtitutions of Minors, and the other Rules of the like nature.

[a] *See the Preamble to the Title of the Vices of Covenants.*

All theſe ſorts of Rules which are to be the ſubject matter of this Title, may be reduced under three Heads which comprehend them all, and we ſhall divide them into as many Sections. The firſt ſhall contain the Rules which are common to all ſorts of Reſciſſions and Reſtitutions: The ſecond ſhall take in thoſe which reſpect the Reſtitutions of Minors: And the third ſhall comprehend the Rules which have relation to the Reſtitution of Majors, in the caſes where they may have juſt cauſe to ſue for the repeal of their Contracts.

SECT. I.

Of Reſciſſions and Reſtitutions in general.

IT is neceſſary to obſerve touching this matter of Reſciſſions and Reſtitutions in general; that according to our Uſage in *France*, the ways of Nullity do not take place; that is to ſay, that one cannot procure an Act or Deed to be annulled, to which he has been a party, by barely alledging the grounds and reaſons which render it null; but it is neceſſary to procure Letters from the Prince, in order to obtain a Reſciſſion of the Deed, and Reſtitution of things to their firſt eſtate.

It is likewiſe proper to take notice here, that all Reſciſſions and Reſtitutions, upon what ground ſoever they be built, whether it be Fraud, Violence, Damage in more than the half of the true value; or any other ground whatſoever, preſcribe in ten years, reckoning from the day of the Act or Deed which is complained of, or from the time that the Violence, or other Cauſe which may have hindred the party from bringing his Action, ſhall have ceaſed. And with reſpect to Minors, the Reſtitution preſcribes in ten years, counting from the day of their Majority; and after thirty five years compleat, the age of Majority in *France* being twenty five, one is not admitted to ſue for Reſtitution [a]. We have made here this Remark, becauſe the time of Reſciſſion was ſhorter in the *Roman* Law [b]; for which reaſon we have not ſet down the preciſe time in the thirteenth Article of this Section, where mention is made of the time of Reſciſſions and Reſtitutions.

[a] *See the Ordinance of* 1510. *art.* 46. *that of* 1535. *ch.* 8. *art.* 30. *that of* 1539. *art.* 134.

[b] *V. l. ult. C. de tempor. in int. reſtit.*

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1. *Definition of Reſciſſion and Reſtitution.*
2. *The Deed may be annulled, altho' the party be not guilty of any fraud.*
3. *Reſtitution againſt Sentences, or Decrees.*
4. *Reſciſſions depend on the prudence of the Judge.*
5. *They ought not to be granted eaſily.*

6. *Effect of the Reſciſſion againſt third perſons.*
7. *The Heir may be relieved in right of the deceaſed.*
8. *A ſpecial Proxy is neceſſary for the demanding of a Reſciſſion.*
9. *The Party's Ratification of the Act, hinders the Reſciſſion of it.*
10. *Reciprocal effects of the Reſciſſion.*
11. *Limits of the Reſciſſion, if there be matters in the Act or Deed, which it has no relation to.*
12. *Reſciſſion of one part which hath its effect for the whole.*
13. *The time for demanding a Reſciſſion.*
14. *When this time begins to run.*
15. *How the time is computed, with reſpect to Heirs and Executors.*

I.

1. Definition of Reſciſion and Reſtitution.

THE Reſciſſion of a Contract, or Reſtitution of things to their firſt eſtate, is a benefit which the Laws give to him who has been aggrieved by ſome Act or Deed, to which he was a party, that he may be put in the ſame condition he was in before the ſaid Act or Deed, if there be any juſt cauſe for it [a].

[a] Sub hoc titulo plurifariam prætor hominibus vel lapſis, vel circumſcriptis ſubvenit. *l. 1. ff. de in int. reſt.* Omnes in integrum reſtitutiones causâ cognitâ a prætore promittuntur. *l. 3. eod.*

We have explained in the Preamble to this Title, the difference there may be between Reſtitution, and Reſciſſion of Contracts.

II.

2. The Deed may be annulled, altho' the party be not guilty of any fraud.

It is not always neceſſary for obtaining the Reſciſſion of a Deed, or Reſtitution of things to their firſt condition, that the party who demands it ſhould prove that it is by the fraud of his adverſary that he has been deceived; but it ſufficeth in many caſes, that there be in it ſome grievance of another nature, provided it be ſuch as that it ought to have this effect [b]. Thus, for example, if a Minor has borrowed Money which he has fooliſhly and idly ſquandered away, the upright and honeſt intention of his Creditor will not hinder the Reſtitution [c]. Thus, a Major who is wronged in a Partition, will procure the ſame to be redreſſed, altho' the perſon who is concerned with him in the Partition cannot be charged with any fraud [d].

[b] Si nullus dolus interceſſit ſtipulantis, ſed ipſa res in ſe dolum habet. *l. 36. ff. de verb. obl.* See the ninth Article of the ſixth Section of Covenants; and the fourth Article of the third Section of the Vices of Covenants.

[c] *See the ſecond Article of the ſecond Section.*

[d] *See the third Article of the third Section.*

III.

3. Reſtitution againſt Sentences or Decrees.

One may procure to be reſcinded or annulled, not only Covenants, or other Acts which one has made voluntarily, but even Sentences or Decrees of a Court of Juſtice to which they have been Parties, if there be juſt cauſe for it; as if he who complains be a Minor who was not defended in the Suit, or even although he be Major, if he can ſhew that his adverſary has been guilty of ſome fraud, or offers any other reaſon which the Law approves of [e].

[e] Nec intra has ſolum ſpecies conſiſtet hujus generis auxilium. Etenim deceptis, ſine culpa ſua, maximè ſi fraus ab adverſario intervenerit, ſuccurri oportebit. *l. 7. §. 1. ff. de in int. reſt.*

Sed & in judiciis ſubvenitur, ſive dum agit, ſive dum convenitur, captus ſit. *l. 7. §. 4. ff. de min. d. l. §. ult.*

This is the foundation of the uſe of Civil Requeſts, even for Majors. The grounds of a Civil Requeſt are explained in the Ordinances. See the Ordinance of 1667. in the Title of Civil Requeſts, art. 34. 35. 36.

IV.

4. Reſciſſions depend on the prudence of the Judge.

Reſciſſions being founded upon facts and circumſtances, as if the party has been guilty of ſome fraud, if any force has been uſed againſt him who prays to be relieved, if he has been drawn in by ſome error, or ſome ſurprize, or if there be any other cauſe aſſigned which may be ſufficient to obtain a Reſciſſion; the ſame is not decreed till after a Judicial hearing of the Cauſe. And it depends on the prudence of the Judge to diſcern if the reaſons which are alledged be ſufficient, and if it be equitable to decree the Deed or Contract to be reſcinded [f].

[f] Sub hoc titulo plurifariam prætor hominibus vel lapſis, vel circumſcriptis ſubvenit: ſive metu, ſive calliditate, ſive ætate, ſive abſentia inciderunt in captionem. *l. 1. ff. de in integ. reſt.*

Omnes in integrum reſtitutiones causâ cognitâ à prætore promittuntur: ſcilicet ut juſtitiam earum cauſarum examinet, an veræ ſint, quarum nomine ſingulis ſubvenit, *l. 3. eod.*

Ubi æquitas evidens poſcit, ſubveniendum eſt, *l. 7. eod.*

V.

5. They ought not to be granted eaſily.

Among the circumſtances which are to be weighed in the grant of a Reſciſſion, one ought to conſider, of what moment the Thing in diſpute is, and what will be the conſequences of the Reſciſſion if it is granted. For it ought not to be eaſily granted under the circumſtances, where the damage to be repaired is inconſiderable, and where the Reſciſſion which is prayed on account of the ſaid Damage, might be attended with conſequences which would amount to ſome injuſtice[g].

[g] Scio illud à quibuſdam obſervatum, ne propter ſatis minimam rem vel ſummam, ſi majori rei vel ſummæ præjudicetur, audiatur is qui integrum reſtitui poſtulat. *l. 4. ff. de in int. reſt.*

VI.

6. Effect of the Reſciſſion againſt third perſons.

When there is ground for granting a Reſciſſion, the ſame hath its effect not only againſt the perſons whoſe fact has given occaſion to it, but likewiſe againſt thoſe who repreſent them, and againſt third poſſeſſors. Thus, for example, if he who had purchaſed an Eſtate of a Minor, ſells it to a third perſon, the Reſtitution of the Minor will take place againſt the ſaid third perſon, and againſt every other poſſeſſor, and the Purchaſer will have his remedy only againſt his Seller. Thus, a Proprietor who is ſtript of his Eſtate by a Sale, or other Contract, to which he was conſtrained to give his conſent by ſome violence, may bring his Action againſt any poſſeſſor whatſoever of the ſaid Eſtate, and he will recover it from him, although that third poſſeſſor had no hand in the violence[h].

[h] Interdum autem reſtitutio & in rem datur minori, id eſt, adverſus rei ejus poſſeſſorem, licet cum eo non ſit contractum. Ut puta, rem à minore emiſti, & alii vendidiſti: poteſt deſiderare interdum adverſus poſſeſſorem reſtitui, ne rem ſuam perdat, vel re ſua careat. *l. 13. §. 1. ff. de minor.* See the twenty ſeventh Article of the ſecond Section.

In hac actione non quæritur utrùm is qui convenitur, an alius metum fecit: ſufficit enim hoc docere, metum ſibi illatum, vel vim. *l. 14. §. 3. ff. quod metus cauſ.* See the ſixth Article of the ſecond Section of the Vices of Covenants.

VII.

7. The Heir may be relieved in right of the deceaſed.

The Heirs of thoſe who had a right to be relieved againſt any Deed or Contract, may ſue to have the ſame reſcinded[i]. For altho' the Action ſeems to belong only to the perſon who has been wronged, yet the Right of demanding reparation of the loſs he has ſuſtained in his Goods, will paſs to his Heir. And even the Father, who is Heir to his Son who was a Minor, may demand Reſtitution in the right of his Son[l].

[i] Non ſolùm minoris, verùm quoque eorum qui reipublicæ cauſa abfuerunt: item omnium, qui ipſi potuerunt reſtitui in integrum, ſucceſſores in integrum reſtitui poſſunt. Et ita ſæpiſſimè eſt conſtitutum. *l. 6. ff. de in integ. reſt.*

Non ſolùm minoribus, verùm ſucceſſoribus quoque minorum datur in integrum reſtitutio, etſi ſint ipſi majores. *l. 18. §. ult. ff. de min.*

[l] Pomponius adjicit, ex cauſis ex quibus in re peculiari filiifamilias reſtituuntur, poſſe & patrem quaſi hæredem nomine filii poſt obitum ejus impetrare cognitionem. *l. 3. §. 9. eod.* See the fifteenth Article.

VIII.

8. A ſpecial Proxy is neceſſary for the demanding a Reſciſſion

The Reſciſſion cannot be demanded by a Proxy or Attorney, although he ſhould produce a general Letter of Attorney; but he muſt have a ſpecial Power or Proxy to authorize him to make a demand of this nature[m]. For the ſilence of the perſon who might complain of an Act or Deed, is an approbation thereof: And it is reaſonable to preſume, that ſeeing he does not expreſly ſignify his deſire to be relieved, he is willing to abide by what has been done.

[m] Si talis interveniat juvenis cui præſtanda ſit reſtitutio, ipſo poſtulante præſtari debet, aut procuratori ejus cui id ipſum nominatim mandatum ſit. Qui verò generale mandatum de univerſis negotiis gerendis alleget, non debet audiri. *l. 25. §. 1. ff. de min.*

IX.

9. The Party's ratification of the Act hinders the Reſciſſion of it.

If the cauſe of the Reſtitution having ceaſed, he who might have been relieved has ratified the Act or Deed which he had ground to complain of, he will not afterwards be admitted to ſue for the Reſciſſion thereof; for the approbation makes a new Act which confirms the former. Thus, for example, if a Minor being come of Age ratifies an Obligation againſt which he might have been relieved, he cannot afterwards ſue for relief[n]. Thus he who being at full liberty ratifies an Act which he pretended he was forced to conſent to, cannot any more complain of it.

[n] Qui poſt vigeſimum quintum annum ætatis, ea quæ in minore ætate geſta ſunt rata habuerint, fruſtra reſciſſionem eorum poſtulant. *l. 2. C. ſi maj. fact. rat. habuer. l. 30. ff. de min.* See the twenty third Article of the ſecond Section.

X.

10. Reciprocal effects of the Reſciſſion.

If the Reſciſſion or Reſtitution is decreed, things are reſtored, on the part of him who is relieved, to the ſame condition in which they would have been, if the Act or Deed which is annulled had never been made. But as he enters again to the poſſeſſion of his Rights, and recovers what ought to be reſtored to him, either in Principal, or Intereſt and Fruits, if there be ground for it; ſo ought he likewiſe on his part to give back to his adverſe party what profit he has reaped thereby, ſo that he may draw no other advantage from the Reſciſſion, beſides the bare effect of entring again to his Rights, his Adverſary

ſary being likewiſe reſtored on his part to his Rights, as far as the effect of the Reſciſſion will permit. Thus, the Seller who procures a Contract of Sale to be vacated, of which he had received the Price, ought to give back the ſaid Price. But if a Minor is relieved againſt a Sale which he had made, or againſt the Grant of an Annuity which he had made for borrowed Money; he ſhall reſtore of the Price of the Sale, and of the Money he has borrowed, only ſo much as ſhall be found to have turned to his benefit, by an uſeful application thereof. Thus, the Reſciſſion is reciprocal or not, according to the Juſtice that may be due to him who is relieved[o].

[o] Qui reſtituitur in integrum ſicut in damno morari non debet, ita nec in lucro. Et ideò, quidquid ad eum pervenit, vel ex emptione, vel ex venditione, vel ex alio contractu, hoc debet reſtituere. *l. un. C. de reput. quæ f. in jud. in int. reſt.*

Reſtitutio ita facienda eſt, ut unuſquiſque jus ſuum recipiat. Itaque, ſi in vendendo fundo circumſcriptus reſtituetur, jubeat prætor emptorem fundum cum fructibus reddere, & pretium recipere: niſi ſi tunc eum dederit cùm eum perditurum non ignoraret. *l. 24. §. 4. ff. de minor.*

Sed & cùm minor adiit hæreditatem & reſtituitur, mox quidquid ad eum ex hæreditate pervenit, debet præſtare. Verùm & ſi quid dolo ejus factum eſt, hoc eum præſtare convenit. *d. l. un. §. 2. C. de reput. quæ f. in jud. in integ. reſt.*

XI.

11. Limits of the Reſciſſion, if there be matters in the Act or Deed which it has no relation to.

If in the Act or Deed of which the Reſciſſion is demanded, there were other matters beſides thoſe which he who ſues for relief may have ground to complain of, and if they have no connexion one with another, the Reſciſſion would be limited to that which may give occaſion for it, and would not be extended to the other matters contained in the ſaid Act or Deed. But if there were any connexion between the different parts of the ſaid Act or Deed, the effect of the Reſciſſion would reach them all, whether it were in favour of him who ſhould demand it, or for the intereſt of the adverſe party, in every thing that ought to be reſtored to its former ſtate and condition[p].

[p] Ex cauſa curationis condemnata pupillo, adverſus unum caput ſententiæ reſtitui volebat. Et quia videtur in cæteris litis ſpeciebus relevata fuiſſe actor major ætate qui acquievit tunc temporis ſententiæ, dicebat totam debere litem reſtaurare. Herennius Modeſtinus reſpondit, ſi ſpecies in qua pupilla in integrum reſtitui deſiderat, cæteris ſpeciebus non cohæret, nihil proponi cur à tota ſententia actor poſtulans audiendus eſt. *l. 29. §. 1. ff. de minor.*

XII.

12. Reſciſſion of one part, which hath its effect for the whole.

If a Tutor had ſold an Eſtate belonging in common to him and his Minor, and the ſaid Minor ſhould get himſelf relieved from the ſaid Bargain; the Purchaſer might oblige the Tutor who ſold him the Eſtate to take back his portion of it, for this reaſon, that he would not be bound to divide the effect of the Contract, and to keep one part of the Eſtate, which he would not have bought without the reſt[q].

[q] Curator adoleſcentium prædia communia ſibi & his quorum curam adminiſtrabat, vendidit. Quæro, ſi decreto prætoris adoleſcentes in integrum reſtituti fuerint; an catenùs venditio reſcindenda ſit, quatenus adoleſcentium pro parte fundus communis fuit? Reſpondit catenùs reſcindi, niſi ſi emptor à toto contractu velit diſcedi, quod partem empturus non eſſet. *l. 43. §. 1. ff. de min.*

XIII.

13. The time for demanding a Reſciſſion.

Reſciſſions and Reſtitutions ought to be demanded within the time preſcribed by Law; and when that is expired, no demand of this kind is received[r].

[r] *V. l. ult. C. de temp. in int. reſtit.*

We do not ſet down here the words of this Law; for the time for commencing Actions of Reſciſſion and Reſtitution is otherwiſe regulated by the Ordinances. See what has been ſaid of this matter in the Preamble to this Section.

XIV.

14. When this time begins to run.

The time of this Preſcription begins to run from the day that the cauſe of the Reſciſſion has ceaſed. Thus, it begins againſt Minors from the day of their attaining Majority; and againſt Majors, from the day that they ſhall have been at liberty to enter their Action[s].

[s] Et quemadmodum omnis minor ætas excipitur in minorum reſtitutionibus, ita & in majorum tempus quo rei publicæ cauſa abfuerint, vel aliis legitimis cauſis, quæ veteribus legibus enumeratæ ſunt, fuerint occupati, omne excipiebatur. Et non abſimilis ſit in hac parte minorum & majorum reſtitutio. *l. ult. C. de temp. in int. reſtit.* See the Preamble to this Section.

XV.

15. How the time is computed with reſpect to Heirs and Executors.

This time of Preſcription is reckoned with reſpect to Heirs and Executors who demand the Reſtitution, in ſuch a manner as to join the time which had run againſt the perſon to whom they ſucceed, to that which has run againſt themſelves. But if the Heir were a Minor, his time would not begin to be added to that of the deceaſed, till after the day of his Majority. For he would be relieved even againſt that, in that he had neglected to demand Reſtitution during his Minority[t].

[t] Interdum tamen ſucceſſori pluſquàm annum dabimus, ut eſt ex edicto expreſſum: ſi fortè ætas ipſius ſubveniat, Nam poſt annum viceſimum

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quintum habebit legitimum tempus, hoc enim ipſo deceptus videtur, quòd cùm poſſet reſtitui intra tempus ſtatutum ex perſona defuncti, hoc non fecit. Planè ſi defunctus ad in integrum reſtitutionem modicum tempus ex anno utili habuit, huic hæredi minori poſt annum viceſimum quintum completum non totum ſtatutum tempus dabimus ad integrum reſtitutiónem, ſed id dumtaxat tempus, quod habuit is cui hæres extitit. *l.* 19. §. 1. *ff. de minor.*

SECT. II.

Of the Reſtitution of Minors.

NO body is ignorant who the perſons are who are called Minors, and wherein they are diſtinguiſhed from thoſe who are called Majors. As to which the Reader may conſult what has been ſaid of this matter in the ſixteenth Article of the firſt Section of the Title of Perſons, and in the ninth Article of the ſecond Section of the ſame Title.

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1. *The cauſe of the Reſtitution of Minors.*
2. *This Reſtitution is independent of the honeſty or knavery of the party.*
3. *The Minor is not relieved in all caſes without diſtinction.*
4. *He is not relieved againſt what has been done for juſt and reaſonable cauſes.*
5. *The Minor is not relieved when he cheats, or does any harm.*
6. *Nor when he is guilty of any Crime, or Offence.*
7. *If a Minor gives it out that he is of age.*
8. *Minors are relieved from all manner of damage, except in the caſes of the preceding Articles.*
9. *The Minor is relieved againſt all ſorts of Acts or Deeds, in which he is injured.*
10. *He is relieved if he has accepted an Inheritance, or Legacy, that is burdenſome, or refuſed one that is profitable.*
11. *If the Succeſſion is profitable when the Minor enters to it, but becomes afterwards burdenſome by ſome accident.*
12. *If the Succeſſion which the Minor has renounced, is cleared and diſentangled by another Heir.*
13. *The Reſtitution takes place for the profits of which the Minor has been deprived.*
14. *The Minor is relieved from an Engagement that would run him into Law-Suits, and Expences.*
15. *The Minor is relieved againſt a Compromiſe.*
16. *Reſtitution againſt an omiſſion.*
17. *The Minor is relieved againſt an Obligation for borrowed Money, if he has not laid out the Money to his advantage.*
18. *Reſtitution between two Minors.*
19. *The Authority of the Tutor does not hinder the Reſtitution; and the Minor is reſtored, even againſt the Act of the Tutor.*
20. *Minority ends at five and twenty years compleat.*
21. *The Surety of a Minor.*
22. *Diſpenſation of Age.*
23. *The Ratification of an Act, after one is come of age, hinders the Reſtitution.*
24. *The Immoveables of Minors cannot be alienated without neceſſity.*
25. *Formalities to be obſerved in the Sale of the Immoveables of Minors.*
26. *A Sale made by the Tutor, without obſerving the formalities.*
27. *Effect of the Reſciſſion againſt the Tutor, if there be ground for it, and alſo againſt the Poſſeſſor.*
28. *Improvements made by the Purchaſer of Lands and Tenements belonging to a Minor.*
29. *Reſtitution of a Purchaſe made by a Minor.*

I.

1. The cauſe of the Reſtitution of Minors.

THE Reſtitution of Minors is founded on the weakneſs of their Age, and on the inſtability of their Conduct, for want of experience, and knowledge in buſineſs. And ſeeing this condition expoſes them not only to be impoſed upon by others, but likewiſe to be miſtaken often in their own intereſt; the Law gives them relief againſt all Acts and Deeds by which their Minority may have engaged them in ſome damage.

[a] Hoc Edictum prætor naturalem æquitatem ſecutus propoſuit, quo tutelam minorum ſuſcepit. Nam cum inter omnes conſtet, fragile eſſe, & infirmum ejuſmodi ætatum conſilium, & multis captionibus ſuppoſitum, multorum inſidiis expoſitum: auxilium eis prætor hoc edicto pollicitus eſt, & adverſus captiones opitulationum. *l.* 1. *ff. de minor.*

II.

2. This Reſtitution is independent of the honeſty or knave-

It follows from the preceding Rule, that the Reſtitution of Minors being founded on their weakneſs, and on their want of experience, and knowledge in *y of the party.*

Affairs, the ſame is altogether independent on the honeſty or knavery of thoſe with whom they have treated. And whether it be that they themſelves have been miſtaken, or that the perſons with whom they have had to do have overreached them, the Reſtitution is equally granted to them, with the effect which it ought to have. Thus, the Law protects Minors, both againſt their own proper Act and Deed, and alſo againſt that of perſons who would take advantage of their eaſineſs and weakneſs[b].

[b] Vel ab aliis circumventi, vel ſua facilitate decepti. *l. 44. ff. de min.*

Minoribus in integrum reſtitutio in quibus ſe captos probare poſſunt, etſi dolus adverſarii non probetur, competit. *l. 5. C. de integ. reſt. min.*

Lex conſilio ejus quaſi parum firmo reſtitit. *l. 4. in f. ff. de ſerv. export.*

III.

3. The Minor is not relieved in all caſes without diſtinction.

It follows alſo from the ſame Rule explained in the firſt Article, that Minors being relieved only when they are actually wronged thro' their weakneſs of age, and eaſineſs of temper; they are not indifferently reſtored againſt all the Acts or Deeds which they may complain of. But it is by the circumſtances of their own Conduct, of that of the Parties with whom they have to do, of the quality of the fact of which they complain, of the cauſes and conſequences of the Damage, and other the like circumſtances, that we are to examine if it be juſt that they ſhould be relieved, or not. For the intention of the Law is not to exclude them from the uſe of all Affairs, and of all Commerce; but only to prevent their deceiving themſelves, or being deceived by others[c]. Thus, they are relieved, or not, according to the Rules which follow.

[c] Prætor edicit, quod cum minore quàm viginti quinque annis natu, geſtum eſſe dicetur, uti quæque res erit animadvertam. *l. 1. §. 1. ff. de minor.*

Non omnia quæ minores annis viginti quinque gerunt irrita ſunt. *l. 44. eod.*

Sciendum eſt non paſſim minoribus ſubveniri, ſed cauſa cognita, ſi capti eſſe proponantur. *l. 11. §. 3. eod.*

Non ſemper autem ea quæ cum minoribus geruntur reſcindenda ſunt, ſed ad bonum & æquum redigenda ſunt: ne magno incommodo hujus ætatis homines afficiantur, nemine cum his contrahente: & quodammodo commercio eis interdicetur. Itaque, niſi aut manifeſta circumſcriptio ſit, aut tam negligenter in ea cauſa verſati ſunt, prætor interponere ſe non debet. *l. 24. §. 1. eod.*

IV.

4. He is not relieved againſt what has been done for juſt and reaſonable cauſes.

If a Minor who prays to be relieved, does not alledge ſomething that may be imputed either to his own bad conduct, or to ſome ſurprize from his adverſe party, and if he has done nothing but what his intereſt, or ſome duty obliged him to do; as if he has borrowed Money to pay a juſt debt, which he diſcharged therewith, or if he has bought things neceſſary, even altho' they may have chanced to periſh by ſome accident, he could not be relieved[d]. Thus, a Minor will not be reſtored againſt him who by his order had furniſhed Alimony to the Minor's Father or Mother in their neceſſity, according as his Condition and Eſtate might allow of it, ſeeing the Minor might be conſtrained by Law to maintain his Parents according to his ability[e]. Thus a Minor who had forgiven an Injury which he might have complained of to a Court of Juſtice, will have no relief in this matter, nor be allowed to ſue afterwards for a reparation of the ſaid Injury[f].

[d] Non reſtituetur qui ſobriè rem ſuam adminiſtrans occaſione damni non inconſultè accidentis, ſed fato, velit reſtitui. Nec enim eventus damni reſtitutionem indulget, ſed inconſulta facilitas. Et ita Pomponius libro viceſimo octavo ſcripſit. Unde Marcellus apud Julianum notat, ſi minor ſibi ſervum neceſſarium comparaverit, mox deceſſerit, non debere eum reſtitui, neque enim captus eſt, emendo ſibi rem perneceſſariam, licet mortalem. *l. 11. §. 4. ff. de min.*

Non videtur circumſcriptus eſſe minor, qui jure ſit uſus communi. *l. ult. C. de in int. reſt. min.*

[e] Filia tua non ſolùm reverentiam, ſed etiam ſubſidium vitæ ut exhibeat tibi, rectoris provinciæ authoritate compelletur. *l. 5. C. de patr. poteſt. v. l. 5. ff. de agnoſc. & al. lib. d. l. §. 2.* See the fourth Article of the fifth Section of Tutors.

[f] Auxilium in integrum reſtitutionis exactionibus pœnarum paratum non eſt: ideòque injuriarum judicium ſemel omiſſum, repeti non poteſt. *l. 37. ff. de minor.*

V.

5. The Minor is not relieved, when he cheats, or does any harm.

The Minor who ſhall have cheated any one, or done ſome damage, will not be relieved on the ſcore of his Minority, ſo as to be diſcharged from repairing the damage he has done. Thus, a Minor who damnifies a Thing which he has borrowed, or which has been depoſited with him, will not be reſtored ſo as to be acquitted of the damage which he ſhall have cauſed[g].

[g] Nunc videndum, minoribus utrum in contractibus captis dumtaxat ſubveniatur, an etiam delinquentibus, ut putà dolo aliquid minor fecit in re depoſita, aut commodata, vel alias in contractu: an ei ſubveniatur, ſi nihil ad eum pervenit: Et placet in delictis minoribus non ſubveniri, nec hic itaque ſubvenietur. *l. 9. §. 2. ff. de minor.*

Si damnum injuria dedit, non ei ſubvenitur. *d. §. 2.*

Errantibus, non etiam fallentibus minoribus, publica jura ſubveniunt. *l. 2. C. ſi min. ſe maj. dix.*

Deceptis, non decipientibus opitulandum. *l. 2. §. 3. ff. ad Velleian.*

VI.

6. Nor when he is guilty of any Crime, or Offence.

In Crimes and Offences the Minority may give occaſion to mitigate the Puniſhments, but it does not hinder the Minor from being condemned to make reparation of the damage which he has done[h].

[h] In delictis minor annis viginti quinque non meretur in integrum reſtitutionem, utique atrocioribus, niſi quatenùs interdum miſeratio ætatis ad mediocrem pœnam judicem produxerit. *l. 37. §. 1. ff. de minor.*

Non ſit ætatis excuſatio adverſus præcepta legum, ei qui dum leges invocat, contra eas committit. *d. l. 37. in fine.* In criminibus ætatis ſuffragio minores non juvantur. Etenim malorum mores infirmitas animi non excuſat. *l. 1. C. ſi adv. delict.* Malitia ſupplet ætatem. *l. 3. C. ſi min. ſe maj. dix.*

VII.

7. If a Minor gives it out that he is of age.

If a Minor has given out that he is of age, and by producing a falſe Certificate of the Regiſtry of his Chriſtening, or by ſome other way, has made people believe that he is a Major, he cannot be relieved againſt thoſe Acts into which he ſhall have engaged any one by this ſurpriſe. Thus, a Minor having borrowed Money by ſuch means, although he has made no good uſe of it, yet his Obligation will nevertheleſs have the ſame effect as that of a Major[i].

[i] Si is qui minorem nunc ſe eſſe aſſeverat, fallaci majoris ætatis mendacio te deceperit, cùm juxta ſtatuta juris, errantibus non etiam fallentibus minoribus publica judicia ſubveniant, in integrum reſtitui non debet. *l. 2. C. ſi min. ſe maj. dix. l. 3. eod. l. 32. ff. de minor.*

This Rule is to be underſtood only of the caſes where the Creditor has had ſome juſt reaſon to believe that the Minor was of age. For if there was no more than a bare declaration of the Minor's, who pretended to be of age, the Creditor ought to blame himſelf for his credulity. And therefore we have conceived the Rule in theſe terms.

VIII.

8. Minors are relieved from all manner of damage, except in the caſes of the preceding Articles.

Seeing Minors are not relieved indifferently in all caſes, but according as the quality of the facts and the circumſtances may give occaſion thereto, and ſince we have ſeen in the foregoing Articles the Rules which relate to the caſes in which Reſtitution is not granted; we ſhall next ſee in the Articles which follow, how it takes place, whether the Minors have been deceived by the deed of others, or by the weakneſs of their own judgments. For the integrity of the perſon who treats with a Minor, does not hinder the Reſtitution: but he ought to blame himſelf for not taking the precaution to inform himſelf of the condition of the perſon with whom he treated, and if he knew him to be under age, for treating with him in any other manner than to his advantage[l].

[l] Minoribus in integrum reſtitutio, in quibus ſe captos probare poſſunt, etſi dolus adverſarii non probetur, competit. *l. 5. C. de in integ. reſt. min.* See the third and ſeventeenth Articles. Qui cum alio contrahit, vel eſt, vel debet eſſe non ignarus conditionis ejus. *l. 19. ff. de reg. jur.*

IX.

9. The Minor is relieved againſt all ſorts of Acts or Deeds in which he is injured.

The Reſtitution of Minors is extended to all ſorts of Acts and Deeds without diſtinction. Thus, they are relieved not only when they are engaged to other perſons, as by a Loan, by a Sale, by a Partnerſhip, or by other ſorts of Covenants, if they have been wronged in them; but alſo when other perſons engage themſelves to them, if the Obligation made for their advantage was not ſuch as it ought to be, either for the Thing it ſelf that was due, or for the Security of the debt. Thus, they are reſtored againſt other Acts as well as Covenants: and they procure Sentences or Decrees of Courts of Juſtice, to which they have been Parties, to be reverſed, if their intereſt has not been ſufficiently defended. Thus, they are relieved, if they have innovated a Debt ſo as to make their condition worſe than it was, or if they have given an Acquittance for a Payment which was not made to their Guardian, but to themſelves, whether it be that they did not actually receive the Money, or that having received it, they have ſquandred it away fooliſhly. Thus, a Minor who had the choice either as Creditor, or as Debtor, to take or to give any one of two Things, will be relieved, if he has made a bad choice. And in general, Minors are reſtored againſt every thing which they may have done, or ſuffered, or omitted to do, from whence any prejudice may have happened to them[m].

[m] Ait prætor *geſtum eſſe dicetur.* Geſtum ſic accipimus, qualiter qualiter, ſive contractus ſit, ſive quidquid aliud contingit. Proinde ſi emit aliquid, ſi vendidit, ſi ſocietatem coiit: ſi mutuam pecuniam accepit & captus eſt, ei ſuccurretur. Sed etſi ei pecunia à debitore paterno ſoluta ſit, vel proprio, & hanc perdidit, dicendum eſt ei ſubveniri quaſi geſtum ſit cum eo. *l. 7. §. 1. ff. de minor. d. l. §. 1.* Sed & in judiciis ſubvenitur ſive dum agit, ſive dum convenitur captus ſit. *d. l. 7. §. 4.* Minus ex tutelæ judicio conſecuti, de ſuperfluo habere actionem ita poteſtis, ſi tempore judicii minores annis fuiſtis.

l. 1. *ſi adv. rem. jud.* Si minor viginti quinque annis ſine cauſa debitori acceptum tulerit. *l.* 27. §. 2. *eod.* Si damnoſam ſibi novationem fecerit. *d. l.* 27. §. 3. Etſi in optionis legato captus ſit, dum elegit deteriorem, vel ſi duas res promiſerit, illam aut illam & pretioſiorem dederit, debere ſubveniri. *d. l.* 7. §. 7. See concerning Loan, the ſeventeenth Article of this Section.

X.

10. He is relieved, if he has accepted an Inheritance, or Legacy, that is burdenſome, or refuſed one that is profitable.

If a Minor has renounced an Inheritance which might have been profitable to him, he will be allowed to retract his Renunciation, and to accept the Inheritance[n]. And if on the contrary he has accepted a Succeſſion that is burdenſome, he may be relieved from it, and allowed to renounce it[o], the Creditors being called that he may deliver up into their hands the goods belonging to the Succeſſion[p]. And he may likewiſe be relieved againſt the Renunciation of a Legacy[q], which would have been profitable to him, or againſt his acceptance of one, if it was burdenſome by reaſon of ſome charge, or ſome diſadvantageous condition.

[n] Minores viginti quinque annis, non tantùm in his quæ ex bonis propriis amiſerunt, verùm etiam ſi hæreditatem ſibi delatam non adierint, poſſe in integrum reſtitutionis auxilium poſtulare, jamdudum placuit. *l.* 1. *ſicut om. hæred.*

[o] Sed etſi hæreditatem minor adiit minùs lucroſam, ſuccurritur ei, ut ſe poſſit abſtinere. *l.* 7. §. 5. *ff. de minor.*

Sed tamen & puberibus minoribus viginti quinque annis, ſi temerè damnoſam hæreditatem parentis appetierint, ex generali edicto quod eſt de minoribus viginti quinque annis, ſuccurrit. Cùm & ſi extranei damnoſam hæreditatem adierint ex ea parte edicti in integrum eos reſtituit. *l.* 57. §. 1. *ff. de acq. vel om. hæred.* See the two following Articles.

[p] *V. Nov.* 119. *c.* 6.

[q] Etſi ſine dolo cujuſquam legatum repudiaverit. *l.* 7. §. 7. *ff. de minor.*

XI.

11. If the Succeſſion is profitable when the Minor enters to it, but becomes afterwards burdenſome by ſome accident.

If after that a Minor has accepted an Inheritance that is profitable, it happens afterwards that the Goods are diminiſhed by ſome Accident, as if a Houſe that is part of the Succeſſion periſhes by Fire, if ſome of the Lands or Tenements are carried off by an Inundation, or if there happen other Loſſes of the like nature; the Minor having done in that caſe nothing but what every other perſon would, and ought to have done, he cannot have relief therein, ſo as to recover and receive back from the Creditors to the ſaid Succeſſion that which he had paid them[r].

[r] Si locupleti hæres extitit, & ſubitò hæreditas lapſa ſit (puta prædia fuerunt quæ chaſmate perierunt, inſulæ exuſtæ ſunt, ſervi fugerunt aut deceſſerunt) Julianus quidem libro quadrageſimo ſexto ſic loquitur quaſi poſſit minor in integrum reſtitui. Marcellus autem apud Julianum notat, ceſſare in integrum reſtitutionem. Neque enim ætatis lubrico captus eſt, adeundo locupletem hæreditatem, & quod fato contingit, cuivis patrifamilias quamvis diligentiſſimo poſſit contingere. Sed hæc res afferre poteſt reſtitutionem minori, ſi adiit hæreditatem in qua res erant mortales, vel prædia urbana, æs autem alienum grave, quod non proſpexit poſſe evenire ut demoriantur mancipia, prædia ruant, vel quod non citò diſtraxerit hæc quæ multis caſibus obnoxia ſunt. *l.* 11. §. 5. *ff. de min.*

We have not put down in this Article, that the Minor who has accepted a Succeſſion of which the Goods are periſhable, may for this reaſon be relieved from it; for Tutors are obliged by the Ordinances *to ſell theſe ſorts of Goods, as has been ſaid in the thirteenth Article of the third Section of Tutors. And beſides, when a Minor accepts a Succeſſion, proviſion is made both for his ſecurity, and that of the Creditors to the Succeſſion, by the Inventory which the Tutor is obliged to make of the Goods belonging to the Succeſſion. For by the effect of this Inventory, the Minor is always in a condition to do Juſtice to the Creditors of the Succeſſion, and if afterwards it become burdenſome by loſſes of Goods of the kind mentioned in this Article, it is but juſt that his condition ſhould be the ſame with that of an Heir or Executor, who has the benefit of an Inventory, and who is never bound beyond the value of the Goods of the Inheritance, ſeeing the Inventory puts the Minor and the Creditors in the ſame condition. But if the Minor, or his Tutor, having imployed the Moveable Effects of the Succeſſion for diſcharging a part of the Debts, and having paid the reſt of the Debts with the Minor's own Money, that the Immoveable Goods of the Inheritance might be preſerved entire to him, it ſhould happen afterwards that the ſaid Immoveables ſhould be loſt by Fire, by Inundations, or by other Events; this loſs, which might happen to the moſt prudent perſons, would not give a right to the Minor to demand back from the Creditors that which he had given them in payment out of his own proper Money. For on his part, he had acquitted himſelf of a duty that was incumbent on him, and had acted the part of a good and prudent manager; and the Creditors on their part had received nothing but what was juſtly due to them, and of which they might have been paid out of the Goods of the Inheritance, which they might have got expoſed to Sale before they had periſhed, if the Minor had renounced the Inheritance, or having accepted it, if he had not prevented their diligence at Law by making the ſaid Payment with his own Money.*

XII.

12. If the Succeſſion which the Minor has renounced, is cleared and diſentangled by another Heir.

If a Minor having renounced a Succeſſion, he who ſucceeds in his place as Heir, whether by a Subſtitution, or as being Next of Kin, accepts of the Inheritance, and the Minor repenting afterwards of his having renounced, is deſirous to retract his Renunciation, and to accept the Succeſſion, he will be relieved, while things are ſtill entire. But if the Succeſſion being incumbred with Affairs and with Debts, had been cleared and diſentangled by the care of this other Heir, who had ſold Goods to pay off the Debts, and had ended all the Affairs; the Minor could not be relieved under theſe circumſtances, to deprive the ſaid Heir of the fruit of his labours[ſ].

[ſ] Scævola noſtra aiebat, ſi quis juvenili levitate ductus omiſerit, vel repudiaverit hæreditatem, vel bonorum poſſeſſionem: ſi quidem omnia in integro ſint, omnimodò audiendus eſt. Si verò jam diſtracta hæreditate, & negotiis finitis, ad paratam pecuniam laboribus ſubſtituti veniat, repellendus eſt. *l.* 24. §. 2. *ff. de minor.*

XIII.

13. The Reſtitution takes place, for the profits of which the Minor has been deprived. Minors are relieved not only when they ſuffer loſs, but alſo when they are deprived of ſome profit which they ought to have had [t]. Thus, for example, if a Minor that is Heir to a perſon who was engaged in a Partnerſhip, being outwitted by the other Partners, had renounced the ſhare he had in it, at the time that an Affair begun with the deceaſed was about to yield ſome profit, he would be relieved. Thus, Minors are reſtored if they have renounced Inheritances, or Legacies, as has been ſaid in the tenth Article.

[t] Hodie certo jure utimur ut & in lucro minoribus ſuccurratur. *l.* 7. §. 6. *ff. de minor.* Aut quod habuerunt amiſerunt, aut quod acquirere emolumentum potuerunt, omiſerunt. *l.* 44. *eod.* Placuit minoribus etiam in his ſuccurri quæ non acquiſierunt. *l.* 17. §. 3. *ff. de uſur.* See the tenth Article.

XIV.

14. The Minor is relieved from an Engagement that would run him into Law Suits, and Expences. Although the Engagement into which a Minor had entred might not occaſion him any preſent loſs in his Goods; he will nevertheleſs be relieved from it, if in other reſpects it ſhould be diſadvantageous to him. As if he had engaged in ſome Buſineſs, or ſome Commerce which would run him into Law-Suits, Expences, or other conſequences which it would have been his intereſt to have avoided and prevented: or if he had accepted an Inheritance incumbred with affairs that would have required a long and tedious diſcuſſion [u].

[u] Minoribus viginti quinque annis ſubvenitur per in integrum reſtitutionem, non ſolùm cum de bonis eorum aliquid minuitur, ſed etiam cùm interſit ipſorum litibus & ſumptibus non vexari. *l.* 6. *ff. de minor.*

Neque illud inquiritur ſolvendo ſit hæreditas, an non ſit: opinio enim, vel metus, vel color ejus qui noluit adire hæreditatem inſpicitur, non ſubſtantia hæreditatis: nec immeritò. Non enim præſcribi hæredi inſtituto debet, cur metuat hæreditatem adire, vel cur nolit: cùm variæ ſint hominum voluntates, quorumdam negotia timentium, quorumdam vexationem, quorumdam æris alieni cumulum, tametſi locuples videatur hæreditas. *l.* 4. *in f. ff. ad Senat. Trebell.*

Although this Law have relation to another ſubject, yet theſe words may be applied here.

See the tenth Article.

XV.

15. The Minor is relieved againſt a Compromiſe. If a Minor has referred ſome matter in diſpute to an Arbitration, he may be reſtored againſt it, even although he had been authorized by his Tutor to compromiſe the matter [x]. For although it be uſual for prudent and wiſe perſons to put their Rights into the hands of Arbitrators; yet the Minor may have been deceived either in the choice of the Arbitrators, or in referring to Arbitration a Right that is indiſputable. And although his Tutor had authorized him to conſent to the ſaid Reference, yet nevertheleſs he would be relieved againſt it [y].

[x] Minores ſi in judicem compromiſerunt, & tutore auctore ſtipulati ſint, integri reſtitutionem adverſus talem obligationem jure deſiderant. *l.* 34. §. 1. *ff. de minor.*

[y] See the nineteenth Article.

XVI.

16. Reſtitution againſt an Omiſſion. Minors are not only relieved againſt what they may have done to their own prejudice, but they may likewiſe have relief for having omitted that which they were obliged to do, in the caſes where this omiſſion may be repaired. Thus, for example, if the Father of a Minor having purchaſed an Eſtate, on condition that if the Price were not paid by a certain time, the Sale ſhould be made void; the Minor, Heir to his Father, omits to pay the Money within the time, and even although the Minor's Guardian have been ſummoned to pay the ſame, and that for default of payment the Seller has been reſtored to his Eſtate, whether it were with the conſent of the Guardian, or by a Sentence of the Judge, yet the Minor may be admitted to take poſſeſſion again of the Eſtate, he paying the Price [z]. Unleſs it ſhould happen that by reaſon of particular circumſtances the things were not any more in ſuch a condition as that the Minor ought to be received to make payment, as if the Sale had not been vacated till after a long time, and after many delays granted to him for paying the Price to the Seller; who having occaſion for the Money to acquit preſſing debts, had been obliged to ſell the Eſtate, to avoid a Seizure of his Goods which had been made by a Creditor.

[z] Minoribus in his quæ vel prætermiſerunt, vel ignoraverunt, innumeris auctoritatibus conſtat eſſe conſultum. *l. pen. C. de in int. reſt. min.*

Æmilius Larianus ab Obinio fundum Rutilianum lege commiſſoria emerat, data parte pecuniæ, ita ut ſi intra duos menſes ab emptione, reliqui pretii partem dimidiam non ſolviſſet, inemptus eſſet: item, ſi intra alios duos menſes reliquum pretium non numeràſſet, ſimiliter eſſet inemptus. Intra priores duos menſes Lariano defuncto, Rutiliana pupillaris ætatis ſucceſſerat, cujus tutores in ſolutione ceſſaverunt: venditor denunciationibus tutoribus ſæpe datis, poſt annum eandem poſſeſſionem Claudio Telemacho vendiderat. Pupilla in integrum reſtitui deſiderabat: victa tam apud prætorem, quàm apud præfectum urbi, provocaverat. Putabam bene judicatum,

dicatum, quod pater ejus, non ipſa contraxerat. Imperator autem motus eſt quod dies committendi in tempus pupillæ incidiſſet, eique effeciſſet ne pareretur legi venditionis. Dicebam, poſſe magis ea ratione reſtitui eam, quod venditor denunciando poſt diem quo placuerat eſſe commiſſum, & pretium petendo, receſſiſſe à lege ſua videretur. Non me moveri quòd dies poſtea tranſiſſet, non magis quàm ſi creditor pignus diſtraxiſſet poſt mortem debitoris die ſolutionis finita. Quia tamen lex commiſſoria diſplicebat ei, pronuntiavit in integrum reſtituendam. *l.* 38. *ff. de min.* See the eighteenth Article of the fourth Section of Covenants, and the twelfth Article of the twelfth Section of the Contract of Sale.

XVII.

17. *The Minor is relieved againſt an Obligation for borrowed Money, if he has not laid out the Money to his advantage.*

It is not enough to hinder the Reſtitution of a Minor, who is bound in a Bond for Money which he borrowed, that he has actually received the Sum that was lent him, but it is likewiſe neceſſary that he have laid it out to a profitable uſe. Thus, the Minor who having borrowed a Sum of Money, has made no good uſe of it, as if he has ſquandered it away fooliſhly, or even if he has lent it to a Debtor that is inſolvent, will be relieved upon his making over his Right to his Creditor [a]. For he who lends, ought to know the condition of his Debtor, whether he be a Major, or a Minor [b]: and knowing him to be a Minor, he ought to have taken care to ſee the Money which he lent him applied to a good and profitable uſe [c].

XVIII.

18. *Reſtitution between two Minors.*

If two Minors treating together, one of them is wronged by the fraud of the other, he ſhall be relieved in the ſame manner as he would be againſt a Major. And if the Minor who has cheated the other has recived of him any Money, he ſhall be bound to reſtore it, although the Money were not any more in his poſſeſſion, and even although he had reaped no benefit by it. And he will alſo be liable for the Coſts and Damages which his fraud may have occaſioned. And the Minor would be likewiſe bound in the ſame manner to a Major whom he had cheated [d]. But if one of two Minors is under an engagement to the other, to do or to give ſomething which turns to his prejudice, he ſhall likewiſe be relieved from it, although there had been no fraud on the part of the Minor to whom he is engaged. For his being wronged in his Minority, entitles him to a relief from his Engagement, without any regard to the quality of the perſon to whom he is obliged, and that even although his Reſtitution ſhould be to the loſs of the other Minor. Thus, for example, if a Minor had bound himſelf Surety for a Debtor of another Minor, he would be reſtored, although the Debtor proving inſolvent, the Minor who is Creditor ſhould loſe his debt. And if it ſhould happen that both the Minors were wronged, when there was no fraud on the part of the one or the other, he who is under an engagement to the other, the performance whereof would be prejudicial to him, will be relieved from it. Thus, for example, if a Minor having borrowed Money of another Minor, has no longer the ſaid Money in his poſſeſſion, and has not laid it out to any profitable account, he will be relieved from his Obligation to pay back the ſaid Money, although the other be a loſer thereby. For ſeeing in all the caſes of this nature, the Obligation of the Minor for a cauſe which has no ways turned to his advantage, ought to be annulled; the conſequence of the loſs which happens thereby to him who had treated with the Minor, does not alter his Right, nor validate his Obligation. But this loſs is conſidered either as a meer Accident, or as an Event which he who had treated with a Minor ought to blame himſelf for. Thus in general, when two Minors have had any dealings with one another, and when there is damage done, either to one of them alone, or to both of them, and it is not poſſible to reſtore both the one and the other to the condition in which they were before; the Judgment in relation to the Reſtitution ought to depend on the quality of the facts and circumſtances, and on the condition into which the Event ſhall have put the one and the other; to relieve him who ſhall be found to be under an Engagement, the execution whereof would do him ſuch a prejudice as might be a juſt ground for annulling the Engagement [e].

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[a] Si mutuam pecuniam accepit & captus eſt, ei ſuccurretur. *l.* 7. §. 1. *ff. de min.*

Si pecuniam quam mutuam minor accepit, diſſipavit, denegare debet proconſul creditori adverſus eum actionem. Quod ſi egenti minor crediderit, ulterius procedendum non eſt, quam ut jubeatur juvenis actionibus ſuis quas habet adverſus eum cui ipſe crediſſet, cedere creditori ſuo. *l.* 27. §. 1. *ff. de minor.*

[b] *See the ſeventh Article of the fifth Section of Covenants, and the ſecond Text before quoted upon the eighth Article.*

[c] Curioſus debet eſſe creditor quo vertatur. *l.* 3. §. 9. *in fine ff. de in rem verſo.*

[d] Militia ſupplet ætatem. *l.* 3. *C. ſi min. ſe maj. dix.* See the fifth and ſixth Articles.

[e] Item quæritur ſi minor adverſus minorem reſtitui deſiderat, an ſit audiendus. Et Pomponius

ſimpliciter ſcribit, non reſtituendum. Puto autem, inſpiciendum à prætore quis captus ſit. Proinde ſi ambo capti ſunt verbi gratia minor minori pecuniam dedit, & ille perdidit, melior eſt cauſa ſecundùm Pomponium, ejus qui accipit, & vel dilapidavit, vel perdidit. l. 11. §. 6. *ff. de min.*

Melior eſt cauſa conſumentis, niſi locupletior ex hoc inveniatur, litis conteſtatæ tempore. *l.* 34. *eod.*

XIX.

19. *The Authority of the Tutor does not hinder the Reſtitution; and the Minor is reſtored even againſt the Act of the Tutor.* Although the Minor have been authorized by his Tutor to paſs the Act or Deed againſt which he deſires to be relieved, yet the Reſtitution will nevertheleſs have its effect, even altho' the Tutor were Father of the Minor, and intruſted with the Management of the Son's Eſtate. And although it were an Act ſped in a Court of Juſtice, yet the Minor may be relieved againſt it, if there be juſt ground for it. And it would be the ſame thing in whatever the Tutor ſhall have tranſacted in that quality without the preſence of the Minor, if it appears that he is wronged by the act of the Tutor. For the Power of the Tutor is limited to what may be profitable for the Minor [f].

[f] Minoribus annis viginti quinque etiam in his quæ præſentibus tutoribus vel curatoribus, in judicio, vel extra judicium geſta fuerint, in integrum reſtitutionis auxilium ſupereſſe, ſi circumventi ſunt, placuit. *l.* 2. *C. ſi tut. vel cur. interv.*

Etiamſi patre, eodemque tutore auctore, pupillus captus probari poſſit, curatorem poſtea ei datum nomine ipſius in integrum reſtitutionem poſtulare non prohiberi. *l.* 29. *ff. de minor. V. l.* 3. §. 5. *&* 7. *eod.*

Tutor in re pupilli tunc domini loco habetur cùm tutelam adminiſtrat, non cùm pupillum ſpoliat. *l.* 7. §. 3. *ff. pro emptore.* See the twenty fourth Article of this Section, and the tenth Article of the ſecond Section of Tutors.

XX.

20. *Minority ends at five and twenty years compleat.* The Minority ends only at the laſt moment of the five and twentieth year compleat, to be reckoned from the moment of the birth of the perſon who ſues for relief. Thus the Minor may be reſtored againſt Acts which have preceded this laſt moment. And the years are computed in ſuch a manner, that the two days which are called Biſſextile, which according to our computation are the twenty eighth and twenty ninth of *February*, are only reckoned as one. For both the one and the other are of the ſame year, at what moment ſoever it may have begun [g].

[*Altho' by the* Roman *Law, the age of Majority was fixed at five and twenty years, and is ſtill ſo in many Countries; yet by the Laws of* Great Britain, *all perſons who have fulfilled one and twenty years, are reckoned to be Majors.* Coke 1. Inſt. fol. 79]

[g] Minorem autem viginti quinque annis natu, videndum, an etiam die natalis ſui adhuc dicimus, ante horam qua natus eſt, ut ſi captus ſit reſtituatur. Et cum nondum compleverit, ita erit dicendum, ut à momento in momentum tempus ſpectetur. Proinde & ſi Biſſexto natus eſt, ſive priore, ſive poſteriore die, Celſus ſcribit, nihil referre. Nam id biduum pro uno die habetur, & poſterior dies Kalendarum intercalatur. *l.* 3. §. 3. *ff. de min.*

The Origin of this word Biſſextile *is ſufficiently known, ſo that it is not neceſſary to explain it here. It ſufficeth to remark in this place, that as the day which is added in the Biſſextile, or Leap-year, is a day compoſed of the hours which the annual courſe of the Sun exceeds* 365 *days, and which make up one entire day every four years; ſo this day makes a part of thoſe four years. So that it ought to be reckoned in the number of the years neceſſary to attain Majority. And every Leap-year is counted only for one year, altho' it have a day more than others. From whence it follows, that he, for example, who is born on the twenty eighth of* February, *and whoſe five and twentieth year happens on a Leap-year, will remain Minor till the twenty ninth day, and the hour of his birth on that day.*

XXI.

21. *The Surety of a Minor.* The Reſtitution which vacates the Obligation of the Minor, does not vacate that of his Surety, unleſs it be that the Reſtitution of the Minor is founded on the Fraud of his adverſe party [h], or upon ſome other Vice of the Obligation, which ought to have this effect; purſuant to the Rules which have been explained in the Title of Sureties [i].

[h] Si ea quæ tibi vendidit poſſeſſiones, interpoſito decreto præſidis, ætatis tantummodo auxilio juvatur, non eſt dubium fidejuſſorem ex perſona ſua obnoxium eſſe contractui. Verùm ſi dolo malo apparuerit contractum interpoſitum eſſe, manifeſti juris eſt utrique perſonæ tam venditricis, quàm fidejuſſoris conſulendum eſſe. *l.* 2. *C. de fidejuſſ. min.* See the tenth Article of the firſt Section of Sureties.

[i] *See the ſecond, third, fourth, and fifth Articles of the fifth Section of the ſame Title of Sureties.*

XXII.

22. *Diſpenſation of Age.* When the conduct of Minors appears to be ſuch, that before they attain the years of Majority they are judged capable of the Adminiſtration of their own Affairs, the Law allows the ſame to be granted to them by Letters of Diſpenſation of Age, which Sons may obtain at the age of one and twenty years compleat, and Daughters after they are paſt eighteen. And this Diſpenſation of Age hath this effect, that they may take the management of their Eſtates into their own hands, and look after them themſelves, but they may not alienate them, nor mortgage them [k]. Thus the Diſpenſation of Age does not hinder the Reſtitution of Minors, except in what relates to this enjoyment of their Eſtates, and not as to Acts or Deeds which Minors may do afterwards to their prejudice, either by alienating or mortgaging their Eſtates, or otherwiſe. Neither hath the ſaid Diſpenſation of Age the effect

to make thoſe who have obtained it be reputed Majors, when the queſtion is touching the accompliſhment of a condition of a Legacy, of a Subſtitution, or other matter which ſhould have its effect by their Majority: unleſs the ſaid condition did mention the caſe of a Diſpenſation of Age[m].

[l] Omnes adoleſcentes qui honeſtate morum prædіti, paternam frugem, vel avorum patrimonia gubernare cupiunt, & ſuper hoc imperiali auxilio indigere cœperint, ita demum ætatis veniam impetrare audeant, cùm viceſimi anni metas impleverint. *l. 2. C. de his qui ven. ætat. impetr.*

Fœminas quoque quas morum honeſtas, mentiſque ſolertia commendat, cùm octavum & decimum annum egreſſæ fuerint, veniam ætatis impetrare ſancimus. *d. l. §. 1. V. l. 3. ff. de min.*

Eos qui veniam ætatis à principali clementia impetraverunt vel impetraverint, non ſolùm alienationem, ſed etiam hypothecam minimè poſſe, ſine decreti interpoſitione, rerum ſuarum immobilium facere jubemus: in quorum alienatione, vel hypotheca decretum illis neceſſarium eſt, qui necdum veniam ætatis meruerunt: ut ſimilis ſit in ea parte conditio minorum omnium, ſive petita ſit, ſive non ætatis venia. *l. 3. eod.*

Eos qui veniam ætatis à principali clementia impetraverunt, etiamſi minus idoneè rem ſuam adminiſtrare videantur, in integrum reſtitutionis auxilium impetrare non poſſe, manifeſtiſſimum eſt, ne hi, qui cum eis contrahunt, principali auctoritate circumſcripti eſſe videantur. *l. 1. eod.*

[m] *Si* quis aliquid dari vel fieri voluerit, & legitimæ ætatis fecerit mentionem, vel (ſi) abſolutè dixerit perfectæ ætatis, illam tantummodò ætatem intellectum eſſe videri volumus, quæ & xxv annorum curriculis completur, non quæ ab imperiali beneficio ſuppletur. Et præcipuè quidem in ſubſtitutionibus vel reſtitutionibus hoc intelligi ſancimus, nihilominus tamen & aliis: niſi ſpecialiter quiſquam addiderit, ex venia ætatis velle aliquid procedere. *l. ult. C. de his qui ven. æt. impetr.*

XXIII.

23. The Ratification of an Act after one is come of age, hinders the Reſtitution.

If an Act or deed executed by a Minor, were not to take effect till after he arrived at the years of Majority, he would nevertheleſs be reſtored againſt it, if he were wronged by it. But if after he is come of age, he executes it, or does any other act in approbation of it, he cannot afterwards be relieved againſt it. And in general, every act of approbation made by a Major of what he did in his Minority, makes the Reſtitution to ceaſe. Thus, he who during his Minority had approved of the Teſtament of his Father, which he might have procured to be annulled, and who might have been relieved againſt his ſaid approbation thereof, will not be admitted to oppoſe it; if after he has attained the years of Majority, he receives or demands a Legacy which his Father had left him by the ſaid Teſtament. Thus he who might have been relieved againſt a Bond which he had given in his Minority, after he is arrived at full age makes a payment to his Creditor, either of the whole, or of a part of the debt, cannot afterwards ſue for Reſtitution. But if a Minor who during his Minority had engaged himſelf in an Affair which was attended with a great many conſequences, and linked with many other Affairs, ſuch as an Inheritance, and who had a little time after he was become Major received payment of ſome debt owing to the ſaid Inheritance, whether it were to prevent the loſs of the debt, or to pay off with that Money another preſſing debt, and ſhould at the ſame time demand to be relieved; he might be excuſed, if the circumſtances ſhould ſhew that what he had done after he was come to Majority, was not ſo much an approbation of his taking upon him the quality of Heir, as an act neceſſary for the preſervation of the Goods of the Succeſſion[n].

[n] Si quis cum minore contraxerit, & contractus inciderit in tempus quo major efficitur: utrum initium ſpectamus, an finem. Et placet (ut & eſt conſtitutum) ſi quis major factus comprobaverit quod minor geſſerat, reſtitutionem ceſſare. *l. 3. §. 1. ff. de minor.*

Qui poſt vigeſimum quintum annum ætatis, ea quæ in minore ætate geſta ſunt, rata habuerint, fruſtra reſciſſionem eorum poſtulant. *l. 2. C. ſi maj. fact. rat. hab.*

Si filius emancipatus contra tabulas non accepta poſſeſſione, poſt inchoatam reſtitutionis quæſtionem, legatum ex teſtamento patris major viginti quinque annis petiiſſet, liti renuntiare videtur; cùm etſi bonorum poſſeſſionis tempus largiretur, electo judicio defuncti, repudiatum beneficium prætoris æſtimaretur. *l. 30. ff. de min.*

Si paterfamilias factus ſolverit partem debiti, ceſſabit Senatuſconſultum. *l. 7. §. ult. ff. de Senatuſc. Maced.*

Although this Law relates to another ſubject, yet it may be applied to this.

Scio illud aliquando incidiſſe, minor viginti quinque annis miſcuerat ſe paternæ hæreditati, majorque factus exegerat aliquid à debitoribus paternis: mox deſiderabat reſtitui in integrum, quo magis abſtineret paterna hæreditate: contradicebatur ei quaſi major factus comprobaſſet, quod minori ſibi placuit. Putavimus tamen reſtituendum in integrum, initio inſpecto. Item puto etſi alienam adiit hæreditatem. *l. 3. §. 2. ff. de minor.*

This Heir receiving in this manner a payment, would more effectually preſerve his Right to a Reſtitution, by entring a Proteſt by ſome Act.

XXIV.

24. The Immoveables of Minors cannot be alienated without neceſſity.

The Laws have not only provided for the Reſtitution of Minors, but they have moreover forbid the alienation of their Immoveable Goods. And altho' the Minor were not wronged in the Price of the Sale of his Lands or Tenements, yet he would be relieved againſt the Sale thereof, if it were for no other reaſon but becauſe it is more profitable for him to keep his Lands and Tenements,

ments than to have the Price thereof. Thus Minors are reſtored againſt all Sales of their Lands and Tenements, whether they have been ſold by themſelves, or by their Tutors, under colour of a Tranſaction, an Exchange, Barrenneſs of the Lands, or other pretext whatſoever[*]. But if it ſhould be neceſſary to ſell the Immoveables of a Minor, in order to pay off his debts, the ſame might be ſold after that the Sale thereof has been directed by a Court of Juſtice, and provided the formalities be therein obſerved which ſhall be explained in the following Article[p].

[*] Imperatoris Severi oratione prohibiti ſunt tutores & curatores prædia ruſtica, vel ſuburbana diſtrahere. *l.* 1. *ff. de reb. eor. qui ſub tut.*

Non ſolum per venditionem ruſtica prædia, vel ſuburbana pupilli vel adoleſcentes alienare prohibentur: ſed neque tranſactionis ratione, neque permutatione & multò magis donatione, vel alio quoquo modo ea transferre, ſine decreto à dominio ſuo poſſunt. *l.* 4. *C. de præd. & al. reb. min. ſ. d. n. al.*

Si fundus ſit ſterilis, vel ſaxoſus, vel peſtilens, videndum eſt an alienare eum non poſſit: & Imperator Antoninus, & D. Pater ejus in hæc verba reſcripſerunt, quod allegatis infructuoſum eſſe fundum quem vendere vultis, movere nos non poteſt. Cùm utique pro fructuum modo pretium inventurus ſit. *l.* 13. *ff. de reb. eor. qui ſub tut.*

Et domus, & cætera omnia immobilia in patrimonio minorum permaneant. *l.* 22. *C. de adm. tut.* See the Remark on the thirteenth Article of the third Section of Tutors.

[p] Ob æs alienum tantùm, cauſa cognita præſidiali decreto, prædium ruſticum minoris provinciale diſtrahi permittitur. *l.* 12. *C. de præd. & al. reb. min.* See the following Article, and the fourth Article of the ſecond Section of Tutors.

XXV.

25. Formalities obſerved in the Sale of the Immoveables of Minors. To juſtify the Alienation of any of the Lands or Tenements belonging to a Minor, it is required that the Sale be made for a neceſſary cauſe, ſuch as paying off debts that are preſſing, of which the payment cannot be delayed, and which cannot be acquitted any other way: that this Sale be directed by a Court of Juſtice, after it has been made appear, by producing an Inventory of the Goods of the Minor, and a ſtated Accompt given in by the Tutor, that there is neither Money, nor Moveables, nor Debts, nor Rents due, or to become due, nor other Effects that may ſuffice for the payment of the ſaid Debts; ſo that it is neceſſary to alienate ſome of the Lands, or Tenements. And it is likewiſe neceſſary to make choice for the ſaid Sale of the Lands, or Tenements, that are of leaſt value, and that no more of them be ſold than what is abſolutely neceſſary, that they be ſold by Cant or Auction, by Order of the Judge, after the delays which have been regulated, and the Advertiſements for giving notice to the parties concerned, and the Buyers, and laſtly that the Price of the Sale be applied to the payment of the Debts[q].

[q] Quod ſi fortè æs alienum tantum erit, ut ex rebus cæteris non poſſit exolvi, tunc prætor urbanus vir clariſſimus adeatur, qui pro ſua religione æſtimet quæ poſſint alienari, obligarive debeant, manente pupillo actione, ſi poſteà potuerit probari obreptum eſſe prætori. *l.* 1. §. 2. *ff. de reb. eor. qui ſub. tut.*

Non paſſim tutoribus, ſed obtentu æris alieni, permitti debuit venditio. Namque non eſſe viam eis diſtractionis tributam: & ideò prætori arbitrium hujus rei Senatus dedit, cujus officio imprimis hoc convenit, excutere an aliundè poſſit pecunia ad extenuandum æs alienum expediri. Quærere ergò debet, an pecuniam pupillus habeat: vel in numerato, vel in nominibus quæ conveniri poſſunt, vel in fructibus conditis, vel etiam redituum ſpe atque obventionum, item requirat, num aliæ res ſint præter prædia quæ diſtrahi poſſunt, ex quorum pretio æri alieno ſatisfieri poſſit. Si igitur deprehenderit, non poſſe aliundè exolvi quàm ex prædiorum diſtractione, tunc permittet diſtrahi, ſi modo urgeat creditor, aut uſurarum modus parendum æri alieno ſuadeat. *l.* 5. §. 9. *ff. de. reb. eor. qui ſub. tut.*

Jubere debet (prætor) edi rationes, itemque ſynopſim bonorum pupillarium. *d. l* 5. §. 11.

Etſi præſes provinciæ decrevit alienandum, vel obligandum pupilli ſuburbanum, vel ruſticum prædium, tamen actionem pupillo, ſi falſis allegationibus circumventam religionem ejus probare poſſit, Senatus reſervavit: quam exercere tu quoque non vetaberis. *l.* 5. *C. de præd. & al. reb. min.*

Manet actio pupillo ſi poſteà potuerit probari obreptum eſſe prætori. *l.* 5. §. 15. *ff. de reb. eor. qui ſub tut.*

The formalities for the Sale of the Goods of Minors, are the ſame with thoſe uſed in the Sale of Eſtates ſeized by Creditors, and ſold by Decree of a Court of Juſtice. And it is only a Decree of a Court of Juſtice in due form, that can ſufficiently ſecure him who purchaſes Lands or Tenements belonging to Minors.

XXVI.

26. A Sale made by the Tutor, without obſerving the formalities. If the Tutor being preſſed by the Creditors of the Minor, and in order to prevent or ſtop a Seizure of his Goods, ſells ſome of the Immoveables of the Eſtate without obſerving the formalities required, the Minor may be reſtored againſt the Sale[r].

[r] Tutor urgentibus creditoribus, rem pupillarem bonâ fide vendidit, denuntiante tamen matre emptoribus. Quæro, cum urgentibus creditoribus diſtracta ſit, nec de ſordibus tutoris meritò quippiam dici poteſt, an pupillus in integrum reſtitui poteſt? Reſpondi, cognita cauſa æſtimandum: nec idcircò, ſi juſtum ſit reſtitui, denegandum id auxilium, quod tutor delicto vacaret. *l.* 47. *ff. de minor.* See the nineteenth, the twenty fourth and twenty fifth Articles of this Section.

XVII.

27. Effect of the Reſciſſion againſt the Tutor, if there be ground for If the Alienation of the Lands or Tenements of a Minor be liable to be reſcinded, he will have his Action not only againſt his Tutor, if there be ground for it; but likewiſe againſt the *it, and alſo againſt the Poſſeſſor.*

Poſſeſſor of the Lands and Tenements that have been alienated[s].

[s] Manet actio pupillo, ſi poſteà poterit probari obreptum eſſe prætori. Sed videndum eſt, utrum in rem, aut in perſonam dabimus ei actionem. Et magis eſt ut in rem detur, non tantùm in perſonam adverſus tutores ſive curatores. *l.* 5. §. 15. *ff. de reb. eor. qui ſub. tut.* See the ſixth Article of the firſt Section.

XXVIII.

28. *Improvements made by the Purchaſer of Lands and Tenements belonging to a Minor.*

If he who has purchaſed Lands or Tenements belonging to a Minor, has laid out Money upon them in making conſiderable Improvements; as, for example, if having bought only the Ruins of an old Houſe, he has built a great Houſe upon it, and the Minor, having on his part juſt cauſe of Reſtitution, demands the Sale to be vacated; he cannot enter again to the poſſeſſion of the ſaid Eſtate, without refunding the Expences which have been laid out upon it, and of which he ought not to reap the benefit, to the prejudice of the Purchaſer: Eſpecially, if it ſhould appear that the Minor's Tutor or Guardian ought to anſwer for the ſaid Alienation, and that he were ſolvent. For in this caſe the Minor would recover his Coſts and Damages againſt his Tutor[t]. But if he enters again to the poſſeſſion of his Eſtate, reimburſing the Purchaſer for the Improvements he has made; the Expences which he has been at for things which ſerve only for pleaſure, will not be reckoned as Improvements. And the Purchaſer will only have liberty to take away ſuch of thoſe things deſtined for pleaſure, as may be removed without changing the condition in which the places were before the Alienation.

[t] Vendentibus curatoribus fundum, emptor extitit Lucius Titius, & ſex ferè annis poſſedit: & longe longeque rem meliorem fecit. Quæro, cùm ſint idonei curatores, an minor adverſus Titium emptorem in integrum reſtitui poſſit? Reſpondi, ex omnibus quæ proponerentur vix eſſe eum reſtituendum: niſi ſi maluerit omnes expenſas, quas bonâ fide emptor feciſſe approbaverit, ei præſtare: maximè cum ſit ei paratum promptum auxilium, curatoribus ejus idoneis conſtitutis. *l.* 39. §. 1. *ff. de minor.*

[u] Idem reſpondit, *ſumptibus voluptatis cauſa ab emptore factis, adoleſcentem onerandum non eſſe.* Quæ tamen ab eodem ædificio ita auferri poſſunt, ut in facie priſtina (id eſt quæ fuit ante venditionem) ædificium eſſe poſſit, emptori auferre permitti oportere. *l.* 32. §. 5. *ff. de admin. & per tut.* See the ſixteenth and following Articles of the tenth Section of the Contract of Sale; and the twelfth and ſubſequent Articles of the third Section of the Title of Dowries.

But if the Minor who might be reſtored to the poſſeſſion of his Eſtate, upon his refunding the Expences laid out upon thoſe Improvements, ſhould not be able to refund the ſaid Expences, and if the Eſtate had not been ſold for its juſt value; it would be reaſonable that the Purchaſer, whoſe Title is liable to be vacated by the Reſciſſion, ſhould pay to the Minor the Supplement of the Price which he ought to have paid at the time of the purchaſe.

XXIX.

29. *Reſtitution of a Purchaſe made by a Minor.*

Altho' the Minor by a purchaſe of Lands makes his condition better, yet nevertheleſs if he buys them at too dear a rate; or if he buys Lands that will be chargeable to him, he will be relieved, whether he have paid the Price with his own Money, or whether he have borrowed it for that purpoſe. And both in the one and the other caſe, he will recover the Intereſt of the Price, from the day that he paid it, he giving back to the Seller the value of the Fruits of which he has reaped the advantage[x]. Unleſs it ſhould appear to be juſt and equitable to compenſate the Fruits with the Intereſt.

[x] Prædium quoque, ſi ex ea pecunia (quam mutuam accepit) pluris quam oporteret emit. Ita temperanda res erit, ut jubeatur venditor reddito pretio recuperare prædium. Ita ut ſine alterius damno, etiam creditor à juvene ſuum conſequatur. Ex quo ſcilicet ſimul intelligimus quid obſervari oporteat, ſi ſua pecunia pluris quam oportet emerit. Ut tamen hoc, & ſuperiore caſu venditor qui pretium reddidit, etiam uſuras, quas ex ea pecunia percepit, aut percipere potuit, reddat, & fructus quibus locupletior factus eſt juvenis, recipiat. *l.* 27. §. 1. *ff. de minor.*

SECT. III.

Of the Reſciſſion of Contracts in favour of Majors.

The ſubject matter of this Section.

There are Cauſes of Reſciſſions in favour of Majors, which are common to all perſons of both ſexes; as if one has been deceived by ſome trick, or forced by ſome violence: and there are other Cauſes which are peculiar to ſome perſons. Thus, by our uſage, married Women, altho' of Age, cannot oblige themſelves without the authority of their Huſbands; and by the Cuſtoms of ſome Provinces they cannot bind themſelves even altho' they have their Huſband's conſent. Thus Fathers, whoſe Children, altho' Majors, have borrowed Money for their Debauches, may procure their Obligations to be annulled, if it appear that the Obligations have this vice in them; and the Sons themſelves may have relief in this caſe, according to the circumſtances. As to what concerns the Obligations of married Women, that has been explained in the Remarks on the firſt Article of the firſt Section of the Title of Perſons; and what relates to the Obligations of Sons, has been treated of in the fourth Section of the Title of the Loan of Money, and of Uſury; and here we ſhall ſpeak only of the other Reſciſſions which are common to all Majors.

Seeing the Reſciſſions which Majors may obtain, are founded on the Vices which happen to be in the Acts or Deeds which they complain of, ſuch as thoſe which have been treated of in the Title of the Vices of Covenants; we ſhall not therefore repeat here what has been ſaid of this matter in that Title: It will ſuffice if we acquaint the Reader, that the Rules explained in that Title ought to be applied to Reſciſſions in favour of Majors, according as the Rules may be applicable to them. And that it is chiefly from the ſaid Rules that we are to draw all the Principles relating to this matter; ſo that there remains but few Rules concerning it to be ſet down in this Title.

The CONTENTS.

1. *The Vices of Covenants are the cauſes of Reſciſſion in favour of Majors.*
2. *Fraud between Co-heirs.*
3. *Reſciſſion of a Partition.*
4. *Reſciſſion of a Sale, becauſe of damage ſuſtained in the Price.*
5. *Reſtitution on the account of abſence, or for ſome other juſt cauſe.*

I.

1. The Vices of Covenants are the cauſes of Reſciſſion in favour of Majors.

THE Vices of Covenants are ſo many Cauſes of Reſciſſion, which Majors may make uſe of for obtaining relief againſt Acts or Deeds which have any one of the ſaid Vices in them, provided it be ſuch as may be a ſufficient ground to found the Reſciſſion upon. Thus a Major who has entred into an Obligation, being a Madman, or a declared Prodigal, may be relieved. Thus a Major who has engaged himſelf thro' ſome error or miſtake, or by the fraud and tricking of the Party with whom he had to do, or by reaſon of ſome violence which may have forced him to give his conſent, will procure thoſe Acts or Deeds to be repealed, in which any of the ſaid Cauſes ſhall be found, purſuant to the Rules which have been explained in the Title of the Vices of Covenants[a].

II.

2. Fraud between Co-heirs.

If in the caſe of two Co-heirs, one of them, being ignorant of ſome Titles, or Effects of the Inheritance, which were known to the other, has been engaged by his Co-heir to treat with him under this ignorance, without having juſtice done him, as to his ſhare of the Goods which the Co-heir concealed from him; he will procure that which has been done in this fraudulent manner to be annulled, and will recover ſuch Coſts and Damages as the quality of the fact ſhall deſerve; even altho' there had been a Tranſaction, if it be evident that this Fraud gave occaſion thereto[b].

III.

3. Reſciſſion of a Partition.

If in a Partition among Majors there be any conſiderable wrong done, altho' there be neither Fraud, nor Knavery on the part of any of the perſons concerned in the Partition, yet he who is aggrieved may demand a new Partition[c].

IV.

4. Reſciſſion of a Sale, becauſe of damage ſuſtained in the Price.

Majors may alſo procure Contracts of Sale to be reſcinded, if they have ſold any Lands or Tenements for leſs than the half of their juſt value, purſuant to the Rules which have been explained in their proper place[d].

V.

5. Reſtitution on the account of abſence, or for ſome other juſt cauſe.

Majors not only procure Acts or Deeds to be reſcinded, to which they have been parties, when there is ſufficient ground for reſcinding them; but they likewiſe obtain Reparation of what has been done without their knowledge, if they have received any prejudice thereby, and if they have juſt cauſe for demanding the ſame to be annulled. Thus, a Major who has been abſent, is relieved againſt a Preſcription, purſuant to the Rule that has been explained in its place. Thus, an abſent perſon who has been condemned for Contumacy on the head of ſome Accuſation, is admitted to make his defence when he appears. And in general, Majors may obtain a redreſs of the wrong which they may have ſuffered, when they were not in a condition to exerciſe their Rights, or to defend themſelves againſt any thing attempted to their prejudice. And whether their demand be to recover the poſſeſſion of any Goods uſurped from them, or to obtain reparation of ſome Loſs, or even to recover ſome Right which had accrued to them, ſuch as a Legacy, or an Inheritance, and in all other caſes, proviſion will be made therein according as their pretenſion is well or ill grounded, and according as Equity may require in the circumſtances of the caſe: obſerving likewiſe this againſt Majors, that they be not allowed to reap any benefit either by their abſence, or by the other cauſes which procure them Reſtitution to their Right, ſo as to cauſe any prejudice thereby to other perſons[e].

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[a] *See the whole Title of the Vices of Covenants, and the Remark there made on Uſurious Contracts, at the end of the Preamble.*

[b] Qui per fallaciam cohæredis, ignorans univerſa quæ in vero erant inſtrumentum tranſactionis, ſine Aquiliana ſtipulatione, interpoſuit, non tam paciſcitur, quam decipitur. *l. 9. §. 2. ff. de tranſact.*

[c] Majoribus etiam per fraudem, vel dolum, vel perperam ſine judicio factis diviſionibus, ſolet ſubveniri. Quia in bonæ fidei judiciis, quod inæqualiter factum eſſe conſtiterit, in melius reformabitur. *l. 3. C. comm. utr. jud. tam fam. erc. q. c. d.* See the ninth Article of the ſixth Section of Covenants.

According to our Uſage, the party aggrieved may demand a new Partition, if the wrong done him be between a fourth and a third part.

[d] *See the ninth Section of the Contract of Sale.*

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[e] Hujus Edicti cauſam nemo non juſtiſſimam eſſe confitebitur. Læſum enim jus per id tempus quo quis *reipublica operam dabat, vel adverſo caſu laborabat*, corrigitur. Nec non adverſus eos ſuccurritur ne vel obſit, vel proſit quod evenit. *l.* 1. *ff. ex quib. cauſ. maj.*

Item ſi qua alia mihi juſta cauſa eſſe videbitur, in integrum reſtituam, quod ejus per leges, plebiſcita, ſenatuſconſulta, Edicta, decreta principum, licebit. *d. l. in f.*

Hæc clauſula (ſi qua alia mihi juſta cauſa videbitur) Edicto inſerta eſt neceſſario. Multi enim caſus evenire potuerunt, qui deferrent reſtitutionis auxilium; nec ſingulatim enumerari potuerunt. Ut quoties æquitas reſtitutionem ſuggerit, ad hanc clauſulam erit deſcendendum. *l.* 26. §. 9. *eod.*

Et ſive quid amiſerit, vel lucratus non ſit, reſtitutio facienda eſt: etiam ſi non ex bonis quid amiſſum ſit. *l.* 27. *eod.*

In contractibus qui bonæ fidei ſunt, etiam majoribus, officio judicis causâ cognitâ, publica jura ſubveniunt. *l.* 3. *C. quib. ex cauſ. maj. in int. reſt.*

Si propter officium legationis ad me bona fide factæ, abſens & indefenſus condemnatus es, inſtaurationem judicii jure deſideras: ut ex integro defenſionibus tuis utaris. *l.* 1. *eod.*

Abſentia ejus qui reipublicæ causâ abeſt, neque ei, neque alii damnoſa eſſe debet. *l.* 140. *ff. de reg. jur.*

Quemadmodum ſuccurrit (prætor) ſuprà ſcriptis perſonis, ne capiantur: ita & adverſus ipſas ſuccurrit, ne capiant. *l.* 21. *ff. ex quib. cauſ. maj.*

See the ſixth Article of the fifth Section of Poſſeſſion.

We have not put down in this Article, that which relates to the effect of abſence in Majors, according to the Uſage of the Roman *Law, with reſpect to Sentences pronounced againſt them. For ſeeing by our Uſage abſent perſons may be cited, in the manner regulated by the Ordinances, and that they have the remedy of appealing from Sentences pronounced in their abſence, after they have been cited in due form, our Uſage does not allow of Reſtitution againſt Sentences.*

THE CIVIL LAW IN ITS NATURAL ORDER.

PART II. *Of SUCCESSIONS.*

The PREFACE.

Wherein are contained divers Remarks, and many Principles of great Importance in the matters treated of in this Second Part.

I.

The reaſons for diſtinguiſhing Succeſſions from Engagements.

WE have diſtinguiſhed the matters belonging to Succeſſions from thoſe that relate to Engagements, which have been examined in the Firſt Part. For although Succeſſions contain ſome kinds of Engagements, ſuch as thoſe of the Heir or Executor to the Creditors and Legataries of the perſon to whom he ſucceeds, and thoſe of Co-Heirs and Co-Executors to one another; yet it was not proper to conſider Succeſſions under this view of the Engagements which they may happen to contain, becauſe theſe kinds of Engagements are nowiſe eſſential, but only acceſſory to Succeſſions: And it may ſometimes happen that a Succeſſion contains no manner of Engagement, as in the caſe where there is one only Heir or Executor who ſucceeds to an Inheritance free from all manner of Debt, Legacies, and other burdens; whereas in the matters contained in the Firſt Part, ſuch as Covenants, Tutorſhips, Guardianſhips, the Adminiſtration of the Affairs of Communities, and all the others, the Engagement is eſſential to their Nature: And all theſe matters are of themſelves, and in their own nature, ſo many Ties and Engagements which God has made uſe of for ſupporting and maintaining the Society of Mankind in all places; as it is the nature of Succeſſions to preſerve and continue it to all Ages*. So that it was neceſſary to diſtinguiſh Succeſſions from all thoſe other matters, as being of a different Order, which requires a ſeparate Rank.

II.

The Neceſſity of Succeſſions, and in what manner they have been regulated by the Laws.

The nature of Succeſſions, and their uſe.

Succeſſions are the ways by which the Goods, the Rights, and the Charges of thoſe who die, paſs to other perſons who ſucceed in their places, and repreſent them.

It appears evidently enough, that Succeſſions are Natural in the Order of the Society of Mankind, and that it was neceſſary to tranſmit the uſe of the Goods of the Generation which paſſes, to that which ſucceeds. But it does not appear ſo clearly, in what manner this change ought to be regulated, and what is the Natural Order of it; that is, whether this Order is naturally ſuch, that the Goods of thoſe who die, ought to paſs intirely to their Children, or in default of Children, to their other near Relations; or whether the dying perſons may diſpoſe of their Goods in whole, or in part, in favour of other perſons who are ſtrangers to them: or even whether there might not be ſome other way of tranſmitting the Goods of one Generation to another ſucceſſively.

Three ways of tranſmitting the uſe of the Goods of one Generation to the other.

If we ſuppoſe that in the beginning of the Society of Mankind, the firſt who entred into that ſtate, did take into their conſideration the ways of tranſmitting the uſe of the Goods of one Generation to another; there were three principal ways which they could not fail to have in their view, among others which might probably occur to their thoughts in ſuch a deliberation.

The firſt way is, by conſidering all the Goods as if they ought to be in common to all men, no man having a right to any thing but what he ſhould conſume for his own uſe. And upon this ſuppoſition, in whatever manner this total Community of Goods among all men ſhould be regulated, there would neither be Heirs nor Succeſſions, in the ſame manner as it is in Regular Communities, where all the Goods of the Community belong to the Body, and none of the particular Members have a right of property in any part of them.

Succeſſions Legal and Teſtamentary.

The two other ways, ſuppoſe that all the Goods do not belong in common to all Men, but that every one may have ſomething that is properly his own, excluſive of others. One of theſe ways is that of Legal Succeſſions, which are ſo called, becauſe they tranſmit all the Goods of thoſe who die without having diſpoſed of them, to the perſons whom the Laws call to the Succeſſion by virtue of their Proximity of Blood, according to their Order of Deſcendants, Aſcendants, and Collaterals. The other is that of Teſtamentary Succeſſions, which tranſmit the Goods of thoſe who die, to the perſons whom the deceaſed have called to the Succeſſion by a Teſtament.

Of theſe three ways, the firſt which would render all things common to all men, would be ſo full of inconveniencies, that we ſee plainly that it is impoſſible. For the love of Juſtice and Equity not being common to all men, nor the only Principle of the conduct of each particular perſon; the Univerſal Community of all Goods would be a Syſtem altogether impracticable, among ſo great a number of Partners, ſo full of Self-Love, and ſo much wedded to their own particular Intereſts. And it would be equally unjuſt, as it is impoſſible that all things ſhould be always in common to the good and to the bad, to thoſe who labour and to thoſe who ſit idle and do nothing; that thoſe perſons who know to make a right uſe, and a juſt diſtribution of the Goods, ſhould be on the ſame level with thoſe who have neither the fidelity neceſſary to preſerve the Goods to the Society, nor the prudence that is requiſite for the right diſpoſal of them, and who would do nothing but conſume and waſte them. So that the ſtate of an Univerſal Community, which might have been equitable and uſeful among men perfectly juſt, living in a ſtate of innocence, and free from paſſions, cannot but be unjuſt, chimerical, and full of inconveniencies among men, ſuch as we are now a days. And we ought not to draw any conſequence from the Societies which we ſee among the particular perſons who live in Regular Communities, to an Univerſal Society of a whole Nation, of a whole People, or even only of a Town, or other Corporation. For that which preſerves thoſe Regular Communities, is, that they are not made up of many Families, who are to be maintained according to their condition, and according to the number of perſons in each Family; but conſiſt only of ſingle Perſons, who are ſubject to their Superiors, having no ſhare in the administration of the Goods and Affairs of the Society, and who are allowed no other uſe either of the ſaid Goods, or even of their own Liberty, but what is preſcribed by the Rules of the Religious Order which they profeſs. This is what cannot be put in practice in a Body that is compoſed of many Families.

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* *See the fourteenth Chapter of the Treatiſe of Laws,* Numb. 2.

III.

Of the two ſorts of Succeſſions, which are called Legal, or Teſtamentary.

It is not therefore without reaſon that no Government, where there has been any thing like Order, has ever put in practice the Univerſal Community of all Things among all Men; but they have obſerved the two other ways of Succeſſion, to wit, the *Legal*, which is likewiſe called the Succeſſion of Inteſtates, becauſe it takes place when any dies without making a Teſtament, and the *Teſtamentary* Succeſſion. And the uſe of theſe two ways of Succeſſion has been differently intermixed. For ſeeing both the one and the other have their foundation in the Order of Society, they have been both received in all places. And ſince they reciprocally derogate one from another, they have been reconciled divers ways, as ſhall be explained hereafter.

IV.

The Order of Legal Succeſſions.

Three kinds of Heirs, Deſcendants, Aſcendants, Collaterals.

There are three Orders of Legal Succeſſions, according to three Orders or Degrees of Perſons whom the Laws call to ſucceed. The firſt is the Order of Children, and other Deſcendants: The ſecond is that of Fathers and Mothers, and other Aſcendants: And the third is of Brothers and Siſters, and other near Relations, who are called Collaterals; becauſe that whereas the Deſcendants and Aſcendants are in one and the ſame Line which unites them ſucceſſively one to the other; the Brothers and all the other more remote Relations are among themſelves at the ſide one of another, every one in his own Line under the Aſcendants which are common to them.

Firſt Order. Succeſſion of Children to Parents.

The firſt of theſe three Orders, which calls the Children to the Succeſſion of their Parents, is altogether Natural, as being a conſequence of the Order which God has eſtabliſhed, by giving Life to Men by the birth which they derive from their Parents. For ſince Life is a Gift which renders the uſe of Temporal Goods neceſſary, and that God gives them as a ſecond benefit, which is a conſequence of the former; it is natural that the Goods being an Acceſſory to Life, thoſe which belong to the Parents ſhould paſs to their Children, as a benefit which ought to accompany that of Life. And this Rule, which is part of the Divine Law, as well as of Humane Laws, is ſo juſt and ſo natural, that it is engraven on the Minds of all Mankind[a].

Second Order, Succeſſion of Parents to Children.

The ſecond Order which calls the Aſcendants to the Succeſſion of the Deſcendants, is not natural, as the firſt is which makes the Deſcendants to ſucceed to the Aſcendants. For as it is conformable to the Order of Nature, that the Children ſhould ſurvive their Parents; ſo it is contrary to the ſaid Order, that the Parents ſhould outlive their Children. But when that caſe does happen, it would be againſt Natural Equity, that the Parents ſhould be deprived of the ſorrowful comfort of ſucceeding to their Children, and that they ſhould ſuffer at the ſame time both the loſs of their Perſons, and likewiſe that of their Goods[b]. And the ſame reaſon which unites to the Benefit of Life that of the Temporal Goods, and which makes the Children to receive both the one and the other from their Parents, demands likewiſe, that when the Aſcendants ſurvive the Deſcendants, who die without Children, they ſhould not be deprived of their Goods; ſince the Children and the other Deſcendants holding their Life of their Parents, the Goods of the Children are deſtined by Nature for ſupplying the neceſſities of the Life of thoſe to whom they owe their own. So that in one ſenſe, the Succeſſion of Aſcendants to Deſcendants is agreeable to the Law of Nature, as well as that of Deſcendants to Aſcendants: And both the one and the other are a conſequence of the ſtrict Union that is between theſe Perſons, and of the mutual Duties which God has eſtabliſhed between them. For one of the principal effects of that Union, and of thoſe Duties, is the reciprocal uſe which Nature gives to the Children, of the Goods of their Parents, and to the Parents of the Goods of their Children, making them as it were common to both. This is the reaſon why the Laws of the *Romans*, even before they knew any thing of the Chriſtian Religion, conſidered the Goods of Parents as the property of their Children, and the Goods of the Children as belonging to their Parents in the ſame manner; and looked upon their mutual Succeſſions to one another, to be not ſo much an Inheritance which brought them any new Right, as a continuation of that Right which ſeemed to make them Maſters of the Goods of one another [c].

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[a] *See Chap.* 3. *of the Treatiſe of Laws*, N°. 3.
He that ſhall come forth out of thine own bowels, ſhall be thine heir. *Gen.* xv. 4. And if children, then heirs. *Rom.* viii. 17. A good man leaveth an inheritance to his children's children. *Prov.* xiii. 22. Ratio naturalis, quaſi lex quædam tacita, liberis parentum hæreditatem addicit, velut ad debitam ſucceſſionem eos vocando. Propter quod & in jure civili ſuorum hæredum nomen eis indictum eſt. Ac ne judicio quidem parentis, niſi meritis de cauſis, ſummoveri ab ea ſucceſſione poſſunt. *l.* 7. *ff. de bon. dam.*

Remark on the Succeſſion of Aſcendants.

It is to be remarked touching this natural Equity, which calls the Aſcendants to the Succeſſion of the Deſcendants, and which was obſerved in the *Roman* Law, that upon another Principle of Equity, the Cuſtoms of *France* have eſtabliſhed another Rule, which is, that Goods acquired by Deſcent from our Anceſtors, do not aſcend; that is to ſay, that the Father, and the other Aſcendants on the Father's ſide, do not ſucceed to the Goods of their Deſcendants which they have inherited on the Mother's ſide, and which are called, Goods of Maternal Inheritance: And likewiſe, that Mothers, and the other Aſcendants on the Mother's ſide, do not ſucceed to the Goods of their Deſcendants which came to them by the Father's ſide, and which are termed Goods of Paternal Inheritance. This Rule is a conſequence of another Rule of the ſame Cuſtoms, which directs the Goods of Paternal Inheritance to be appropriated to the neareſt Heirs of Blood on the Father's ſide: and the Goods of Maternal Inheritance to be appropriated in the ſame manner to the neareſt Heirs of Blood on the Mother's ſide. And this Rule, which is commonly expreſſed by theſe words, *paterna paternis, materna maternis*, hath its Juſtice founded on the ſame Natural Law which appropriates the Goods to the neareſt Relations. For this approbation of the Goods to the Heirs of Blood, does naturally reſpect thoſe who are of the Family from whence the Goods come. And this juſtifies the Rule, which deprives the Aſcendants of the property of the Goods of Inheritance belonging to a Deſcendant, which came to him from another Stock, to the end that the Goods come from one Family may not paſs to another, as it would happen if the Paternal Goods ſhould aſcend to the Maternal Aſcendants, or the Maternal Goods to the Paternal Aſcendants, who would tranſmit them to their Heirs, and by that means take them away from the Family from whence they came. But theſe Cuſtoms leave to the Aſcendants the Moveables and Acquiſitions of their Deſcendants, and the Goods of Inheritance which deſcended from their Stock, together with the Uſufruct of the Goods of Inheritance come from the other Stock. Which has this double effect, that it preſerves the Goods of Inheritance in the ſame Families from which they came, and likewiſe provides what ſeems to be equitable in favour of the Aſcendants.

[*It is a Maxim in the* Engliſh *Law, That Inheritance may lineally deſcend, but cannot aſcend. By which Maxim, the lineal Aſcent in the Right Line is prohibited, but not in the Collateral. For if there be a Father and a Son, and the Father have a Brother that is Uncle to the Son, and the Son purchaſe Land in Fee Simple, and die without Iſſue, leaving behind him a Father and an Uncle, the Uncle ſhall have the Land as Heir to the Son, and not the Father, altho' the Father is nearer of Blood. Yet if the Son in this caſe die without Iſſue, and his Uncle enter into the Land as Heir to the Son, (as by Law he ought) and after the Uncle dieth without Iſſue living, the Father ſhall have the Land, as Heir to the Uncle, and not as Heir to his Son; for that he cometh to the Land by Collateral Deſcent,*

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[b] Non ſic parentibus liberorum, ut liberis parentium debetur hæreditas. Parentes ad bona liberorum ratio miſerationis admittit: liberos naturæ ſimul & parentium commune votum. *l.* 7. §. 1. *ff. ſi tab. teſt. nul. ext. unde lib.* Ne & filiæ amiſſæ & pecuniæ damnum ſentiret. *l.* 6. *ff. de jure dot.* Nam etſi parentibus non debetur filiorum hæreditas, propter votum parentum, & naturalem erga filios charitatem, turbato tamen ordine mortalitatis, non minus parentibus, quam liberis, piè relinqui debet. *l.* 15. *ff. de inoff. teſt.*

[c] In ſuis hæredibus evidentius apparet continuationem dominii eò rem perducere, ut nulla videatur hæreditas fuiſſe, quaſi olim hi domini eſſent, *qui etiam vivo patre quodammodo domini exiſtimantur.* l. 11. ff. de lib. & poſt.

Largius tempus *parentibus liberiſque* petendæ bonorum poſſeſſionis, tribuitur: in honorem ſanguinis videlicet, quia artandi non erant, *qui penè ad propria bona veniunt.* l. 1. §. 12. ff. de Succeſſ. ed.

ſcent, and not by Lineal Aſcent. Littleton, Book 1. Sect. 3.

The Law of England *agrees with the Cuſtoms of* France, *in preſerving Eſtates in the Families from whence they come. For if Lands deſcend to the Son, of the part of the Father, and he entreth, and afterwards dies without Iſſue, this Land ſhall deſcend to the Heirs on the part of the Father, and not to the Heirs on the part of the Mother. And in like manner, when Lands deſcend of the part of the Mother, the Heirs on the part of the Father ſhall never inherit.* Littleton, Book 1. Sect. 4.]

The third Order, Succeſſion of Collaterals.

The third Order of Legal Succeſſions, which is that of *Collaterals*, is founded on the ſame Natural Equity, which calls the Deſcendants and Aſcendants to Succeſſions. For the Goods which ought to paſs from the deceaſed to his Deſcendants, or in default of them to his Aſcendants, go naturally to thoſe who repreſent the ſaid Aſcendants, and who derive from them their Origin, in common with the deceaſed. Thus, we may ſay in general of theſe three ſorts of Succeſſions, of Deſcendants, Aſcendants, and Collaterals, that all the perſons who are united by Birth in one of theſe three Orders, are conſidered as one Family, to which God had appropriated the Goods of all the particular perſons whereof it conſiſts, in order to make them to paſs from one to the other ſucceſſively, according to the degree of their nearneſs of kin. And in fine, this Succeſſion by Proximity, is ſo natural, that it has been confirmed by the Divine Law[d].

To this we may ſubjoin, as another Principle of the Equity of Succeſſion by proximity of blood, which is a conſequence of the former, that although there were no other Law for Succeſſions, beſides the will of thoſe who diſpoſe of their Goods, it would be juſt and natural, that every one ſhould call his neareſt Relations to ſucceed to his Eſtate, unleſs he ſhould have particular reaſons that might oblige him to diſpoſe of it otherwiſe. For the union which is formed by Birth, between Aſcendants, Deſcendants, and Collaterals, being the firſt Tie which God inſtituted among Men, to unite them together in Society, and to engage them to the duties of mutual Love; every one, in the choice of an Heir, ought to have regard to thoſe perſons, to whom God, by this firſt Tie, has united him more ſtrictly than to others, and not to deprive them of his Goods, without a juſt cauſe. Thus we may ſay that the Legal Succeſſions have this in their favour, that they are not only conformable to the Order and Inſtitution of Nature, which calls to the Succeſſion the neareſt Relations, by the Right of Blood, and by appropriating the Goods to the Families; but they are likewiſe moſt conſiſtent with the Love and Affection, which thoſe who diſpoſe of their Goods ought to have for their Relations, unleſs they have rendred themſelves unworthy of the Succeſſion, or that ſome other reaſonable motives may have induced the Teſtators to diſpoſe of their Eſtates another way. It is upon this Equity, that the Cuſtoms of *France* are founded, which appropriate Eſtates unto Families, in ſuch a manner, that they do not permit perſons to diſpoſe of all their Goods to the prejudice of the Collateral Relations, even the moſt remote, as ſhall be obſerved hereafter.

[*It may not be amiſs to take notice here of the difference between the* Engliſh *and* Roman *Law, in the Succeſſion of Collaterals. By the* Roman *Law, all of the Collateral Line ſucceed according to their proximity, without any other diſtinction, except in the Right of Repreſentation allowed to the Children of Brothers and Siſters. But by the Law of* England, *the Collateral Line is divided; the direct Line is, into Deſcendants, and Aſcendants. The Deſcendants in the Collateral Line, are the Brothers and Siſters, together with their Iſſue; the Aſcendants are the Uncles and Aunts, Great Uncle and Great Aunt, and ſo upwards. And in this Line none of the Aſcendants are admitted to the Succeſſion, till all the Deſcendants, that is, the Brothers and Siſters, with their Iſſue, are quite extinct.* Bract. lib. 2. c. 30. §. 1. *Hales's* Hiſtory of the Common Law of *England. Another difference there is, for by the* Roman *Law, the Brothers, and others related by the half blood, are admitted to the Succeſſion after thoſe of the whole blood in the ſame degree. As for inſtance, when one dies without leaving any Iſſue of his own body, and having none of his Aſcendants alive, his Brothers and Siſters of the whole blood, with their Iſſue, ſucceed to him in the firſt place; and next to them are admitted the Brothers and Siſters of the half Blood, with their Deſcendants. But in* England, *thoſe of the half blood, that is, thoſe who have only one Parent in common, are never admitted in Succeſſions to Lands of Inheritance, tho' in Perſonal Eſtates it is otherwiſe. Coke,* 3 Rep. *Ratclife's* Caſe, fol. 40. 41. *Hales's* Hiſtory of the Common Law, pag. 236. Stat. 22. & 23. Car. 2. cap. 10.]

V.

The Origin of Teſtamentary Succeſſions.

Uſe of Teſtaments.

Teſtamentary Succeſſions have likewiſe their foundation in the Order of Society; and we may obſerve in the ſaid Order, different cauſes which may juſtify the liberty of diſpoſing of our Goods by Teſtament. Thus it may happen, that a Man has no Relations at all, or that thoſe which he has have rendred themſelves unworthy of ſucceeding him; and in this caſe, the equity of a Teſtament is clear and evident. In like manner, one who has perhaps a ſmall inconſiderable Eſtate, and which he owes to the liberality and bounty of ſome Benefactor, who happens to be at that time in great want and neceſſity, might juſtly leave either all his Goods, or a part of them, to his Benefactor; and that to the prejudice of his Collateral Relations, who perhaps are related to him only at a great diſtance, and have a plentiful Eſtate of their own. It is juſt likewiſe, that thoſe perſons whoſe preſumptive Heirs are Strangers, that is, Aliens, or Foreigners, incapable of ſucceeding, may diſpoſe of their Eſtates to others. Thus Baſtards, not being born in lawful Wedlock, have no Relations who can ſucceed to them; and if they die Inteſtate, without leaving any Children lawfully begotten of their own body, they can have no Heir at Law, not even their Mother. So that it is juſt that they ſhould have liberty to diſpoſe of their Goods by Teſtament. Thus in fine, it is juſt and equitable in general, that all perſons who are capable of diſpoſing of their Goods, ſhould have liberty to acquit themſelves of the duties of Gratitude, and of other Engagements which may oblige them to give, if not all their Goods, at leaſt a part of them, to other perſons than their Heirs at Law, or next of Kin. And this liberty of diſpoſing by Teſtament, is more eſpecially favourable in thoſe Goods which the Teſtator may have acquired by his own Labour and Induſtry. Thus *Jacob* diſpoſed of the Spoil which he had taken from the *Amorites* by the force of his Arms, in favour of *Joſeph*, preferably to his brothers[a].

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[d] If a man die, and have no Son, then ye ſhall cauſe his inheritance to paſs unto his daughter. And if he have no daughter, then ye ſhall give his inheritance unto his brethren. And if he have no brethren, then ſhall ye give his inheritance unto his father's brethren. And if his father have no brethren, then ſhall ye give his inheritance unto his kinſman, that is next to him of his family, and he ſhall poſſeſs it, and it ſhall be unto the Children of Iſrael a ſtatute of judgment, as the Lord commanded Moſes. *Numb.* xxvii. 8. 9. 10. 11.

From all theſe conſiderations we may infer, that as Legal Succeſſions are natural in the Order of Society, ſo likewiſe Diſpoſitions in view of death, whether it be of all one's Goods, or of a part of them, have their Juſtice and Equity in the ſaid Order: and we ſee alſo that Teſtaments are authorized by the Law of God[b].

VI.

The Uſe of Teſtaments reconciled with the Legal Succeſſions.

The Origin of the different Diſpoſitions of the Roman *Law, and of the Cuſtoms, with reſpect to Teſtaments.*

It is becauſe of this Natural Equity, which is in the Succeſſion of near Relations, and of the Natural Equity which appears likewiſe in Teſtaments, that we ſee both the uſe of Legal Succeſſions, and alſo that of Teſtaments, received in all places. But if it is juſt and natural that Succeſſions ſhould paſs to the neareſt Relations whom the Law calls to ſucceed, how can it be likewiſe juſt and natural that they may be deprived thereof by a Teſtament? And the Laws which call the neareſt Relations to ſucceed, ſhall they have their effect only when there is no diſpoſitions which deprive them of the Succeſſion? Or ſeeing theſe Laws are a part of the Law of Nature, will it not be juſt, that they ſhould have their effect without regard to the will of thoſe who have Goods to leave after their death; and that at leaſt they may not have power to deprive their near Relations, unleſs it be of a part of their Inheritance?

All thoſe who have made Laws to regulate the matter of Succeſſions, have without doubt examined this queſtion; for they have been ſenſible of the Natural Equity which calls the neareſt Relations to ſucceed, and they have likewiſe been perſuaded that it is juſt to allow thoſe who have Goods, to make diſpoſitions of them which may be executed after their death. Thus they having all of them ſeen the contrariety which ſeems to ariſe from the uſe of theſe two Principles, they could not fail to conſider under all theſe views, what might be the propereſt means of reconciling them together[a].

They have not therefore been ignorant, that in order to make a right uſe of theſe two Laws, it was neceſſary to look upon that which calls the Heirs of Blood, as a firſt general Rule, which gives them all the Goods of the Succeſſion, when there is no juſt cauſe to deprive them of them. From whence it follows, that when they granted the liberty to perſons, to diſpoſe either of all their Goods, or of a part of them, they ſuppoſed that he who chuſes other Heirs than thoſe of his Blood, or who gives a ſhare of his Goods to other perſons, ought to have ſome particular motives which induce him to diſpoſe of his Succeſſion otherwiſe than the Law would diſpoſe of it. For it was not their intention to countenance unreaſonable diſpoſitions, which ſhould have only for their motive ſome paſſion, or humour, and to grant an inconſiderate liberty of making all ſorts of diſpoſitions, juſt or unjuſt; ſince the good Order of Society doth not permit, even in matters which have their effect in the lifetime of the parties, diſpoſitions which may be any way inconſiſtent with Decency and Good Manners, and doth not allow Prodigals to have the management of their own Eſtates. Thus, the liberty which the Laws grant to perſons to diſpoſe of their Eſtates by a Teſtament, implies without doubt, according to the intendment of the Law, this condition, that the diſpoſitions which they ſhall make in ſo ſerious an Act as is that of making a Teſtament, ſhall be according to Reaſon. But altho' the intention of the Laws which permit Teſtaments, ought not to be explained in any other ſenſe, ſince we cannot ſay that they approve indifferently of all manner of diſpoſitions; yet there would have been too many inconveniences in adding to the Law which permits Teſtaments, the condition that the diſpoſitions ſhould be reaſonable. For this reſervation would call in queſtion all manner of Teſtaments, even thoſe that ſhould be the moſt conformable to Prudence and Equity; ſince there would be a liberty given from hence to examine them, and that by conſidering them under a different view than what the Teſtator had, it would be an eaſy matter to call them in queſtion. Since therefore it was not convenient to add to the Law ſuch a condition, and that it was neither juſt nor poſſible to preſcribe to every Man in particular, the manner in which he ought to diſpoſe of his Goods; it was neceſſary that the Law which permits Teſtaments, ſhould leave it to every one in particular to diſpoſe of his Goods as he himſelf ſhould judge moſt reaſonable, whether by granting to each Teſtator an indefinite liberty to diſpoſe of all his Goods, or by reſtraining this liberty to a part of them; but ſtill leaving it to his own Judgment and Prudence, how he will bequeath that which the Law allows him to diſpoſe of.

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[a] Moreover I have given to thee one portion above thy brethren, which I took out of the hand of the Amorite, with my ſword, and with my bow. *Gen.* xlviii. 22.

[b] Though it be but a man's covenant, yet if it be confirmed, no man diſannulleth or addeth thereto. *Galat.* iii. 15. *Heb.* iii. 16, *&c.* *Gen.* xlviii. 5. 2 Kings xx. 1. Iſaiah xxxviii. 1.

[a] *See Treatiſe of Laws, chap.* 11. *n.* 7. *and n.* 31.

From all theſe general Principles, which all Mankind muſt agree in, we may reaſonably draw this conſequence, that ſince it is agreeable to the Law of Nature that Succeſſions ſhould go to the Next of Kin, and that it is likewiſe equitable that thoſe who have Goods may diſpoſe of them by Will; the ſpirit and intention of the Laws which have permitted the making of Teſtaments, has been, that the liberty of bequeathing ſhould be regulated in every one according to Prudence, which may determine the uſe of this liberty to more or leſs, according to the condition of his Eſtate, his Family, and his different Obligations to other perſons beſides his Children, if he has any, or his other near Relations; for it is by theſe circumſtances, and others of the like kind, the various combinations of which are infinite, that every one ought to regulate his diſpoſitions, and proportion them to his Subſtance, and to the different obligations he lies under. Thus, thoſe who have but a ſmall Eſtate, and a great many Children, are leſs at liberty to diſpoſe of their Goods by Will, than thoſe who are rich, and have no Children. In like manner, thoſe perſons who have poor Relations, are under a greater tie and obligation towards them, than thoſe are whoſe Relations are wealthy, and in a good condition. Thus in general, the circumſtances in which every one happens to be, point out to him the uſe of this Prudence, which ought to be his Rule and Guide.

If we conſult therefore only natural Equity, which ought to be the Spirit of all Laws; we ſhall be apt to conclude, that the Principle which juſtifies this liberty of bequeathing by Will, is nothing elſe but the Equity that is in the uſe of this Prudence. Thus, it would ſeem that we may reaſonably ſuppoſe, that thoſe who made the Laws concerning Succeſſions, did agree in this Principle; and were divided only in the conſequences which they drew from it, and made as it were two Parties; from whence have ſprung the two different ſorts of Laws which are extant concerning this matter.

The one is that of the *Roman* Law, the Authors whereof thought it proper to leave to every one an entire liberty to diſpoſe of his Goods as he pleaſes[b]; and they did not think the inconveniencies ariſing from the bad uſe which ſome might make of this liberty, to be a ſufficient cauſe why it ſhould not be left common to all perſons; to the end that the condition of thoſe who are reaſonable, might not be reſtrained within the bounds which perhaps it might be convenient to preſcribe to the conduct of others.

The other kind of Law concerning Succeſſions, is that of the Cuſtoms in *France*, the Authors of which did not judge it convenient to leave particular perſons at liberty to have no manner of regard for Natural Equity, which calls the neareſt Relations to the Succeſſion, under pretext of ſome few extraordinary occaſions, which might juſtify the uſe of ſuch a liberty. And they were deſirous to prevent the inconvenience of the bad uſe which might be made of this liberty by thoſe who in making their Teſtaments govern themſelves by no other Rule beſides that of their Paſſions, and under theſe ſeveral views, not being able to make different Rules for the different ſorts of perſons, and not thinking it reaſonable to ſuppoſe that the greateſt part of Mankind would regulate their diſpoſitions by a prudent and wiſe conduct, they ſet bounds to this liberty of bequeathing for all ſorts of perſons without diſtinction. We ſhall ſee in the following Article ſome differences which it is neceſſary to obſerve between the Spirit of the *Roman* Law, and the Spirit of our Cuſtoms in *France*.

VII.

Difference between the Spirit of the Roman *Law, and that of the Cuſtoms in* France.

It would ſeem that the manner in which the *Romans* did firſt put in practice this Law which gives a general and indefinite liberty to all perſons to diſpoſe of their Eſtates as they pleaſe, which they derived from the *Grecian* Commonwealths, was a conſequence of that Spirit of Dominion, of which we ſee ſo many other marks in their whole conduct, from the foundation of their State, whether it be in relation to other Nations whom they conquered, or even with reſpect to their own Families, in which they had aſſumed to themſelves an abſolute Power of Life and Death, not only over their Slaves[a], but likewiſe over their Children[b]. Purſuant to this Spirit of Dominion, they took to themſelves the liberty to diſpoſe of all their Goods at pleaſure, and to deprive not only their Relations of their Succeſſions, but even their Children, without any cauſe. 'Tis true, that this might have been a means to keep Children in their duty to their Parents; but the bad uſe that was made of this liberty, many diſinheriting their Children without any juſt cauſe, gave occaſion to the receiving of the Complaints of Children againſt thoſe Teſtaments which they called undutiful, as being contrary to the duties of Paternal Love and Affection. And even theſe Complaints were not received but with this precaution, that in order to give them ſome colour or pretext, and that they might have the effect of annulling thoſe Teſtaments, they ſhould be conſidered as being made by perſons who were not altogether in their right ſenſes, and who were deprived of the uſe of their Reaſon at the time when they made them[c]. They ſettled likewiſe a Legitime, or certain portion of the Parents Goods for the Children, to whom they appropriated a fourth part of the Goods they would have had if their Parents had died Inteſtate[d]; and they allowed likewiſe Fathers and Mothers, and other Aſcendants, to exhibit Complaints againſt the Teſtaments of their Children, as being contrary to the duty and reſpect which Children owe to their Parents[e]. And at laſt the Emperor *Juſtinian* thought he did a great deal in favour of the Children, when he augmented their Legitime, by giving them, inſtead of a Fourth Part, a Third of the Goods, when there were four Children, or a leſſer number, and raiſing it even to a Moiety, in caſe there ſhould happen to be five or more Children[f]. But as for the Collaterals, there was ſtill left an intire liberty to the Teſtator to deprive them of the whole Succeſſion, except in one only caſe, and that in favour only of Brothers and Siſters, who were allowed to complain of the Teſtaments of their Brothers and Siſters, when the Heir inſtituted by them was an infamous or ignominious perſon. And even this liberty was not extended to thoſe who were Brothers and Siſters only by the Mother's ſide[g]. Thus, we ſee that the *Roman* Law conſidered each Teſtator as a Lawgiver in his own Family, leaving to him an abſolute power of diſpoſing of his Goods according to his pleaſure, under theſe reſervations alone, which have been juſt now mentioned.

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[b] Uti quiſque legaſſit rei ſuæ, ita jus eſto. *Inſt. de lege Falcidia.*

[a] *L.* 1. §. 1. *ff. de his qui ſui vel al. jur. ſunt.*

[b] *L.* 12. *in fine ff. de lib. & poſt. l. ult.* C. *de patr. poteſt.*

[c] Hoc colore inofficioſo teſtamento agitur, quaſi

non ſanæ mentis fuerunt, ut teſtamentum ordinarent. *l.* 2. *ff. de inoff. teſt.*

[d] *L.* 8. §. 8. *ff. de inoff. teſt. l.* 6. *C. eod.*

[e] *L.* 14. & 15. *ff. de inoff. teſt.*

[f] *Novell.* 18. *C.* 1.

[g] *L.* 27. *C. de inoff. teſt.*

The Spirit of the Cuſtoms of France, *in relation to Succeſſions.*

This Diſpoſition of the *Roman* Law, which leaves perſons at full liberty to diſpoſe of all their Goods by Teſtament, except the Legitimes, which are reſerved by Law to certain perſons, is obſerved in the Provinces of *France*, which are governed by the written Law, that is, by the *Roman* Law: and the Law which reſtrains the liberty of diſpoſitions in Teſtaments, in favour even of Collateral Relations in the remoteſt degree, has been obſerved in all the Provinces of *France* which have their peculiar Cuſtoms. But ſeeing there is no Natural Rule which aſcertains the preciſe bounds of the liberty of Teſtaments, and of other Diſpoſitions in view of death, and the Portion of Goods which one may give away from his Heirs at Law, or Next of Kin; and that it is only by arbitrary views that theſe bounds can be ſettled; they are differently regulated by the Cuſtoms. And there is only this common to them all, that they have two general Rules, which are conſequences of the Principles which have been juſt now taken notice of. One, which diſtinguiſhes the Paternal Goods from the Maternal, in order to preſerve to the Relations of each ſide the Goods which have deſcended from their Stock: And the other, which allows of no other Heirs beſides the Next of Kin whom the Cuſtom calls to the Succeſſion, and which gives only the quality of Univerſal Legataries to thoſe to whom perſons leave by Teſtament, or other diſpoſition in view of death, all that they can give away; the name of Heir remaining proper only to the Heir of Blood, with this quality annexed to it, which is common in all the Cuſtoms, that the Heir at Law is made Heir at the moment of the death of the perſon to whom he ſucceeds, even although he know nothing of the ſaid death. This Rule the Cuſtoms expreſs in theſe words, *The dead man gives Seiſin to the living, his Next of Kin that is capable of ſucceeding to him*; that is to ſay, that the inheritance accrues to him, with all its Rights, at the moment of the death of his Relation to whom he ſucceeds: which hath this effect, that if the ſaid Heir ſhould chance to die without knowing that the ſaid Succeſſion was fallen to him, he would tranſmit it to his Heirs, in the ſame manner as if he had declared his Acceptance, and taken poſſeſſion of it. But excepting theſe general Rules, which are common to all the Cuſtoms, their other diſpoſitions, and particularly thoſe which fix the bounds of the liberty of Teſtaments, are not ſo common. Some of them grant a liberty to diſpoſe of all the Acquiſitions, and of all the Moveables, and appropriate to the Heirs of Blood only the Goods of Inheritance, giving leave only to bequeath a part of them, ſuch as a Fourth, or a Fifth. Others, without diſtinguiſhing between the different kinds of Goods, Moveables, or Immoveables, Goods of Inheritance, or Goods of Purchaſe[h], give only power to diſpoſe of a part of all the Goods, ſuch as a Fourth. And others again allow even thoſe who have no Children to diſpoſe only of a part of the Immoveables which they themſelves have acquired. And beſides theſe precautions of the Cuſtoms, for the preſervation of Eſtates in Families, there are ſome which have reſtrained the liberty of Teſtaments in another manner: and which, to prevent the facility of engaging dying perſons to make diſpoſitions at the ſuggeſtion and perſuaſion of others, have declared the Teſtaments to be null which are not made ſome certain time before the death of the Teſtator, ſuch as the ſaid Cuſtoms may have preſcribed.

[h] *See the diſtinctions of theſe ſeveral ſorts of Goods, in the Title of Things.* Sect. 2. art. 8. 9. 10. 11. 12.

[*The two general Rules which have been mentioned in this Article, as common to all the Cuſtoms of* France, *are likewiſe agreeable to the Common Law of* England. *For the Common Law is careful to preſerve the Goods in the Families from which they deſcend, as has been already obſerved in the Remark on the fourth Article of this Preface. And as to the other Rule, the Common Law likewiſe knows no other Heir, beſides the Heir of Blood, who is he to whom Lands, Tenements, or Hereditaments by the Act of God, and Right of Blood, do deſcend of ſome Eſtate of Inheritance. According to that Law, it is God alone that can make an Heir, and not Man. A Man, by the Common Law, cannot be Heir to Goods or Chattels; for they are either diſpoſed of by Teſtament, as the Teſtator pleaſeth; or are at the diſpoſition of the Ordinary, to be diſtributed as he in conſcience thinketh meet.* Cooke on Littleton, pag. 7, 8, 12.]

It appears plainly enough, that theſe diſpoſitions of the Cuſtoms, are founded on this view of appropriating to the Heirs of Blood the greateſt part of the Goods, or of certain Goods; but they have not all of them provided alike for this appropriation. For in the Cuſtoms which allow perſons the free diſpoſal of all their Acquiſitions, and of all their Moveables, thoſe who have no Eſtates which came to them by Deſcent from their Anceſtors, enjoy the ſame liberty that was granted by the *Roman* Law, and may give away all their Goods from their neareſt Collateral Relations, and even from their Brothers.

We ſhall not here offer to draw a parallel between theſe Cuſtoms, to ſhew which of them have moſt or feweſt inconveniencies. Every one of them hath its own inconveniencies, and its own advantages. And this diverſity of advantages or inconveniencies which may diſtinguiſh the one from the other, are natural effects of the Arbitrary Laws. But there is this convenience that is common to them all, that every one hath its fixed Rules which are there looked upon to be juſt, and which aſcertain the quiet of Families. However, the great multitude of Cuſtoms in *France*, ſo different one from another, not only in the matter of Succeſſions, but alſo in many others, does naturally give riſe to this Queſtion, Which would be moſt uſeful, whether this diverſity of Rules, whereof every one is confined to its own place, or one only Rule that ſhould be common over all? But we ſhall not attempt here to make a fruitleſs enquiry into a Queſtion of this importance.

VIII.

Which of the two Succeſſions is moſt favourable, the Teſtamentary, or Legal.

All that has been ſaid hitherto obliges us to make one Reflection more, on the compariſon or parallel between Legal and Teſtamentary Succeſſions, in order to diſcover which of theſe two kinds of Succeſſions is moſt favourable, whether that of the Heir at Law, or Next of Kin, or that of Heirs named by a Teſtament. That is to ſay, whether in a caſe which regards the oppoſite Intereſts of a Teſtamentary Heir, and of an Heir at Law, the Right of the one and the other being doubtful and uncertain, we ought to favour one more than the other, and which of the two; as in the caſes between a Plaintiff and Defendant, between a Poſſeſſor and one who ſeeks to turn him out of Poſſeſſion, between an Accuſer and one who is Accuſed, if there is any doubt in any of the ſaid caſes, the favour balances always on the ſide of the Defendant, the Poſſeſſor, and the Party Accuſed, upon the bare conſideration of theſe qualities.

We propoſe here this Queſtion, becauſe there may happen caſes where it may be neceſſary to judge of the preference between theſe two kinds of Heirs, and becauſe the Rule which decides this preference, ought to make in this matter a Principle which we cannot well avoid taking into conſideration, becauſe of its great uſefulneſs in Queſtions of this nature. Thus, for example, if we ſuppoſe that a Teſtator, living in a Country where the *Roman* Law is in full force; and having named in a former Teſtament, made exactly according to the form preſcribed by Law, another Heir or Executor than the perſon who ought to ſucceed to him if he ſhould die Inteſtate; makes a ſecond Teſtament, in which he inſtitutes for his Heir or Executor the perſon who ought to ſucceed to him by Law, and that this Teſtament is ſigned only by five witneſſes in a Country where ſeven are required; the queſtion which of theſe two Teſtaments ought to ſubſiſt, will depend on knowing which of theſe two Heirs ought to be moſt favoured, whether the Teſtamentary Heir, or the Heir of Blood. For if it is the Teſtamentary Heir, or if both Heirs be upon the level, or of equal conſideration in the eye of the Law; it is certain that in the competition between theſe two Teſtaments, the firſt which is made according to form, ought to be preferred to the ſecond which is null. And if on the contrary, the condition of the Heir of Blood is the moſt favourable, his right of Blood being backed by the ſecond Will of the Teſtator, although defective in point of form; it may be doubted whether this ſecond Teſtament, although imperfect, yet being made in favour of the Heir of Blood, be not ſufficient to annul the firſt, which was made according to form, but which tranſferred the Goods of the Family to a Stranger.

It appears plainly enough of what conſequence this Principle is, which ought to decide this Queſtion; ſince it ought to ſerve as a foundation for judging other Queſtions of this kind: and that it is of great importance to fix by ſome certain Rule the different regards which Judges ought to have either in favour of the Heirs of Blood, or in favour of Diſpoſitions made in proſpect of death, whether it be in the caſes where the validity of the ſaid Diſpoſitions may be called in doubt; or in other Queſtions which may depend on the right diſcerning of what may be due to the favour of Blood, or to the favour of the will of a Teſtator; as for inſtance, if in a Teſtament which ſhould call to the Succeſſion the Heir of Blood together with a Stranger, there ſhould happen to be an obſcure or ambiguous clauſe, of which one meaning may be favourable to the Heir of Blood, and another to the Stranger.

In order therefore to examine this Queſtion concerning the preference, whether it ought to be in favour of the Teſtamentary Heirs, or of the Heirs of Blood, it will be neceſſary to add to all the Remarks which have been juſt now made, three Reflections on three differences that are between Legal Succeſſions, and Succeſſions by Teſtament.

The firſt of theſe differences conſiſts in this, that the order of Legal Succeſſions in the caſe of Inteſtates, is ſo juſt and ſo natural, that it has been eſtabliſhed as ſuch by the Law of God, which hath confirmed the uſe of it; whereas that of Teſtaments hath no other Origin beſides the Will of Man. And although Teſtaments are approved of in the Holy Scriptures; yet it is not by any diſpoſition which gives them the force of a Law, as we ſee the uſe of Legal Succeſſions eſtabliſhed there by a Law. And even in that part of the Scriptures where Succeſſions are regulated, there is no mention made of Teſtaments[a]. So that we may ſay, that the Law which permits the uſe of Teſtaments, is as it were an exception to the natural and general Law, which calls the neareſt Relations to Succeſſions.

The ſecond difference between Succeſſions by Teſtament, and the Succeſſion of the Heirs of Blood, is, that the Succeſſion of the Heirs of Blood is abſolutely neceſſary for the Order of Society; becauſe when any perſons die without having been able to diſpoſe of their Eſtates by Will, or having neglected to do it, they muſt of neceſſity go to the perſons whom the Law has called to ſucceed to them, and the Law has called the Next of Kin; whereas the ſaid Order of Society might ſubſiſt without the uſe of Teſtamentary Succeſſions, by the bare uſe of the Succeſſion of the Heirs of Blood, and the Cuſtoms do not own any other Heirs beſides thoſe of the Blood, as has been already obſerved.

The third difference conſiſts in this, that there are many inconveniencies which attend the liberty of chuſing Heirs. For many perſons being prejudiced by their paſſions make an unjuſt choice: and it is they themſelves who are to blame for theſe kinds of inconveniencies; whereas in Legal Succeſſions the inconveniencies are but few; and thoſe which do happen cannot be imputed to any perſon whatſoever, they being only the effects of the Divine Providence, and the natural conſequences of a juſt Rule, ſuch as we ſee do attend very often even the Laws which are the moſt holy and ſacred.

From all theſe Reflections we may draw this conſequence, that the Legal Succeſſions being more natural, more neceſſary, and attended with fewer inconveniencies than the Succeſſions by Teſtament, the uſe of which has been introduced only as an Exception to the Rule which gives the Right of Succeſſion to the neareſt of Kin; the condition of the Heirs of Blood ſeems to be more favourable than that of the Heirs named by Teſtament: and that in any doubtful caſe, where it may be allowable to conſider the favour of one or the other of theſe two kinds of Heirs, it may ſeem reaſonable to decide in favour of the Heir of Blood. Thus, in the Queſtion before mentioned concerning the two Teſtaments, the former of which being made according to form, gives the Right of Succeſſion to a Stranger: the ſecond, which being ſigned only by five witneſſes, would have been declared null, had it been made in favour of a Stranger, ſubſiſts, and diſannuls the firſt Teſtament, becauſe the latter calls to the Succeſſion the Heir at Law[b]. This deciſion is ſo much the more remarkable, that it is part of the *Roman* Law it ſelf, which has above all others favoured the Teſtamentary Succeſſions, and which otherwiſe is ſo very nice and ſcrupulous in matters of form. So that we may conclude from hence, even according to the ſentiment of thoſe who have moſt favoured Teſtaments, that the condition of the Teſtamentary Heir is leſs favourable than that of the Heir of Blood.

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[a] *Numb. xxvii.*

[b] Tunc prius teſtamentum rumpitur, cùm poſterius ritè perfectum eſt. Niſi fortè poſterius vel jure militari ſit factum, vel in eo ſcriptus eſt, qui ab inteſtato venire poteſt. Tunc enim & poſteriore non perfecto, ſuperius rumpitur. *l. 2. ff. de injuſt. rupt. irr. f. teſt.*

Si quis teſtamento jure perfecto, poſtea ad aliud venerit teſtamentum, non alias quod ante factum eſt, infirmari decernimus, quam ſi id quod ſecundo facere teſtator inſtituit, jure fuerit conſummatum: niſi forte in priore teſtamento ſcriptis his qui ab inteſtato ad teſtatoris hæreditatem vel ſucceſſionem venire non poterant: in ſecunda voluntate teſtator eos ſcribere inſtituit, qui ab inteſtato ad ejus hæreditatem vocantur. Eo enim caſu licet imperfecta videatur ſcriptura poſterior, infirmato priore teſtamento, ſecundam ejus voluntatem non quaſi teſtamentum, ſed quaſi voluntatem ultimam inteſtati valere ſancimus. In qua voluntate quinque teſtium juratorum depoſitiones ſufficiant. Quo

non

IX.

The reaſon why we have made all theſe Remarks.

We have thought it neceſſary to make all theſe Remarks on the two kinds of Succeſſion, before we enter on the detail of the Rules of this matter; and this we have done chiefly for two reaſons. One is, that we might give as it were in a Plan theſe general Ideas of the Nature of Succeſſions, which is a ſubject of a very large extent. The other is, that we might fix and lay down in this Plan the Grounds and Principles on which depend many Rules which ſhall be particularly explained hereafter. And becauſe ſome other kinds of Succeſſion are uſed in *France*, which are either altogether unknown in the *Roman* Law, or which have by the Cuſtoms of *France* ſome Rules peculiar to them, we have thought fit to add the following Remarks concerning them.

X.

Of Inſtitutions of Heirs by Contract.

Beſides the two ſorts of Succeſſions, Legal and Teſtamentary, of which we have ſpoken hitherto, there is in *France* a third kind of Succeſſion of a quite different nature, which is that of Heirs inſtituted by Contract, or Covenant, that is to ſay, of Heirs inſtituted by a Contract which aſcertains to them the Right of Succeſſion; the uſe whereof is very frequent in Contracts of Marriage, in favour of the perſons who marry, whether it be that they are inſtituted Heirs by their Fathers and Mothers, or other Aſcendants, or by Collateral Relations, or even by Strangers; and ſome Cuſtoms allow of theſe diſpoſitions not only in Contracts of Marriage, but likewiſe in other Contracts, as in a general Partnerſhip of all the Goods of the Partners.

Theſe ways of naming Heirs or Executors, are called Inſtitutions by Contract, which are lawful and even favourably received in *France*, becauſe they render Marriages more eaſy and more frequent, the perſons who enter into that ſtate having the advantage of being aſſured of theſe Inſtitutions in their favour, which for this reaſon are irrevocable; whereas in the *Roman* Law all Inſtitutions of Heirs by Contract were declared unlawful, as being contrary to the liberty which every one has to diſpoſe of his Eſtate by his laſt Will and Teſtament[*].

Remarks on ſome Principles which relate to Inſtitutions by Contract.

Seeing theſe Inſtitutions by Contract are no part of the *Roman* Law, but directly contrary to it, they do not come within the deſign of this Book, and therefore we ſhall not treat of them expreſly. But the Reader ſhall find here all the eſſential Principles, and the Rules which are neceſſary for theſe ſorts of Inſtitutions, that is, all the Rules which are of Natural Equity, and upon which one may reaſon. For we muſt obſerve, that all the Rules which can have any relation to Inſtitutions by Contract, may be reduced to theſe kinds. The firſt kind conſiſts of the peculiar Rules which each Cuſtom hath eſtabliſhed for theſe ſorts of Inſtitutions; and all theſe Rules are nothing elſe but arbitrary Statutes, different according to the different Cuſtoms, and which are eaſy to be ſeen in each Cuſtom. The ſecond comprehends the Rules of Succeſſions, whether Legal or Teſtamentary, which are of Natural Equity, and which may be applied to theſe Inſtitutions by Contract: and theſe ſorts of Rules ſhall be explained in this Second Part, every one in their proper place. The third kind is made up of the Rules of Covenants, as, for example, thoſe which concern the Interpretation of them, and the others which may likewiſe be applied to Contracts of Succeſſion; and theſe have been already explained in the Firſt Part. So that this Book ſhall contain all the Rules of Natural Juſtice and Equity, and all the Principles on which the Deciſions in the matter of Succeſſions by Contract may depend; and it will be ſufficient for us to take notice here of one eſſential Principle, of great uſe in this matter, and by which we ought to examine the uſe of all the particular Rules which may have any relation to Succeſſions of this kind.

This Principle conſiſts in this, that Inſtitutions by Contract being of a mixed nature, and conſiſting partly of Teſtaments, and partly of Covenants, and by conſequence their Rules being of the ſame mixture, and conſiſting of the Nature of Covenants, as well as of Teſtaments, we ought in each difficulty to diſtinguiſh which of theſe two ſorts of

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non facto, valebit prius teſtamentum, licet in eo ſcripti videantur extranei. *l. 21. §. 3. C. de teſtam.* See the fifth Article of the fourth Section of Teſtaments.

[*] Pactum quod dotali inſtrumento comprehenſum eſt, *ut ſi pater vita fungeretur, ex aqua portione ea qua nubebat cum fratre hæres ſui patris eſſet*, neque ullam obligationem contrahere, neque libertatem teſtamenti faciendi mulieris patri potuit auferre. *l. 15. C. de pactis.*

Rules are proper to be applied to it: and to conſider whether it is by the Rules of Covenants, or by the Rules of Teſtaments, that the difficulty is to be reſolved, according as the one or the other are moſt applicable to it; for there happen daily in this matter queſtions of both theſe natures. And that we may the better comprehend the truth of this Principle, and its uſe, it will not be improper to make application of it in ſome Examples of general difficulties which are eaſy to be reſolved, but which may help us to judge of others.

For a firſt Example, we may ſuppoſe that it is made a queſtion, whether one who is inſtituted Heir by his Contract of Marriage, is at liberty, after the death of the perſon who has made him his Heir, to renounce the Succeſſion, or whether he is under an obligation to accept it. If this queſtion were to be decided by the Rules of Covenants, it might ſeem that as they form mutual obligations, and that he who has by Contract inſtituted one to be his Heir, cannot revoke it, ſo in the ſame manner he who is inſtituted Heir ſhould be obliged on his part to accept the Succeſſion. But as it is eſſential to the quality of an Heir or Executor that he ſhould accept the ſame, not by force, but freely and voluntarily, and that it would be unjuſt that he who could aſſure to himſelf a neceſſary Heir, ſhould have the liberty of ruining him, by burdening the Succeſſion with Debts, Legacies, and other charges above the value of the Goods; it is plain, that this queſtion ought to be decided by the Rules of Succeſſions, which give to Heirs the liberty of accepting, or renouncing them, as they find convenient.

If we ſuppoſe, for a ſecond Inſtance, that it were called in doubt, whether he who has inſtituted his Heir by a Contract of Marriage, may recal that Inſtitution at his pleaſure; if this queſtion were to be determined by the Rules of Succeſſions, it would appear juſt that he might alter this Inſtitution, and name another Heir. But becauſe this liberty would be directly contrary to the intent of theſe kinds of Inſtitutions, which is to aſcertain the Succeſſion to the perſon who is named Heir by his Contract of Marriage, and to give him that aſſurance by a Covenant that is irrevocable; it is by the Rules of Covenants that this queſtion ought to be decided; and according to thoſe Rules, which make firm and irrevocable whatever has been ſtipulated by a Covenant, it is eſſential to ſuch an Inſtitution, that it cannot be recalled.

If, for a third Example, we put the caſe that it were doubted, whether he who has made one his Heir by Contract, not being at liberty to revoke this Inſtitution, may nevertheleſs alienate his Goods, and diſpoſe of them at pleaſure in his life-time, in the ſame manner as if he had made no ſuch Inſtitution. If this queſtion were to be decided by the Rules of Covenants, there would be very good reaſon to doubt, whether the Alienations ought to be permitted without any bounds, ſo as to render the Inſtitution of the Heir fruitleſs and of no effect, the perſon who has inſtituted him Heir having alienated all his Goods, or contracted debts that would exhauſt them. But as this Inſtitution differs from thoſe which are made by Teſtament, only in this, that it is irrevocable, to the end that the Heir by Contract may be ſure of ſucceeding to the Goods which ſhall remain after the death of the perſon who has made him Heir; this queſtion ought to be decided by the Rules of Teſtaments, which give to the Heir only the Goods which the Teſtator leaves behind him at his death, but do not deprive him of the liberty to alienate or mortgage them during his life. So that this Heir by Contract could have no ground of complaint, unleſs it were on account of Donations, or other fraudulent Alienations, made with deſign to elude the Inſtitution.

It is eaſy to judge by theſe three Examples, in what manner we ought to diſcern, in the queſtions which may happen to ariſe concerning Inſtitutions by Contract, whether the difficulties depend on the Rules which belong to the matter of Covenants, or on thoſe which are proper to Teſtaments, or whether both theſe ſorts of Rules may be applied to them, in the caſes which happen not to be regulated by the Cuſtoms.

XI.

Succeſſion of thoſe who die without leaving behind them any Relations, or any Teſtament.

The ways of ſucceeding of which we have ſpoken hitherto, have for their foundation either the Proximity of Blood between the Heir and the perſon to whom he ſucceeds, or the Will of him who makes an Heir or Executor. But there is another ſort of Succeſſion which has neither the one nor the other of theſe foundations, and which, on the contrary, takes place only when he who leaves Goods behind him after his death has no Relations, and has made no Will. For in that caſe, it is neceſſary that the Goods which he has left behind him ſhould find a Maſter; and this is what the Laws have taken care of.

Succeſſion of the Huſband to the Wife, and of the Wife to the Huſband.

Succeſſion of the Exchequer for want of Heirs.

By the *Roman* Law the Huſband and Wife ſucceed one to the other, when any of them who dies firſt has no Deſcendants, Aſcendants, nor Collateral Relations, and dies without making any Will[a]. And if one who is not married, and who has likewiſe no Heir of Blood, dies without diſpoſing of his Goods by Will, they belong to the Exchequer, which in this caſe holds the place of Heir[b].

This Succeſſion of the Huſband to the Wife, and of the Wife to the Huſband, is regulated after this manner according to ſome Cuſtoms in *France*. Others, on the contrary, have expreſſly ordered that the Exchequer ſhould exclude the Huſband and the Wife: And ſome, by a ſingular hardſhip, prefer the Exchequer, or the Lord of the Fee, who has the Rights of the Exchequer, not only to the Huſband and Wife, but even to the neareſt Relations, unleſs they be of the Stock from which the Goods did proceed. But in the other Cuſtoms of *France*, which have eſtabliſhed nothing touching this matter, and in the Provinces which are governed by the Written Law, it ſeems juſt to follow the Rule of the *Roman* Law: and we ſee likewiſe that it is received into uſe by ſeveral examples. For ſeeing the *Roman* Law is the Common Law of *France*, in every thing which is not aboliſhed, or contrary to Uſage, it ought with much more reaſon to be received as Law, when that which it ordains is agreeable to the Law of Nature, and Equity: and it may be ſaid of the Succeſſion of the Huſband to the Wife, and of the Wife to the Huſband, that it is of this Order of Laws, when other Heirs are wanting. And we ought not to look upon this manner of Succeſſion as being any way derogatory to the Rights of the Exchequer; for beſides that this caſe falls out ſo very ſeldom, that the conſequence of it ought to be counted for nothing, the Right of the Exchequer in Succeſſions ought not to take place except where there is no body whom any Law calls to the Inheritance. And it cannot be ſaid that the Huſband and the Wife are not called to ſucceed one to the other by any Law, ſeeing they are called thereto by this Common Law, and that this Law which calls them to the Succeſſion one of another, is founded on the Law of Nature, and on the Divine Law, which hath formed ſo ſtrict a Union between the Huſband and the Wife, and which of Two diſtinct Perſons hath made them One, that they might be the Source of the Birth of Men, and of their Relations to one another, the neareſt degree of which makes a much ſlenderer Tie and Union than that of Marriage. Thus, ſeeing Marriage is the Source of the Relations which give the Right to ſucceed, it is altogether natural to give to the Huſband and Wife the Right of excluding the Exchequer.

[*This Succeſſion of the Husband to the Wife and of the Wife to the Husband for want of Heirs, is not in uſe in* England, *with reſpect to Lands of Inheritance; which in default of Heirs of Blood fall by Eſcheat to the Lord of whom they are held.* Littleton, Book 1. Stat. 4. *But as for the Goods and Chattels of one that dies Inteſtate, the Widow of the deceaſed is admitted to the Succeſſion in conjunction with his neareſt Relations. And the Eccleſiaſtical Judge, who is the Ordinary of the place, may commit the Adminiſtration of the deceaſed's Goods and Chattels either to the Widow of the deceaſed, or to the next of Kin, or to both, as he in his diſcretion thinks proper, and the Effects are to be diſtributed between the Widow and the Next of Kin, in ſuch manner and proportion as the Law has directed.* Stat. 21 Hen. VIII. cap. 5. Stat. 22 & 23 Car. II. cap. 10.]

As for the Succeſſion of the Exchequer, which ſucceeds when there are no other Heirs, it is founded on this, that the Goods which happen to have no Maſter, paſs naturally to the uſe of the Publick, and accrue to the Prince who is the Head of the State, and to whoſe uſe Goods of this kind, and other Caſualties, are appropriated by the Publick, for the maintenance and ſupport of the Princely Dignity. Thus, in *France* the Succeſſions of thoſe who die without Heirs, or without having diſpoſed of their Eſtates by Will, are acquired to the King. In like manner the King has the Right of ſucceeding to Baſtards, who leave no Heirs of their

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[a] Maritus & uxor ab inteſtato invicem ſibi in ſolidum, pro antiquo jure ſuccedant, quoties deficit omnis parentum, liberorumve, ſeu propinquorum legitima vel naturalis ſucceſſio, fiſco excluſo. *l. un. C. unde vir. & uxor.*

[b] Scire debet gravitas tua, inteſtatorum res, qui ſine legitimo hærede deceſſerint, fiſci noſtri rationibus vindicandas. *l. 1. C. de bon. vacant.*

own Body, to Aliens, to Goods confiſcated, of which we ſhall ſpeak in the three following Articles. But theſe matters not coming within the deſign of this Book, we ſhall only obſerve here in general, the relation which they have to the Matter of Succeſſions, and that without touching upon the Grants, either of all theſe Rights, or a part of them, which have been made by Kings to the Lords of Mannors within their reſpective Lands.

XII.

Succeſſion of Baſtards.

We muſt reckon in the number of Succeſſions which accrue to the Prince, that of Baſtards who die without leaving Children lawfully begotten of their own Bodies, and without diſpoſing of their Eſtates by Will. For by our Uſage no man ſucceeds to a Baſtard dying inteſtate but his Children, if he has any lawfully begotten: and they likewiſe ſucceed to no body, except it be by Teſtament. This Right of Succeſſion to Baſtards is grounded upon this, that the Succeſſion of one who dies Inteſtate is conveyed by the Relation of Blood that is between the Heir and the Perſon to whom he ſucceeds, and that we do not own any other Relation beſides that which one has by being born in lawful Wedlock. Thus, as to the Succeſſion of Baſtards, our Law is different from the diſpoſition of the *Roman* Law, as to which it is not neceſſary that we ſhould enlarge any farther here[c].

XIII.

Succeſſion of Foreigners, who are called Aliens.

There is yet another kind of Succeſſion which belongs to the King. It is that of Strangers, who are called Aliens, that is, thoſe who are born in a Country that is not ſubject to the King, or to which our Kings have not granted the Right of Naturalization, as they have done to ſome neighbouring Nations. By virtue of this Right to the Succeſſions of Aliens, the King acquires the Eſtate of a Foreigner who has not been Naturalized in *France* by Letters of Naturalization; which is founded not only on the *Roman* Law[a], but alſo on the Order of Nature which diſtinguiſhes the Society of Mankind into different States, Kingdoms, or Commonwealths. For it is a natural conſequence of this diſtinction, that each Nation, each State may regulate by its proper Laws whatever relates to Succeſſions, or the Commerce of Goods, which may depend on Arbitrary Laws, and that they may diſtinguiſh therein the condition of Strangers from that of Natural Born Subjects. Thus, Strangers are excluded from all Publick Offices becauſe they are not of the Body of the Society which compoſes the State of a Nation, and that theſe Offices require a fidelity and affection to the Prince, and to the Laws of the Kingdom, which it is not to be preſumed that a Stranger has. Thus, they ſucceed to no body, and no body ſucceeds to them, not even their neareſt Relations; and this is ſo eſtabliſhed in order to prevent the Riches and Wealth of a Kingdom from being carried out of it, and from paſſing into the hands of the Subjects of other Princes[b].

XIV.

Confiſcations, or Forfeitures.

By Forfeiture, or Confiſcation, is meant the Right by which the King acquires the Goods of thoſe Perſons who are condemned to Death, or to any Puniſhment which implies Civil Death[a]. Thus Forfeiture, or Eſcheat is a kind of Succeſſion which conveys to the King all the Goods of the perſon who is condemned, in the ſame manner as they would have gone to his Heirs, if the Law had allowed him to have any. And as in Succeſſions the Goods remain ſubject to the burdens thereof, ſo likewiſe the charges to which the forfeited Goods are ſubject, follow the ſaid Goods. And it is the ſame thing in the caſe of Succeſſions to Aliens, Baſtards, and thoſe who die without Heirs.

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[c] *V.* §. 4. *inſt. de Succeſſ. cogn.* §. *ult. inſt. de Senatuſc. Tertull.* §. 3. *inſt. de Senat. Orphit. l.* 29. §. 1. *ff. de inoff. teſt. l.* 2. & *l.* 4. *ff. unde cogn. Nov.* 89. C. 12. *V.* C. 15. *eod.* See the eighth Article of the ſecond Section of Heirs and Executors in general, and the Remark on that Article. See *Geneſ.* xxi. 10. xxv. 6. *Deut.* xxiii. 2. *Gal.* iv. 30.

[*In the Law of* England, *a Baſtard is accounted* quaſi nullius filius, *and can have no Heir but of his own body.* 1 Rolls Abr. p. 359. Coke 1. Inſt. fol. 3. b. fol. 244. b.]

[a] *V. l.* 6. §. 2. *ff. de hered. inſt. l.* 1. *C. eod.. Ulp. tit.* 17. §. 1. *Tit.* 22. §. 2.

[b] *See the ninth Article of the ſecond Section of Heirs and Executors in general, and the other Articles there quoted; the third Article of the fourth Section of the ſame Title, and the Remark on it, as alſo on the twelfth Article of the ſecond Section of Teſtaments.*

[*As to the Succeſſion of Aliens, the Law of* England *makes a diſtinction between Lands of Inheritance, and Goods and Chattels; our Law allows Aliens, who are Friends and in Amity with the Crown of* England, *to diſpoſe of their Goods and Chattels by Will. And if they die Inteſtate, their neareſt Relations, although they be Subjects of another Prince, and not naturalized with us, may have Adminiſtration of their Goods and Chattels.* See the Caſe of Sir *Upwell Caroon*, in *Croke*'s third Report, p. 8. *And this is agreeable to the change which was made in the* Roman *Law by the Emperor* Frederick II. *in his Conſtitution on this Subject. For the ancient* Roman *Law was ſo ſtrict, as not to allow any but* Roman *Citizens to make a Will, or to be Heir; but this rigour was afterwards mitigated by the Emperor* Frederick, *who allowed all Strangers to diſpoſe of their Effects by Will; or if they died Inteſtate, the Biſhop of the Place where the Goods were was ordered to preſerve them for the uſe of the neareſt Relations of the deceaſed.* Conſtit. Friderici II. Imp. Tit. 1, §. 10. *But as for Lands and Tenements which an Alien may have purchaſed, the King is entitled to them by vertue of his Prerogative.* Brook's Abr. verb. *Denizen.* num. 17. Coke 1. Inſtit. fol. 2. 8.]

XV.

Succeſſion of perſons of a Servile Condition.

Beſides all theſe ſorts of Succeſſions which have been juſt now explained, there is another kind of Succeſſion which is uſed in ſome of the Provinces of the Kingdom of *France*, where there are Effects which the Proprietors cannot diſpoſe of by Teſtament, and which go to the Lord of the Fee when the Tenants die without Children. This is differently regulated in different Cuſtoms, according to the Conditions which were agreed on in relation to this Right when it was firſt eſtabliſhed; in the ſame manner as we ſee the Conditions of Fiefs differently regulated in the Original Grants thereof. The perſons who poſſeſs theſe ſorts of Lands and Tenements are called perſons of a Servile Condition, and the Lands which are held on this Condition return to the Lord, whenever the caſe happens, as being a kind of Succeſſion which falls to him by the death of the Poſſeſſor, and which might be called a Reverſion by Covenant[a].

XVI.

The uſe of theſe laſt Remarks on the different kinds of Succeſſions.

Of all theſe ſorts of Succeſſions aforementioned, which tranſmit Eſtates to the King, or to the Lord of the Mannor, there is not one which comes regularly within the deſign of this Book, as has been already obſerved. For they are matters which either belong to the Publick Law, or to the Cuſtoms. But although theſe kinds of Succeſſions come not properly within the deſign of this Book, yet it was neceſſary to make theſe general Remarks concerning them, in order not only to give an Idea of all that may be comprehended under the word Succeſſion[a], and to diſtinguiſh what relates to the Succeſſions which we are to treat of in this Second Part, from all that may have any relation to them; but more eſpecially to inform the Reader, that even in thoſe kinds of Succeſſions which are either part of the Publick Law, or peculiar to the Cuſtoms, the Rules of Succeſſion which ſhall be explained in this Second Part may be applied to them in the caſes where there is any reſemblance; ſuch as the Rules which concern in general the Quality of the Heir, the Rights and Burdens of Heirs, their Engagements, and other Rules which it will be eaſie to diſcover if they can be of any uſe in thoſe other kinds of Succeſſions, altho' no mention be made thereof in the places where they ſhall be explained.

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[a] *See the eleventh Article of the ſecond Section of Heirs and Executors in general, and the other Articles there cited.*

[*In* England *the King, by vertue of his Prerogative, is intitled to the Goods of all Felons attainted, or Fugitives, wheresoever they be found. And if they have Lands and Tenements, the King has the profits thereof for a year and a day. See the Statute entitled* Prerogativa Regis, *made the ſeventeenth year of* Edw^d. II. *See* Stamford's Expoſition of the King's Prerogative, fol. 44. b. *But in the caſe of High Treaſon the Forfeiture is of a larger Extent, for if any perſon is duly convicted or attainted thereof, he loſes and forfeits to the King all ſuch Lands, Tenements, and Hereditaments, which he has of any Eſtate of Inheritance in his own right, in uſe or poſſeſſion within the Realm of* England, *or elſewhere within any of the King's Dominions, at the time of ſuch Treaſon committed, or at any time after.* Stat. 5 & 6 Edw. VI. cap. 11. *Stamford's* Pleas of the Crown, Book 3. chap. 20. 26.]

[a] *See the end of the Preamble of the fourth Section of Heirs and Executors in general.*

[*This kind of Succeſſion to perſons of a Servile Condition, is in the Common Law of* England *called Tenure in Villenage, which is twofold. One, where the perſon of the Tenant is bond, and the Tenure ſervile. The other, where the perſon is free, and the Tenure ſervile. As to what Inheritances, or other things of a Villain, his Lord has a Right to by the Common Law of* England, *and what not, ſee* Coke 1. Inſtit. fol. 117.

[a] *We have not comprehended under the word Succeſſion, the* Peculium, *or ſmall Patrimony, which ſome Profeſſed Monks may leave behind them at their death. For ſeeing they themſelves had no Right of Property therein, it is not by Succeſſion that that little Patrimony which they leave behind them paſſes to the perſons who are to have it.*

THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK I.

Of SUCCESSIONS in general.

Matters treated of in this Book.

IT is not neceſſary to explain here what are all the particular matters treated of in this firſt Book. This appears ſufficiently from the Table, and from the Plan of the ſeveral Matters which has been laid down in the Treatiſe of Laws[a]. And it ſufficeth to remark in general, that as there are ſome Matters common to both kinds of Succeſſions, the Legal and Teſtamentary; it is of theſe common Matters, that we are to treat in this firſt Book, before we paſs to the Matters which are peculiar to each kind of Succeſſion.

[a] *See the fourteenth Chapter, numb.* 14. 15. 16. *of the Treatiſe of Laws.*

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TITLE I.

Of HEIRS and EXECUTORS in general.

THE name and quality of Heir, agree equally to the Heir at Law, or Next of Kin; that is, the perſon whom the Law calls to the Succeſſion, and to the Heir inſtituted by Teſtament; in the ſame manner as the words *Succeſſion*, or *Inheritance*, are common to the two kinds of Succeſſion, that by Teſtament, and that of Inteſtates. And altho' there be this difference between the Provinces of *France* which are governed by their Cuſtoms, and thoſe which are governed by the written Law, that in the Cuſtoms they give the name of Heir, as has been obſerved in the Preface to this Second Part[a], only to the Heirs of Blood, who are the Heirs at Law; and give the name only of Univerſal Legataries to thoſe who are inſtituted Heirs by a Teſtament; whereas in the Provinces which are governed by the written Law, they give the name of Heir to him who is inſtituted by Teſtament, as well as to him who is Heir of Blood: this difference conſiſting only in the Name, they are all of them equally conſidered as Heirs, and we may apply to the univerſal Legataries in the Cuſtoms, as well as to all the other ſorts of Heirs, the Rules which ſhall be explained in this Title, and likewiſe the Rules contained in the other Titles, in ſo far as the ſaid Rules may be applicable to them.

[a] *See the Preface, numb.* 7.

[*The Common Law of* England *is ſo far agreeable to the Cuſtoms in* France, *that it knows no other Heir, beſides the Heir of Blood.* Coke, 1 Inſt. fol. 237. b. *Cowel's* Inſtit. Book 2. tit. 14.]

As to the detail of this firſt Title of Heirs and Executors in general, the Table of the Sections which compoſe it, ſhews plainly enough what are the Matters to be treated of in it.

SECT. I.

Of the quality of Heir, or Executor, and of the Inheritance.

ALL the Articles of this Section, agree both to the Heirs by Teſtament, and to the Heirs at Law.

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I.

1. Definition of Heir.

THE Heir, or Executor, is he who is Univerſal Succeſſor to all the Goods, and all the Rights of the deceaſed, and who is bound to acquit all the Charges and Burdens of the ſaid Goods[a].

[a] Hæredes juris ſucceſſores ſunt. *l.* 9. §. 12. *ff. de hæred. inſt.* Hæres in omne jus mortui, non tantùm ſingularum rerum dominium ſuccedit. *l.* 37. *ff. de acquir. vel om. hæred.*

Hæredes onera hæreditaria agnoſcere placuit. *l.* 2. *C. de hær. act.* As to theſe words, of all the Goods, and all the Rights of the deceaſed; ſee the fifth Article. And concerning the Charges, ſee the ſeventh Article.

We have put down in the definition, what is ſaid in the ſecond of theſe Texts, that the Heir ſucceeds to all the Goods, and to all the Rights, altho' there may happen to be Legataries who have a ſhare of the Goods; for the Heir is the Univerſal Succeſſor, and the Legacies are a part of the Charges which he is to acquit.

II.

2. Two ſorts of Heirs.

There are two ſorts of Heirs: Thoſe who are inſtituted, that is to ſay, who are named by a Teſtament, who are called Teſtamentary Heirs: And thoſe to whom the Law gives the Inheritance, on account of their Proximity in Blood; who are called, for that reaſon, Heirs at Law. And they are called likewiſe Heirs to Inteſtates, becauſe they ſucceed if they are not excluded by a Teſtament[b].

[b] Duplex conditio eſt hæreditatum. Nam vel ex teſtamento, vel ab inteſtato ad vos pertinent. §. *ult. in fin. Inſt. per quas perſ. cuique acquir.*

[*The Law of* England *makes a diſtinction between theſe two ſorts of Heirs explained in this Article, and gives them different names. For the* Heir, *in the legal underſtanding of the Common Law, is he to whom Lands, Tenements, or Hereditaments, by the Act of God, and Right of Blood, do deſcend of ſome Eſtate of Inheritance. And by the Common Law, a Man cannot be Heir to Goods or Chattels. For as to theſe, the perſon who ſucceeds to them is called in the Law,* Executor, *if he ſucceeds by the appointment of the deceaſed in his laſt Will and Teſtament; or* Administrator, *if he ſucceeds by the appointment of the Ordinary, in the caſe of one dying inteſtate. Coke,* 1 Inſtit. fol. 7. 8. Terms of the Law, verb. Executor, Adminiſtrator.]

III.

3. Definitions of Succeſſion.

By Succeſſions, or Inheritance, is meant the Maſs or Stock of Goods, of Rights, and of Charges, which one leaves behind him after his death, whether it be that the Goods exceed the Charges, or that the Charges ſurpaſs the Goods. And we give likewiſe the name of Succeſſion, or Inheritance, to the Right which the Heir or Executor has to gather in the Effects, and exerciſe the Rights belonging to the deceaſed, ſuch as they ſhall happen to be[d].

[c] Hæreditas etiam ſine ullo corpore intellectum habet. *l. 50. ff. de petit. hær.* Bona ita accipienda ſunt, univerſitatis cujuſque ſucceſſionem, qua ſucceditur in jus demortui: ſuſcipiturque ejus rei commodum. Nam ſive ſolvendo ſunt bona, ſive non ſunt: ſive damnum habent, ſive lucrum: ſive in corporibus ſunt, ſive in actionibus, in hoc loco propriè bona appellantur. *l. 3. ff. de bon. poſſeſſ.*

[d] Hæreditas nihil aliud eſt quam ſucceſſio in univerſum jus quod defunctus habuerit. *l. 62. ff. de reg. jur. l. 24. ff. de verb. ſign.* Bonorum poſſeſſionem ita rectè definiemus, jus perſequendi retinendique patrimonii, ſive rei quæ cujuſque, cum moritur, fuit. *l. 3. §. 2. ff. de bon. poſſ.* See the fifth Article, on theſe words, *leaves after his death.*

IV.

4. Two ſorts of Succeſſions.

There are two ſorts of Succeſſions, as well as two ſorts of Heirs, as has been mentioned in the ſecond Article. One is called, the Legal Succeſſion, or Succeſſion of Inteſtates, which the Law gives: And the other is, the Teſtamentary Succeſſion[e]. The word Succeſſion here, is to be taken in the ſenſe explained at the end of the third Article.

[e] *See the Text quoted on the ſecond Article.*

Theſe two ſorts of Succeſſions are the Subject Matter of the Second and Third Book.

V.

5. All the Goods of the deceaſed, are not always part of the Inheritance.

The Inheritance comprehends only the Goods and Rights which are tranſmiſſible to a Succeſſor. For it may happen that the deceaſed was in poſſeſſion of ſome which he had not Power to leave to his Heirs; and thoſe are no part of the Inheritance. Thus the Rights annexed to the Perſon, and which are extinct by death, ſuch as a Penſion for Life, an Uſufruct, a Perſonal Privilege, are never reckoned part of the Succeſſion. Thus, there are Offices which are loſt by the death of the Officer, and do not paſs to his Heirs. Thus, Goods which are ſubject to a Subſtitution, do not remain in the Inheritance of him who is charged to reſtore them at his death[f].

[f] Morte amitti uſumfructum non recipit dubitationem. Cùm jus fruendi morte extinguatur: ſicuti ſi quid aliud quod perſonæ cohæret. *l. 3. §. ult. ff. quib. mod. uſufr. amitt. l. 3. C. de uſufr.*

We ſhall explain what is meant by Subſtitution, in the fifth Book.

VI.

6. An Inheritance may be without any Goods.

Seeing an Inheritance conſiſts in Goods and Rights ſubject to Debts, and to other Charges, and that it may ſo fall out, either that the Debts and Charges exceed the Goods, or that the Goods, if there remain any after all the Charges are cleared, are diminiſhed, or even quite deſtroyed; this word Inheritance, is only a term of Law, that is to ſay, which does not denote any ſort of Goods in particular, but which ſignifies in general, the Right which the Heir has, and which is applicable as well to a Succeſſion that is over burdened with Debts and other Charges, as to a plentiful Succeſſion, where there is a Reſidue of Goods after all the charges are acquitted. Thus, the Heir may chance to have only the bare name, without any profit, and ſometimes even with Loſs[g].

[g] Hæreditatis appellatio ſine dubio continet etiam damnoſam hæreditatem, juris enim nomen eſt, ſicuti bonorum poſſeſſio. *l. 119. ff. de verb. ſignif.* Hæreditas juris nomen eſt, quod & acceſſionem & deceſſionem in ſe recipit. *l. 178. §. 1. eod.*

VII.

7. Three ſorts of Charges in a Succeſſion.

The Charges of the Succeſſion are of three ſorts. The firſt is of thoſe which are due independently of the will of the deceaſed; ſuch as the debts which he owes, the reſtitution of Goods which are ſubſtituted, if he had any ſuch in his poſſeſſion. The ſecond ſort conſiſts of thoſe which he himſelf may have directed, ſuch as Legacies. And the third ſort is made up of thoſe which may happen after his death, ſuch as the Funeral Charges[h].

[h] *Theſe different ſorts of Charges ſhall be explained, each in its proper place.* See the ſixth and following Sections.

VIII.

8. The Heir, or Executor, is in

The Heir, or Executor, ſucceding to the Eſtate, and to the Burdens of it, he *the place of the deceaſed.* he puts himſelf in the place of the deceaſed: and his condition is the ſame as if he had covenanted with him, that on condition he would leave him his Goods after his death, he ſhould be obliged to pay his Debts, and to acquit the other Charges, and as if he had expreſly bound himſelf to thoſe perſons to whom he may be under Engagements, by virtue of this quality of Heir, or Executor. Thus, the condition of the Heir, or Executor, is in one ſenſe the ſame with that of the deceaſed, in that he has all the ſame Goods, and the ſame Rights, and that he is obliged to bear the Charges of them, in ſo far as the ſaid Goods and Rights may paſs to him, as has been explained in the fifth Article[l].

[l] Si pupillus hæres extiterit alicui, exque ea cauſa legata debeat, videndum eſt, an huic edicto locus ſit. Magiſque eſt, ut Marcellus ſcribit, etiam pupilli poſſe bona poſſideri: eſſeque in arbitrio hæreditariorum creditorum, quid potius eligant. *Etenim videtur impubes contrahere cùm adiit hæreditatem. l. 3. §. ult. ff. quib. ex cauſ. in poſſ. eatur.* (Hæres) quaſi ex contractu debere intelligitur. *§. 5. in f. inſt. de obl. quæ quaſi ex contr. naſc.*

Hæredem ejuſdem poteſtatis juriſque eſſe cujus fuit defunctus conſtat. *l. 59. ff. de reg. jur.*

Nemo plus commodi hæredi ſuo reliquit quàm ipſe habuit. *l. 120. eod.*

The engagement of the Heir cannot be looked upon as a kind of Contract, as it is called in theſe texts, without ſuppoſing that he has engaged himſelf to ſome perſon. Which may be applied to an Engagement towards the deceaſed, by a retroactive effect[*]*, or towards his Memory, and to an Engagement towards the Creditors and Legataries.* See concerning the Engagement towards the deceaſed, the fourteenth Article.

[*] *We call that a* retroactive effect, *which makes a thing that has happened after another, to be conſidered in ſuch a manner, as to give it the ſame effect, as if the laſt thing had happened at the ſame time with the firſt.*

IX.

9. *Three characters of the Engagement of the Heir.* This Engagement, which obliges the Heir, or Executor, to all the Charges, and to all the conſequences of the Inheritance, has three eſſential characters, which it is neceſſary to remark and to diſtinguiſh. It is irrevocable, it is univerſal, it is indiviſible: and theſe three qualities have the effects which ſhall be explained in the following Rules[l].

[l] *This is a conſequence of the preceding Articles, and of thoſe which follow.*

X.

10. *This Engagement is irrevocable.* The Engagement of the Heir is irrevocable, and he who being of age, takes upon himſelf once the quality of Heir, ſhall be always Heir; and can never, upon any pretence whatſoever, diveſt himſelf of that character, or free himſelf from the engagements which attend it; not even altho' the Goods ſhould be leſs than the Charges, nor under pretext of the loſs and diminution of the effective Goods, nor of the Charges that were perhaps unknown to him. For he ought to have foreſeen theſe events; and he may be charged with having found in the Succeſſion, Goods which he has concealed[m]; unleſs he had taken the precaution to accept the Inheritance under the benefit of an Inventory; of which we ſhall ſpeak more fully under the ſecond Title.

[m] Sine dubio hæres manebit, qui ſemel extitit. *l. 7. §. 10. in f. ff. de minor.* Hæreditas quin obliget nos æri alieno, etiam ſi non ſit ſolvendo, plus quam manifeſtum eſt. *l. 8. ff. de acquir. vel amit. hæred.*

Sicut major vigintiquinque annis antequam adeat, delatam repudians ſucceſſionem poſt quærere non poteſt, ita quæſitam renuntiando nihil agit. Sed jus quod habuit retinet. *l. 4. C. de repud. hæred.* See the ſeventeenth Article.

We have added in the Article theſe words, who being of age, *that we might not comprehend Minors within this Rule; as to which ſee the tenth and following Articles of the ſecond Section of Reſciſſions.*

XI.

11. *It is univerſal.* The Engagement of the Heir is univerſal, and extends it ſelf to all the debts owing by the deceaſed, and to all the kinds of Obligations to which the deceaſed was a party, and which might affect his Eſtate. As if he was under any Engagement on account of things which he had ſold, bought, exchanged, hired or let to hire, or other Covenants: if he was engaged in any Tutorſhip, or other Adminiſtration: if he was Surety for other perſons: if he had ſucceeded to ſome Inheritance. And in general, the Heir, or Executor, who has taken upon him that character, has obliged himſelf indefinitely to all the charges which the deceaſed owed; and likewiſe to thoſe which the deceaſed may have impoſed upon him by a Teſtament, or other diſpoſition. For by ſucceeding to all the Goods of the Inheritance, he ſubjects himſelf to all the Charges without diſtinction[n].

[n] Hæreditas nihil aliud eſt quam ſucceſſio in univerſum jus quod defunctus habuerit. *l. 62. ff. de reg. jur.* Hæredes onera hæreditaria agnoſcere placuit. *l. 2. C. de hæred. act.* See the ſixteenth Article.

XII.

12. *It is indiviſible.* The Engagement of the Heir is indiviſible, for he cannot confine his acceptance of the Succeſſion, either to any certain kind of Goods, or to a certain portion of Goods of the ſame kind, ſo as to diminiſh the charges in proportion. And even altho' it were a Teſtamentary Heir inſtituted for two different

rent Portions of the Inheritance, one of which ſhould be left him on conditions which he ſhould agree to, and the other Portion left on conditions which he ſhould not approve of; yet he could not renounce the one, and accept the other. And much leſs can the Heir, having once accepted the Inheritance, divide the charges thereof, in order to free himſelf either from ſome of them, or from a part of each of them, under pretext that there are not Goods ſufficient to acquit all the Charges, or even that the whole Goods, and the whole Rights of the Succeſſion are entirely periſhed[o].

[o] Qui totam hæreditatem acquirere poteſt, is pro parte eam ſcindendo adire non poteſt. Sed & ſi quis ex pluribus partibus in ejuſdem hæreditate inſtitutus ſit, non poteſt quaſdam partes repudiare, quaſdam agnoſcere. *l.* 1. & 2. *ff. de acq. vel omitt. hæred.* Vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jur. delib.* Si ex aſſe hæres deſtinaverit partem habere hæreditatis, videtur in aſſem pro hærede geſſiſſe. *l.* 10. *ff. de acq. vel omitt. hæred.*

The Rule explained in this Article is not contrary to that Rule of the Cuſtoms, by which the Succeſſion of one who leaves behind him Goods Paternal, and Goods Maternal, ought to be divided; and the Relations of the Father's ſide, who ſucceed to the Paternal Goods, are not bound for the debts and charges which ought to be acquitted out of the Maternal Goods; as on the contrary the Heirs of the Mother's ſide, who ſucceed to the Maternal Goods, are not anſwerable for the debts and charges which reſpect only the Paternal Goods. For theſe two kinds of Goods are conſidered as two different Succeſſions which go to different Heirs.

XIII.

13. *The Inheritance is divided among the Co-heirs.*

Although the quality of Heir be indiviſible in the ſenſe explained in the foregoing Article; yet the Goods and Charges of the Inheritance, which one ſole Heir cannot divide in order to free himſelf of a part of them, may nevertheleſs be divided among the Heirs, when there are more than one, according to the portions which may belong to each of them, whether the ſame be regulated by the Law, as if they are Heirs to an Inteſtate, who are called jointly to the Succeſſion; or by a Teſtament, if they are Teſtamentary Heirs. And they may likewiſe in their Partitions divide among themſelves the Goods and the Charges in what manner they pleaſe, as ſhall be explained hereafter in the proper place[p].

[p] *See the ninth Section of this Title, and the firſt Section of Partitions.*

XIV.

14. *The Succeſſion not as yet entred to repreſents the deceaſed.*

Since it often falls out that the Inheritance remains for ſome time without a Maſter, either becauſe he who ought to ſucceed is abſent, or that he deliberates whether he ſhall accept or renounce the Inheritance, and that during theſe intervals, it may happen that ſome Right may accrue to the Succeſſion, or that it may be engaged in new charges, or other affairs, the ſaid Inheritance is therefore conſidered as holding the place of Maſter, and as repreſenting the deceaſed to whom the Goods did belong[q].

[q] Hæreditas perſonæ defuncti, qui eam reliquit, vice fungitur. *l.* 116. §. 3. *ff. de legat.* 1. Creditum eſt hæreditatem dominum eſſe, defuncti locum obtinere. *l.* 31. *in f. ff. de hæred. inſtit.*

XV.

15. *The Heir is reputed ſuch from the moment of the death of the perſon to whom he ſucceeds.*

After the Inheritance which had lain ſome time without a Maſter, is accepted by the Heir, his acceptance of, or entry to the Inheritance has this retroactive effect, that it makes him to be conſidered in the ſame manner as if he had entred to the Succeſſion in the moment that it fell to him by the death of the perſon to whom he ſucceeds. And whatever ſpace of time there may have been between the ſaid death and the act by which he takes upon himſelf the quality of Heir, it will be the ſame thing as if he had declared his acceptance at the time of the death: And as he will have all the Goods which may have augmented the Succeſſion, ſo he will be alſo bound for all the Charges that have fallen out ſince the death of the perſon to whom he ſucceeds[r].

[r] Hæres quandoque adeundo hæreditatem, jam tunc à morte ſucceſſiſſe defuncto intelligitur. *l.* 54. *ff. de acq. vel omitt. hæred.*

Omnia ferè jura hæredum perinde habentur, ac ſi continuò ſub tempus mortis hæredes extitiſſent. *l.* 193. *ff. de reg. jur.*

Omnis hæreditas quamvis poſtea adeatur, tamen cum tempore mortis continuatur. *l.* 138. *ff. de reg. jur.* See the third Section of the ſixth Article.

We have not explained in this Article what is meant by the word retroactive, having already explained it in the Remark on the eighth Article.

XVI.

16. *Several Succeſſions of one Heir to another, paſs all of them to the laſt Heir.*

It follows from the preceding Rules, that the Heir being univerſal Succeſſor to all the Goods, and bound irrevocably and without diſtinction for all the Charges, if the perſon to whom he ſucceeds had likewiſe ſucceeded to others, the Goods and Chattels which remain of the Succeſſions which the deceaſed had inherited, paſs to his Heir. And whatever number of Heirs there may have been ſucceſſively one to the other, whether by Teſtament, or without Teſtament, he who ſucceeds to the laſt of the ſaid Heirs, ſucceeds to all the others, and will be liable for all the Charges of thoſe Succeſſions[s], although that in the laſt Succeſſion there ſhould be no Goods belonging to any of the former: for the Charges of each Succeſſion are tranſmitted from one Heir to the other: Thus the laſt Heir takes them all upon himſelf.

[ſ] In omni ſucceſſione, qui ei hæres extitit, qui Titio hæres fuit, Titio quoque hæres videtur eſſe: nec poteſt Titii omittere hæreditatem. *l. 7. §. 2. ff. de acq. vel omitt. hered. l. 3. de hered. petit.*

Qui per ſucceſſionem quamvis longiſſimam defuncto hæredes conſtiterunt, non minus hæredes intelliguntur, quam qui principaliter hæredes exiſtunt. *l. 194. ff. de reg. jur.* Hæres hæredis teſtatoris eſt hæres. *l. ult. C. de hered. inſtit.* Hæredis appellatio non ſolùm ad proximum hæredem, ſed & ad ulteriores refertur, nam & hæredis hæres, & deinceps, hæredis appellatione continetur. *l. 65. ff. de verb. ſignif.*

XVII.

17. The Heir who diveſts himſelf of the Inheritance, is nevertheleſs bound for all the Charges.

It follows alſo from the ſame Rules, that he who has once entred to an Inheritance, or done any act which may be conſtrued as taking upon him the quality of Heir, according to the Rules which ſhall be explained in the firſt Section of the third Title, ſhall remain always Heir; and although he ſhould afterwards diveſt himſelf of the Inheritance, whether it be by making it over to another by a Deed of Gift, or by Sale, or by leaving it to the perſon who next to him had the right to ſucceed, or by abandoning it, or diſpoſing of it otherwiſe in any manner whatſoever, he will nevertheleſs be always accounted as Heir, and be liable for all the Charges. For the engagement by which he took upon himſelf the quality of Heir is irrevocable. But he may be warranted againſt all the burdens of the Succeſſion by the perſon to whom he ſhall have ſold, given, or yielded up his Right[t].

[t] Quamvis hæres inſtitutus hæreditatem vendiderit, tamen legata & fideicommiſſa ab eo peti poſſunt: & quod eo nomine datum fuerit, venditor ab emptore, vel fidejuſſoribus ejus petere poterit. *l. 2. C. de legat.* Sine dubio hæres manebit qui ſemel extitit. *l. 7. inf. ff. de minor.* See the following Article, and the eighth, ninth, and tenth Articles of the firſt Section of the third Title.

XVIII.

18. He who receives a Sum of Money to abſtain from the Succeſſion, is reputed Heir.

We may place in the ſame rank with the Heir who having once accepted the Succeſſion does afterwards diſpoſe of it, him who renounces it for a certain price, that it may go to the perſon who next to him has the right to ſucceed. For although he may ſeem not to be Heir, having renounced the Succeſſion, yet he really and truly ſells his Right of Inheritance, which no one can do but as being Heir. In the ſame manner as every one who ſells any other thing declares himſelf to be Maſter of it, and by diveſting himſelf of it, he exerciſes a Right of Proprietor. Thus, the Heir who for a certain price renounces the Succeſſion, remains ſtill Heir with reſpect to the Creditors and Legataries, altho' he loſes the Rights appertaining to that quality, with reſpect to him to whom he has made them over[u].

[u] Licet pro hærede gerere non videatur, qui pretio accepto prætermiſit hæreditatem, tamen dandam in eum actionem, exemplo ejus, qui omiſſa cauſa teſtamenti, ab inteſtato poſſidet hæreditatem, Divus Adrianus reſcripſit. Proinde legatariis, & fideicommiſſariis tenebitur. *l. 2. ff. ſi quis om. cauſ. teſt.* Si pecunia accepta (hæres) omiſit aditionem, legata, & fideicommiſſa præſtare cogitur. *l. 1. C. ſi omiſſa ſit cauſ. teſtam.* See the ninth Article of the firſt Section of the third Title.

XIX.

19. The Succeſſion of Inteſtates does not take place, if there is a Teſtament which ſubſiſts.

When the queſtion is to know to whom the Succeſſion of a perſon deceaſed doth appertain, we muſt always firſt enquire whether he has diſpoſed of it by Will. For whether the Teſtator have Children, or not, he may make diſpoſitions which change the Order of the Succeſſion of Inteſtates, and which ought to be executed. So that in order to know who has the right to the Goods, we muſt always begin with the Teſtaments[x].

[x] Quamdiu poteſt ex teſtamento adiri hæreditas, ab inteſtato non defertur. *l. 39. ff. de acquir. vel om. her.* In plurium hæredum gradibus hoc ſervandum eſt, ut ſi teſtamentum proferatur, prius à ſcriptis incipiatur. Deinde tranſitus fiat ad eos ad quos legitima hæreditas pertinet. *l. 70. eod.*

The Rule explained in this Article has nothing in it contrary to what has been ſaid in the Preface, N°. 8. *touching the Queſtion, Which of the two ſorts of Succeſſion is moſt favourable, whether that of the Heirs by Teſtament, or that of the Heirs of Blood; for here we ſpeak only of caſes where the Teſtament ought to have its effect.*

XX.

20. If the Portions of the Heirs are not regulated, they will be equal.

If there are ſeveral Teſtamentary Heirs, whoſe portions of the Inheritance are not regulated by the Teſtament, or ſeveral Heirs to one dying Inteſtate, and the Law has not determined the ſhares which every one ought to have, they ſhall be equal. For it being neceſſary to divide the Inheritance, and there being no reaſon for an Inequality in the Partition, the Heirs ought all of them to have as much the one as the other[y].

[y] Si plures inſtituantur hæredes, dividi inter eos jus à teſtatore oportet. Quod ſi non fiat, omnes æqualiter hæredes ſunt. *l. 9. §. 12. ff. de hæred. inſtit.*

We have ſaid in this Article with reſpect to the Heirs of one dying Inteſtate, that their Portions ſhall be equal. if the Law does not regulate them. For it may happen among Co-heirs to one dying Inteſtate, that their portions are not equal, becauſe of the Right of Repreſentation. Thus, for example, if there are ſeveral

Children of a Son deceaſed, who divide with their Uncle the Succeſſion of their Grandfather; they will have no more among them all than the Moiety which their Father would have had, and the other Moiety will go to their Uncle. And it happens often in the Cuſtoms of France, *that there are different Heirs to different Goods.*

SECT. II.

Who may be Heir or Executor, and who are the perſons incapable of that quality.

IN order to know who may be Heir or Executor, it is neceſſary to know who are the perſons incapable of this quality; for theſe being excepted, all others are capable of it. There are two ſorts of perſons who cannot be Heirs or Executors, thoſe who are incapable of this quality, and thoſe who have rendred themſelves unworthy of it. We ſhall explain in this Section the cauſes which render perſons incapable of ſucceeding, and in the following Section thoſe which render perſons unworthy of it.

The incapacities of ſucceeding may reſpect both the Succeſſions of *Inteſtates*, and the Teſtamentary Succeſſions: and it will be eaſy to perceive in each Article the Effect of the Incapacity with regard to theſe two ſorts of Succeſſion.

It is to be obſerved touching the cauſes which render perſons incapable of ſucceeding, that beſides thoſe which ſhall be explained in this Section, there is one which is received in ſome Cuſtoms of *France*, which exclude the Daughter, who is married by her Father, and even without giving her any Portion, not only from the Succeſſion of her Father, but from all other Succeſſions of Inteſtates, both in the Direct and Collateral Line, when there are Male Children, or Iſſue of Male Children. And by an univerſal Uſage this excluſion hath been extended to Daughters, who being married and endowed by their Father, renounce all Succeſſions that may fall to them by the death of any one dying Inteſtate, in favour of the Male Iſſue. Which begets an Incapacity, or rather an Excluſion by Agreement, from the ſaid Succeſſions, founded on the regard that is ſhewn to the Male Iſſue, in order to preſerve the Eſtates in the Families, the Daughters who are married finding in the Family of their Huſbands the ſame advantages which they leave to their Brothers and their Deſcendants when they go out of their own Family. And this Uſage is juſtified by the Example of the Divine Law, which excluded the Daughters from the Inheritance of their Fathers, as long as there was any of the Male Iſſue alive[a]. We may conſider likewiſe as another reaſon for this Uſage of the Excluſion of Daughters, who by their Marriages renounce their Right to all Legal Succeſſions in favour of the Males, and of their Deſcendants, the uncertainty of events, which makes it to be thought reaſonable, that the Father in giving to his Daughter a Marriage Portion, may lawfully impoſe on her this condition, that the Portion which he gives her in hand and at preſent, ſhall be to her in lieu of the uncertain hopes of all Succeſſions of *Inteſtates* that might hereafter fall to her. But this excluſion doth not extend to Teſtamentary Diſpoſitions: and this Renunciation of a married Daughter does not render her incapable of diſpoſitions made in proſpect of death for her benefit, whether it be by other perſons, or even by her Father.

Seeing this Excluſion of Daughters by a Renunciation in their Contract of Marriage is not a part of the *Roman* Law, but is directly contrary to it[b], it is not a matter that comes properly within the Deſign of this Book; but we have thought fit to make this Remark upon it. And we may add, that the Reader ſhall have here all the Rules that are eſſential to the matter of this Renunciation; for they depend on the Rules of Covenants, and on thoſe of Succeſſions, which are here explained: and we ſhall likewiſe inſert here the Rules which concern Inſtitutions by Contract, purſuant to the Remark which has been made on this ſubject in the Preface, Numb. X.

Laſtly, it may be remarked on this Subject of the Incapacity of ſucceeding, that beſides that of the Daughters who have renounced their Right to all Succeſſions of *Inteſtates*, there is another ſort of incapacity introduced by the Ordinances and ſome other Cuſtoms of *France*, with reſpect to Teſtamentary Succeſſions, from which they exclude certain perſons. Thus the Ordinances of

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[a] *Numb.* xxvii.

[b] Pater inſtrumento dotali comprehendit filiam ita dotem accepiſſe, *ne quid aliud ex hæreditate patris ſperaret.* Eam ſcripturam jus ſucceſſionis non mutaſſe, conſtitit. Privatorum enim cautionem legum auctoritate non cenſeri. *l. ult. ff. de ſuis. l.* 3. *C. de collat.*

France annul all *Deeds of Gift, or Teſtamentary Diſpoſitions, made by Donors or Teſtators, in favour of their Tutors, Curators, and other Adminiſtrators during their Adminiſtration, or to other perſons for their behoof*[c]. Which ſome Cuſtoms extend to other perſons, from whom the Donors or Teſtators may receive ſuch impreſſions as may diminiſh the liberty of diſpoſing. Thus, upon the like conſiderations, or upon other views, ſome Cuſtoms exclude the Huſband and the Wife from receiving any benefit by diſpoſitions made in favour one of another: which ſome Cuſtoms reſtrain to the diſpoſitions made by the Wife in favour of her Huſband, not prohibiting thoſe of the Huſband in favour of the Wife[d]. But there is this difference between theſe incapacities or excluſions regulated by the Ordinances and by the Cuſtoms, and the incapacities treated of in this Section, that theſe are founded on qualities which reſpect the ſtate of the perſons, and render them incapable by reaſon of ſome perſonal defect, whereas the others are founded on motives which have no relation either to the ſtate of the perſons or to any defect; but which reſpect only ſome advantage for the good of Families.

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[c] *Ordinances of* 1539. *Art.* 131. *and of* 1549. *Art.* 2.

[d] *By the* Roman *Law the Husband and Wife were allowed to give to one another by donations made in proſpect of death, but not by donations that ſhould take effect in their lifetime.* V. l. 1. ff. de donat. int. vir. & ux. l. 32. cod. d. l. 1. §. 2. & 3. *See the Preamble to the Title of Donations.*

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I.

ALL perſons may be Heirs, whether it be to *Inteſtates*, if the Law calls them to the Succeſſion, or that they be named by a Teſtament; provided there be no cauſe which excludes them from the Right of ſucceeding[a].

1. *All perſons may be Heirs or Executors, if there is no impediment.*

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[a] *Capacity ariſes from thence, that there is no Incapacity.*

II.

2. Two ſorts of Incapacity, with reſpect to the two ſorts of Succeſſion.

There are ſome perſons who are incapable only of ſucceeding to Inteſtates, and who are capable of Teſtamentary Succeſſions, ſuch as Baſtards. And there are ſome who are incapable of both kinds of Succeſſion, ſuch as Foreigners, who are called Aliens, and others; of which we ſhall ſpeak hereafter[b].

[b] *See the eighth, ninth, tenth and eleventh Articles.*

III.

3. Two ſorts of Incapacity, with reſpect to their cauſes.

The cauſes of incapacity of ſucceeding, are of two ſorts. There are ſome cauſes which are natural, ſuch as the cauſe of the incapacity of ſtill-born Children; and there are others regulated by the Laws, ſuch as that of the incapacity of profeſſed Monks[c].

[c] *See the following Article, and Article* 10.

IV.

4. Of ſtill-born Children, and of thoſe born without humane ſhape.

Still-born Children, altho' they were alive in their Mother's Womb at the time that any Succeſſion fell, whether it be of one dying *inteſtate*, or of one who had made a Teſtament, that might belong to them, do not ſucceed: and conſequently they do not tranſmit that Succeſſion to the perſons who would ſucceed to them, if they had died only after their birth. For they could never be reckoned in the number of perſons capable of acquiring Goods; ſince it may be ſaid, that they never had any Exiſtence in this World; and by conſequence could never have right to any thing in it[d]. And the ſame incapacity excludes, with much greater reaſon, that which is born of a Woman without humane Shape, although it may have had life; for it is a Monſter, or a Maſs of Fleſh, which cannot be ranked in the number of Perſons[e].

[d] Qui mortui naſcuntur, neque nati, neque procreati videntur: quia nunquam liberi appellari potuerunt. *l. 129. ff. de verb. ſignif.* Uxoris abortu teſtamentum mariti non ſolvi—— juris evidentiſſimi eſt. *l. 2. C. de poſt. hared. inſt.* See the following Article.

[e] Non ſunt liberi qui contra formam humani generis converſo more procreantur: veluti ſi mulier monſtruoſum aliquid aut prodigioſum enixa ſit. *l. 14. ff. de ſtat. hom. v. l. 135. ff. de verb. ſignif.* See the fourth Article of the firſt Section of Perſons, and theſe laſt words of the third Law, *C. de poſt. hared. inſt.* cited on the following Article, *ſi vivus ad orbem totus proceſſit, ad nullum declinans monſtrum vel prodigium.*

[*The Law of* England *agrees with the Civil Law in this particular. For a Monſter, which hath not the ſhape of Mankind, cannot be Heir, or inherit any Land, albeit it be brought forth within Marriage. But although he hath deformity in any part of his body, yet if he hath humane ſhape, he may be Heir.* Bracton, de legibus Angliæ lib. 5. cap. 30. numb. 10. Coke, 1 Inſtit. fol. 7. *b.*]

V.

5. Children who die as ſoon as they are born, ſucceed.

Children who are born alive, altho' they die immediately after their birth, are capable of the Succeſſions which fell in the interval between their Conception and their Birth. Thus, a Child who was born alive after the death of his Father, and who died in the moment after his birth, would ſucceed to him. And if there was a Teſtament which had called another perſon to the Succeſſion, it would be annulled by the ſaid birth[f].

[f] Uxoris abortu teſtamentum mariti non ſolvi, poſtumo verò præterito, quamvis natus illico deceſſerit, non reſtitui ruptum juris evidentiſſimi eſt. *l. 2. C. de poſt. hared. inſtit.* Quid ſi non integrum animal editum ſit, cum ſpiritu tamen: an adhuc teſtamentum rumpat? & hoc rumpit. *l. 12. §. 1. ff. de lib. & poſt. hared. inſt.*

Quod certatum eſt apud veteres, nos decidimus. Cum igitur is, qui in ventre portabatur, præteritus fuerit, qui ſi ad lucem fuiſſet redactus, ſuus hæres patri exiſteret, ſi non alius eum antecederet, & naſcendo ruptum teſtamentum faceret, ſi poſtumus in hunc quidem orbem devolutus eſt, voce autem non emiſſa ab hac luce ſubtractus eſt: dubitabatur ſi is poſtumus ruptum facere teſtamentum poſſet. Et veterum animi turbati ſunt, quid de Paterno elogio ſtatuendum ſit. Cumque Sabiniani exiſtimabant, ſi vivus natus eſſet, etſi vocem non emiſit, rumpi teſtamentum: apparetque quòd & ſi mutus fuerat, hoc ipſum faciebat. Eorum etiam nos laudamus ſententiam: & ſancimus, ſi vivus perfectè natus eſt, licet illicò poſtquam in terra cecidit, vel in manibus obſtetricis, deceſſit, nihilominus teſtamentum rumpit. Hoc tantummodo requirendo, ſi vivus ad orbem totus proceſſit, ad nullum declinans monſtrum vel prodigium. *l. 3. C. de poſt. hared. inſt.*

Whether a Child born before its time, but born alive, can inherit.

☞ From the Rule explained in this Article, and the Laws here quoted, there ariſes naturally a queſtion, which being of frequent uſe, deſerves our conſideration; that is, Whether among the Children capable of ſucceeding, we ought to reckon thoſe who being born before their time, cannot live, and are born for no other end but to die? This queſtion is never moved on account of the intereſt of the Children themſelves, but becauſe of the concern which other perſons have in it. Thus, for example, if a Widow big with Child is delivered after the death of her Huſband, of a Child of four or five Months old, which dies as ſoon as it is born, the queſtion will be between this Widow, who will demand that which the Law gives her of her Child's Paternal Goods; alledging, that her Child ſucceeded to its Father; and the Heirs of the Father, who will pretend, that the Child not having been able to live, was not capable of ſucceeding. In which queſtion it will be neceſſary to determine, whether the Child did ſucceed to its Father, or not. And it would be the ſame thing, with reſpect to the Maternal Goods of the Child, if the Child having ſurvived its Mother, who died in Child-bed, the Father ſhould demand, in oppoſition to the Heirs of the Mother, that which he ought to have of the Maternal Goods of the ſaid Child.

In this queſtion, the Heirs of the Father, or thoſe of the Mother, would ſay in one word, that ſeeing this Child could not live, it could not ſucceed; that being incapable of uſing or ſtanding in need of any temporal Goods, it is incapable of acquiring any, and conſequently of having any ſhare in a Succeſſion. And the Father and Mother would ſay, on the contrary, that if the Child is born alive, it is a ſufficient reaſon why it ſhould be counted in the number of Children: That the birth of any perſon places him in the World in the rank of Men, who are really and truly Children of thoſe from whom they derive their birth: That the birth of this Child, and the care and pains taken about it, both before and at its birth, have been as chargeable to the Parents, as the birth of any other Child; ſo that its death is to them a real loſs of a Child, more grievous in one ſenſe than the death of their other Children, and which requires the ſame conſolation which they would have at the death of any of their other Children, by ſucceeding to them, which cannot be unleſs the Child be allowed to have a right of ſucceeding, that it may leave to its Father, or to its Mother, that Portion which the Law has allotted to the Parents of the Goods of their Children. That the Law gives the Right of Succeſſion to all the Children without diſtinction, and excludes none from that number, except thoſe, who being born without human ſhape, cannot be placed in the Rank of Perſons[a]. That altho' the ſaid Children can make but little uſe of the Goods, yet their condition in this reſpect, doth not differ from the condition of thoſe Children, who being born in due time, are nevertheleſs incapable of living, and who die as ſoon as they are born, whether it be that their death is occaſioned by the hard labour of their Mother, or by ſome infirmity, or for the want of a juſt conformation of their Members, or by ſome other cauſe, which altho' it makes it impoſſible for them to live, and renders the Goods in a manner uſeleſs to them, yet it does not for all that make them incapable of Succeſſions. That altho' the little occaſion which Children born before their time may have for the uſe of the Goods, expires in a few days, or even in a few hours, yet it may be ſaid, and not without ground, that they ſtand in need of them both before their birth, and even after they are born, if they live any time, and that it is out of the Goods which belong to them, that what they ſtand in need of ought to be taken. That it is in conſideration of all Children without diſtinction before their birth, that the Law allots to Widows who are big with Child, and even to thoſe who have Eſtates of their own, a proviſion out of the Eſtate of their deceaſed Huſbands, during their being with Child, for the preſervation of the Child[b]: and that Curators are aſſigned to the Children who are yet unborn, in order to take care of the Goods which wait for them[c], becauſe they are Heirs before they are born, and that with reſpect to the acquiring of Goods which may belong to them, the Law conſiders them as if they were already born[d]. That the Succeſſions of the Father or Mother of the ſaid Children, ought not to remain in ſuſpence after their birth: and that ſeeing they did already belong to them before they came into the world, upon this condition only that they ſhould be born alive; and that during the time they remain in this life theſe Succeſſions can belong to no other perſon but to them; it ſeems juſt, that adding to theſe conſiderations the great favour which attends the Cauſe of the Father or Mother who ſurvive their Children, we ſhould look upon theſe Succeſſions as being acquired to the Children, both on account of the Right which the Children had to them even before they were born, and likewiſe in conſideration of the natural motive which induced our Lawgivers to give to the Father or Mother the conſolation not to loſe at the ſame time their Children, and alſo their Effects[e]: and likewiſe for this reaſon, that the Succeſſion of the Father or Mother of this Child cannot, during its Life, go to any other perſon but to the Child, and that it likewiſe cannot be one moment without belonging to ſome body or other. That the Laws quoted on this Article require nothing more for making Children capable of ſucceeding, but only that they may have one moment of Life at their birth. That the firſt of the ſaid Laws oppoſes to the Still-born Child which does not ſucceed, the Child that dies immediately after its birth, and declares it capable of ſucceeding; whereas the ſtill-born Child is incapable thereof. That the ſecond Law requires only that the Child ſhould have a humane ſhape, and be born alive, *integrum animal cum ſpiritu*. That as for the third Law, it appears that *Juſtinian* has there decided a queſtion that was between two Parties of Lawyers; the one pretending that the Child which had given any ſign of Life at its birth, altho' it did not cry, after the uſual manner of Children, might ſucceed: And the others being of opinion that crying was neceſſary in order to prove that the Child had Life; which in all appearance was founded on the uncertainty of all the other ſigns of Life. Thus, it would ſeem that the queſtion between thoſe Lawyers, was not, Whether a Child born before its time, altho' born alive, was capable of ſucceeding? but only, Whether we could judge of the Child's being born alive, by any other tokens than that of its crying? Which ſeems in a manner to prove, that both Parties agreed that a Child, altho' born before its time, might ſucceed, if it had lived. And likewiſe in this diſpute, *Juſtinian* does not decide, that Children come to their full time, and born alive, ſhould ſucceed; and that thoſe born before their time ſhould not ſucceed, altho' they ſhould be alive at their birth; which he ought to have decreed, if that had been the queſtion: but he only decides in general and indefinitely, that Children who are born alive may ſucceed, altho' they die immediately after their birth. That it is true, that this Law is expreſſed in theſe terms, *ſi vivus perfecte natus eſt*; but whether the word *perfecte* relates to the preceding word *vivus*, or to the word *natus*, which follows, and that this expreſſion ſignifies either perfectly born, or perfectly alive, it cannot be gathered from either of theſe two meanings, that the words of the Law are to be underſtood only of a Child born at its full time; ſince a Child born before its time, may be born in ſuch a manner as that there can be no room for doubting of the Child's being perfectly alive, or of its being perfectly born; that is to ſay, of its being ſeparated from the Bowels of its Mother, either by a natural and ordinary birth, or by opening the Mother's body after her death. And the words which follow ſeem to explain the Law in this manner, ſince they make the only queſtion to be, to know whether the Child is perfectly born, and whether it is a Child, and not a Monſter, *Hoc tantummodò requirendo, ſi vivus ad orbem totus proceſſit, ad nullum declinans monſtrum vel prodigium*. That if we ſhould give to this Law the effect to exclude all Children, who by reaſon of their being born before their time cannot live, we ſhould be obliged likewiſe to exclude from Succeſſions, Children born in the eighth Month, who, according to the general opinion, cannot live. That even the Laws which ſpeak of Children not come to their full time, conſider in them this defect only when the queſtion is concerning the ſtate of the Children, and to know if they are lawfully begotten, or no; whether it be that they are born too ſoon after the Marriage, or too late after the Huſband's death. 'Tis true, that this queſtion regards alſo the Right of Succeſſion, for Children who are not legitimate cannot inherit; but there is not any one of thoſe Laws which conſiders in the Children the capacity or incapacity of living, in order to exclude thoſe from inheriting, who by reaſon of their being born before their time are incapable of living. It is in reference to this queſtion concerning the State of theſe Children, that it is ſaid in one Law, that a Child born in the ſeventh Month after the Marriage, is the lawful Child of the Huſband[f]. That it is ſaid in another Law, that a Child born after the tenth Month from the death of the Huſband, does not ſucceed to him, the Law judging that he has another Father: and it is there added, That a Child born in the hundredth fourſcore and ſecond day, is born at its full time; and that if a Woman Slave, being made free, happens afterwards to be brought to bed on the hundredth fourſcore and ſecond day after her freedom, her Child ſhall have been conceived Free[g]. Thus all that is contained in thoſe Laws, which has any relation to the capacity or incapacity of theſe Children to inherit, concerns only their ſtate, and their quality of Legitimacy, without taking it into conſideration whether they may, or may not live. There is another text, which altho' it is not in the Body of the Law, is nevertheleſs of ſome Authority, becauſe it is in the Works of the Lawyer *Paulus*, one of the firſt Authors of the *Roman* Laws, in which it is ſaid, that a Child of ſeven Months is counted in the number of Children, and is of advantage to its Mother[h]. From whence it follows, that a Child born before that time, is of no benefit to her. But this is only in relation to the ancient *Roman* Law, which gave the Mother right to ſucceed to her Children, only when ſhe had three of them. So that this Rule, no more than the others already mentioned, had no relation to the capacity or incapacity of theſe Children, for Succeſſions, and it ſerved only to exclude the Children born before the ſeventh Month from being of the number of Children neceſſary to intitle the Mother to this Right of Inheritance: which was founded on this reaſon, that the Law which required that the Mother ſhould have three Children to intitle her to this Right, had in view the advantage which accrued to the Commonwealth by the multiplication of Children, and conſidered that thoſe who could not live were of no advantage in that reſpect. That, in fine, if Children which are born before their time are incapable of inheriting, there will ariſe a great many inconveniences from the difficulty of judging of the time of the Conception of a Child, in order to know whether it is born at its full time, or not; and likewiſe from the uncertainty that may be even in the Rule it ſelf, concerning the time neceſſary for a Child's being born at the full term, as we ſhall obſerve in the proper place.

As to this Queſtion, which is of ſo great importance becauſe of its conſequences in the caſes where it falls out, it would ſeem that from all the foregoing Remarks we might conclude, that if it were to be decided by the Laws which have been quoted, every Child that lives one moment after its birth, was capable of inheriting, whether it was born at its full time, or before. And we ſee likewiſe that it has been adjudged, that Children born in the fifth or ſixth Month, which according to the Rule, is before the due time, having lived for ſome moments, have inherited. And altho' there may be other Examples, where it has been decided on the contrary, that Children born within the ſame time have not ſucceeded, yet this may have happened in caſes where there was no certain proof that the Child was alive. And we ſee in the Author of the greateſt renown among thoſe who have collected the Decrees of the Parliaments in *France*, that he reports one[l], which confirms this conjecture. It was in the caſe of a Child of four or five Months, taken out of the Womb of its Mother after her death, and which, as the Father pretended, was alive; the Heirs of the Mother alledging to the contrary, that the ſaid Child had given no manner of ſign of life; ſo that the diſpute between the Parties, was only about the Fact, to know whether the Child had lived, or not. Upon which it was adjudged, that the Child was ſtill-born. Which ſeems to imply, that if it had been certain that the Child was born alive, it would have ſucceeded. For ſeeing this Child was born before its time, if it had been adjudged for that reaſon, that altho' it had been born alive, it could not have ſucceeded, it would not have been pronounced that it was ſtill-born; becauſe the Fact concerning its life, or its death, would have been indifferent and uſeleſs, as to what concerned the Succeſſion. And alſo another Author[m], reporting a Decree of Parliament, by which it was adjudged, that a Child of five or ſix Months, being born alive, had inherited, ſays, that it was decided that the ſeven Months which the Laws require for the term of a Lawful Birth, ought not to be underſtood, as has been already obſerved, except in reference to the queſtion about the State of the Child, to know whether it is legitimate, or not, *cum agitur de ſtatu, & ſit quæſtio ſtatus*; and have no relation to the queſtion about knowing whether the Child has ſucceeded, in order to tranſ-

mit

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[a] *L.* 14. *ff. de ſtat. hom.* See the preceding Article.

[b] *See the eighth Article of the ſecond Section, In what manner Children ſucceed.*

[c] *See the ſeventh Article of the ſaid ſecond Section, In what manner Children ſucceed.*

[d] *L.* 7. *l.* 26. *ff. de ſtat. hom. l.* 7. *ff. de ſuis & legit. l.* 1. *ff. de vent. in poſſ. mit.*

[e] *L.* 6. *ff. de jur. dot.*

[f] Septimo menſe naſci perfectum partum jam receptum eſt, propter auctoritatem doctiſſimi viri Hyppocratis. Et ideò credendum eſt eum qui ex juſtis nuptiis ſeptimo menſe natus eſt, juſtum filium eſſe. *l.* 12. *ff. de ſtat. hom.*

[g] Poſt decem menſes mortis natus non admittitur ad legitimam hæreditatem. De eo autem qui centeſimo octogeſimo ſecundo die natus eſt, Hippocrates ſcripſit, & Divus Pius pontificibus reſcripſit, juſto tempore videri natum. Nec videri in ſervitutem conceptum, cùm mater ipſius ante centeſimum octogeſimum ſecundum diem eſſet manumiſſa. *l.* 3. §. *pen. & ult. ff. de ſuis & legit. hæred.*

[h] Septimo menſe natus matri prodeſt. Ratio enim Pythagorei numeri hoc videtur admittere, ut aut ſeptimo pleno, aut decimo menſe partus maturior videatur. *Paul. ſent.* 4. *tit.* 9.

[i] *See the fifth Article of the firſt Section, In what manner Children ſucceed; and the remark which is there made.*

mit the Succeſſion, *non cum agitur de tranſmiſſione hæreditatis*; theſe are the words of that Author. Thus, it would ſeem by theſe Decrees, that they did not take it for a Rule, that the Child which is born before its time not being capable of living, is incapable of ſucceeding; and that they have on the contrary taken it for a Rule, that the Child which is born alive, altho' it be before the time neceſſary for its being capable to live, does nevertheleſs ſucceed; provided that the proofs of Life be perfect, and that they do not take for proofs of the life of a Child, ſome appearances of motions of the Members, which may happen even to thoſe which are born dead, and which are commonly the only ſigns of Life that appear in Children which are born ſo long before their time, as it happened in the caſe of the firſt of theſe two Decrees, as the Author has there obſerved in reporting the reaſons inſiſted upon by both the Parties. It was without doubt the uncertainty of ſuch like marks of life in theſe Children, that induced the Lawyers before mentioned, to require for a proof of the life of the Child, that it was heard to cry.

[l] *Loüet, L. E. n.* 5.

[m] *Bouguier, L. C. n.* 4.

VI.

6. A Child born after the Mother's death.

We muſt reckon in the number of Children capable of inheriting, the Child that is taken out of its Mother's Womb, after her death, altho' it had lived only a few moments. For altho' the Child was not born when the Mother's Succeſſion was open; yet the operation by which it is brought into the World, ſtands in place of its birth; and it is enough that the Child hath ſurvived its Mother[g]. And we may even ſay that it ſucceeded to its Mother before its birth.

[g] Quod dicitur filium natum rumpere teſtamentum, natum accipe, etſi exſecto ventre editus ſit. *l.* 12. *ff. de liber. & poſt. hæred. inſt. l.* 6. *ff. de inoff. teſt. v. l.* 132. *& l.* 141. *ff. de verb. ſignif.*

What is added in the Article, that a Child may be ſaid to have ſucceeded to its Mother before its birth, is founded on this, that the Laws conſider the Children which are in their Mother's Womb, as if they were really born, when it concerns matters that are for their advantage, or Succeſſions which may belong to them. See the Laws quoted under the letter [d], in the remark on the foregoing Article.

VII.

7. Perſons who are mad, deaf and dumb, and Prodigals, may inherit.

Thoſe who are born deaf and dumb, or with other infirmities which render perſons incapable of the Management of their Eſtates, are nevertheleſs capable of inheriting, as well as the other Children. And even thoſe who are mad, acquire the Succeſſions which fall to them, as well as Prodigals who are interdicted. But all theſe ſorts of Perſons have Curators aſſigned them; who take care of their Eſtates, as Tutors do of thoſe belonging to Minors. And altho' theſe qualities render them incapable of binding themſelves, and that the quality of Heir may contain ſome engagements, yet their Tutors and Guardians contract for them. But always upon this condition, that if the Succeſſions are burthenſome to them, they may renounce them, and be relieved from the ſaid Engagements[h].

[h] *V. tit. ff. de bon. poſſ. furioſo inf. muto, ſurdo, cæco compet.* Furioſus, & mutus, & infans, & filiusfamilias—— teſtamenti factionem habere dicuntur. Licet enim teſtamentum facere non poſſunt, attamen ex teſtamento, vel ſibi, vel alii acquirere poſſunt. §. 4. *in f. inſt. de hæred. qual. & diff.* Mutus & ſurdus rectè hæres inſtitui poteſt. *l.* 1. §. 2. *ff. de hæred. inſtit. l.* 5. *ff. de acquir. vel omittit. hæred.* Eum cui lege bonis interdicitur, hæredem inſtitutum poſſe adire hæreditatem conſtat. *d. l.* 5. §. 1. *ff. de acquir. vel omit. hæred.*

All theſe ſorts of perſons are capable of having Goods of their own, and it is only becauſe of this capacity that they have Tutors and Curators aſſigned them. And as to the engagements which attend the quality of Heir, they enter no farther into them than to the value of the Goods of the Succeſſion. For when a Succeſſion falls to them, there is an Inventory made of all the Goods, in order to charge the Tutor or Guardian therewith. Thus the Creditors have the ſame ſecurity in this caſe, as they have againſt thoſe Heirs who are of Age, and who take upon them the quality of Heir, only with the benefit of an Inventory. Which ſhall be the ſubject matter of the enſuing Title. See the eleventh, twelfth, and thirteenth Articles of the fifth Section of Perſons.

VIII.

8. Baſtards do not ſucceed to Inteſtates.

Baſtards are incapable of ſucceeding to *Inteſtates*, unleſs it be to their own Children, if they have any lawfully begotten: and they do not ſo much as ſucceed to their own Mothers. For they do not reckon in Families any perſons in the number of Relations who are capable of inheriting, except ſuch as are placed in that Rank by their being born in lawful Wedlock. And as Baſtards cannot ſucceed to any who die *inteſtate*, ſo likewiſe no body can ſucceed to them when they die *inteſtate*, except their own lawful Children, not even their Mothers[i]. But they are capable of receiving by a Deed of Gift, or a Teſtament, and they have power to diſpoſe of their own Eſtates by Will.

[i] Vulgò quæſitos nullos habere agnatos manifeſtum eſt. §. 4. *inſt. de ſucceſſ. cogn.*

Altho' this Text relates only to the Succeſſions on the Father's ſide, and that by the Roman *Law Baſtards* *were capable of ſucceeding to their Relations of the Mother's ſide*[*], *yet nevertheleſs we have thought fit to put down the Rule here in general, and conformable to the Uſage in* France, *which excludes them from all Succeſſions to Inteſtates. For altho' ſome ſingular Cuſtoms in* France *call Baſtards to the Succeſſion of their Mothers, in conjunction with the Children lawfully begotten; yet theſe particular Uſages are no reaſon why the contrary Rule ſhould not be looked upon as being the Uſage of* France, *and as being more agreeable to Decency and Good Manners.* See the Preface to this ſecond Part, numb. XII. and the ſeventeenth, twenty ſecond and thirtieth Articles of this Section; and the fifth Article of the firſt Section in what manner Children and Deſcendants ſucceed.

[*] V. l. 2. ff. unde cogn. §. 4. Inſtit. de ſucceſſ. cogn.

By the 18th *Novel of* Juſtinian, *chap.* 5. *the Children by a Concubine had a ſixth part of their Father's Succeſſion, if he died without lawful Iſſue: and their Mother had in this ſixth part the ſame ſhare or portion which every one of her Children had according to their number.*

☞ It is ſaid towards the cloſe of the Article, that Baſtards are capable of acquiring by Deed of Gift, or by Teſtament, and that they may diſpoſe of their own Goods; concerning which it is neceſſary to obſerve, that as to the diſpoſitions which they may make of their Goods, their Condition is the ſame with that of other perſons, and they have the ſame liberty therein. But as for the bounties which may be given to them, the *Roman* Law, the Cuſtoms of *France*, and Uſage have ſet ſome bounds thereto.

As for the *Roman* Law, the Emperors had prohibited Fathers who had Wives, or lawful Children, to give to their Baſtards, or to their Mother, more than a four and twentieth part of their Eſtates[a]. Which the Emperor *Juſtinian*, by the 89th *Novel*, *chap.* 12. extended to a twelfth part, leaving Fathers who had no lawful Iſſue, or Aſcendants, at liberty to give their whole Eſtate to their natural Children: and in caſe there were only Aſcendants, he reſerved only for them their Legitime.

[a] *L.* 2. *C. de natur. lib.*

As to the Cuſtoms of *France*, many of them allow Parents to give to their Baſtard Children, but differently. Some of them extend this liberty even to the Licenſe of inſtituting them Heirs by their Contract of Marriage, or of making them Gifts, with this effect, that the ſaid diſpoſitions ſhall ſtand good, except in ſo far as they may be prejudicial to the Legitime or Filial Portion of the Children; which is moſt notoriouſly contrary both to Equity and common Decency. There are other Cuſtoms which permit the Fathers and Mothers of Baſtard Children to give them what is neceſſary for their Alimony, and Maintenance; which ſeems to imply a prohibition of giving them any thing more. And theſe bounds which are ſettled indifferently for all ſorts of Baſtards, and which, with reſpect to them all in general, are founded upon Honeſty and good Manners, are ſtill more juſt with regard to Baſtards born in Inceſt, Adultery, or ſome other Criminal Copulation, ſeeing that by a Law of *Juſtinian*'s, theſe could not ſo much as claim Alimony from their Parents[b], altho' it be agreeable both to Natural Equity, to the Canon Law, and to our Uſage, that ſuch ſhould be maintained by their Parents[c].

[b] *V. Nov.* 89. *c. ult.*

[c] *C.* 5. *in f. de eo qui duxit in matr. quam poll. per adult.*

It is ſufficient to take notice here of theſe Principles of Honeſty and Decency, and of the diſtinction which ought to be made between the different ſorts of Baſtards, without entring into the detail of the Queſtions which might be raiſed, touching the bounds or latitude of Diſpoſitions in their favour. For the detail of this matter is not regulated after the ſame manner by the *Roman* Law, as it is by the Cuſtom and Uſage of *France*. So that this Matter not having Rules that are fixed, uniform, and common over all, it were to be wiſhed that ſuch were eſtabliſhed: and this is not a matter that comes properly within the deſign of this Book.

[*The Law of* England *permits every Man, both by Deed made and executed during their lives, and alſo by their laſt Wills and Teſtaments, to give and to deviſe unto any of their Baſtards without diſtinction, all their Lands, Tenements or Hereditaments, without reſtraint, or at leaſt more than will ſuffice for their ſuſtentation. Which liberty cannot but redound to the great prejudice of right Heirs, conſidering the danger whereunto lawful Children are ſubject, thro' the flatteries of lewd Women, who leave no ſtone unturned to procure ample Settlements to be made on their illegitimate Offſpring. Swinburn* of Wills, Part 5. §. 7. *As to a competent Proviſion for the ſuſtentation of Baſtards, that they may not be a burden to the Pariſh where they are born, the Law of* England *has taken due care therein, having impowered the Juſtices of Peace, on due application to them, to compel the reputed Fathers of ſuch Baſtard Children to allow towards their maintenance, ſuch Sum, or Sums of Money, as the ſaid Juſtices ſhall think meet and reaſonable.* Stat. 18 Eliz. cap. 3.

IX.

Strangers, who are called Aliens, are incapable of all manner of Succeſſions, whether they come by Teſtament, or by the death of perſons dying *inteſtate*[l]. 9. *Strangers, or Aliens, do not ſucceed.*

[l] Peregrini capere non poſſunt (hæreditatem.) *l.* 1. *Cod. de hæred. inſtit. l.* 6. §. 2. *ff. eod.* See what has been ſaid touching Strangers, or Aliens, in the Preface to this Second Part, Num. XIII. See the eleventh Article of the ſecond Section of Perſons, the eighteenth, twenty third, and thirty firſt Articles of this Section, the ſecond Article of the thirteenth Section of this Title, and the third Article of the fourth Section of the ſame Title, together with the Remark there made on it.

Strangers are not only incapable of ſucceeding, but are alſo incapable of making a Teſtament. See the twelfth Article of the ſecond Section of Teſtaments.

[*As to the Succeſſion of Aliens in* England, *the Law diſtinguiſhes between Lands of Inheritance and Perſonal Eſtate; which has been already taken notice of in the Remark on Numb. XIII. of the Preface to this Second Part.*]

X.

10. *Profeſſed Monks do not ſucceed.* Profeſſed Monks do not ſucceed: and they are equally excluded by their Vows both from ſucceeding to *Inteſtates*, and by Teſtament[m].

[m] *By the fifth Novel of* Juſtinian, *Chap.* 5. *the Goods belonging to thoſe who entred into a Convent did accrue to the Convent into which they entred themſelves; and they could not afterwards diſpoſe of them, and their Children could retain no more of their ſaid Parents Goods than their Legitime. In* France *the Goods of one who enters into a Religious Order, are not only not acquired to the Convent into which he enters himſelf, but he cannot even diſpoſe of them in favour of any Convent or Monaſtery whatſoever. But he may diſpoſe of his Goods before his Profeſſion, in favour of his Relations, or other perſons, but not after he is once Profeſſed.* See the nineteenth Article of the Ordinance of *Orleans*, and the twenty eighth Article of that of *Blois*. See touching Profeſſed Monks, the thirteenth Article of the ſecond Section of Perſons, and the nineteenth, twenty fourth and thirty ſecond Articles of this Section.

[*As to the incapacity of Religious Perſons by the Law of* England, *in matters of Property and Succeſſion, the ſame has been already obſerved in the Remark on the thirteenth Article of the ſecond Section of the ſecond Title of the Preliminary Book; under which Title the ſtate and condition of Perſons in general is fully explained.*]

XI.

11. *Perſons Condemned to Death, or to Puniſhments which import Civil Death, cannot ſucceed.* Perſons condemned to Death, or to ſome other Puniſhment which implies Civil Death, are capable of no Succeſſion, whether they be called to it by Teſtament, or by the death of an *Inteſtate*. And this incapacity makes the Goods which ought to have come to them, to paſs to the other perſons whom the Law calls to the Succeſſion in their default[n].

[n] Edicto prætoris bonorum poſſeſſio his denegatur qui rei capitalis damnati ſunt, neque in integrum reſtituti ſunt. *l.* 13. *ff. de bon. poſſ.* See the twentieth, twenty fifth, thirty third and following Articles of this Section, the fifth Article of the fourth Section, the firſt Article of the thirteenth Section, and the fourteenth Article of the ſecond Section of Teſtaments.

In France, *by the Ordinance of* 1670. *Art.* 29. *of Defaults, the Puniſhments which import Civil Death, are Sentence of Death, or Condemnation to the Gallies for ever, or to perpetual Baniſhment out of the Kingdom.*

XII.

12. *Corporations and Communities may ſucceed by Teſtament.* Corporations and Communities, ſuch as Towns, Univerſities, Colleges, Hoſpitals, Chapters, Convents, and other Societies, whether Eccleſiaſtical or Secular, which are eſtabliſhed and approved by Law, hold the place of Perſons, and being capable of poſſeſſing Lands and Goods, are likewiſe capable of Teſtamentary Succeſſions. And thoſe who have power to diſpoſe of their Eſtates, may inſtitute the ſaid Communities, their Heirs or Executors, provided the Law has not ordered any thing to the contrary[o].

[o] Habeat unuſquiſque licentiam ſanctiſſimo catholico venerabilique concilio decedens bonorum quod optaverit relinquere, & non ſint caſſa judicia ejus. *l.* 1. *C. de ſacroſanct. Eccl.*

Collegium, ſi nullo ſpeciali privilegio ſubnixum ſit, hæreditatem capere non poſſe dubium non eſt. *l.* 8. *C. de hæred. inſtit.*

We muſt underſtand by the Privilege mentioned in this text, the permiſſion to form a Society. For there can be no lawful Society without the permiſſion of the Prince. See the fifteenth Article of the ſecond Section of Perſons.

There are ſome Communities which are incapable of Succeſſions, ſuch as thoſe of the Mendicant Friars. See concerning diſpoſitions made in favour of Religious Houſes, the Remark on the tenth Article.

XIII.

13. *Children who were not born before the Succeſſion fell may ſucceed.* We muſt not reckon among the number of perſons incapable of ſucceeding, Children who are not yet born when the Succeſſion falls, provided they were then conceived. For Poſthumous Children, who are born only after the death of their Fathers, do nevertheleſs ſucceed to them. And one may name for his Heir or Executor the poſthumous Child of another perſon. So that theſe Children are equally capable of all Succeſſions which may fall to them, whether they come by Teſtament, or by the death of an *Inteſtate*[p].

[p] Furioſus, & mutus, & poſthumus, & infans, & filiusfamilias, & ſervus alienus teſtamenti factionem habere dicuntur. Licet enim teſtamentum facere non poſſunt, attamen ex teſtamento vel ſibi, vel alii acquirere poſſunt. §. 4. *in f. inſt. de hæred. qual. & diff.* (Poſthumus alienus) hodiè rectè hæres inſtituitur. *inſt. de bon. poſſ.*

XIV.

14. *The different Incapacities have their different effects.* All the cauſes of Incapacity which have been explained, have their different effects, according to their nature, and according to the time in which the perſons happen to be under the Incapacity[q]. Which depends on the Rules which follow.

[q] *See the following Articles.*

XV.

15. Difference between the Incapacities with reſpect to the two kinds of Succeſſion.

As to what relates to the nature of the ſeveral ſorts of Incapacities; to wit, that of Baſtards, Foreigners, Profeſſed Monks, and of Perſons condemned to ſome Puniſhment which implies Civil Death, the Incapacity of Baſtards is diſtinguiſhed from the others in this, that Baſtards are incapable only of Legal Succeſſions, or Succeſſion to Inteſtates, and are capable either of ſucceeding by a Teſtament, or receiving ſome benefit thereby, according to the diſtinctions which have been remarked on the eighth Article; but the other Incapacities exclude the perſons who are under them equally from both the kinds of Succeſſion, and from all diſpoſitions made in proſpect of death[r].

[r] *See the eighth Article, and the Remark upon it.*

XVI.

16. Some Incapacities may ceaſe, others laſt always.

We muſt farther obſerve concerning the nature of theſe four ſorts of Incapacities, that there are ſome of them which laſt always, and others which may ceaſe[ſ], as will appear by the Rules which follow.

[ſ] *See the following Articles down to the twenty ſixth.*

XVII.

17. The Incapacity of Baſtards ceaſes by the Marriage of their Father and Mother.

The Incapacity of a Baſtard whoſe Father and Mother might have been lawfully married together at the time of the Child's conception, ceaſes in caſe the Parents being afterwards joined together in Matrimony, own it for a lawful Child, and the ſame is legitimated by the ſubſequent Marriage[t].

[t] Mox poſtquam nuptiæ cùm matribus eorum fuerint celebratæ, ſuos patri & in poteſtate fieri (jubemus.) *l. 5. C. de natur. lib.*

Sancimus in hujuſmodi caſibus omnes liberos, ſive ante dotalia inſtrumenta editi ſint, ſive poſtea, una eademque lance trutinari. *l.* 10 *eod.* Nuper legem conſcripſimus, qua juſſimus ſi quis mulierem in ſuo contubernio collocaverit non initio affectione maritali *(eam tamen cum qua poterat habere connubium)* & ex ea liberos ſuſtulerit, &c. *l.* 11. *eod. V. Nov.* 12. *c.* 4. *Nov.* 74. *c.* 1. *Nov.* 89. *c.* 8.

See touching the incapacity of Baſtards, the twenty ſecond and thirtieth Articles.

We ſhall ſay nothing here of the manner of Legitimating Baſtards by Letters Patents of the Prince, that being a matter which doth not come within the deſign of this Book.

[*By the Law of* England, *Children born before Marriage, are ſtill reputed Baſtards, notwithſtanding the ſubſequent Marriage between their Father and Mother.* Stat. 20. Hen. III. cap. 9. Coke 2. Inſtit. pag. 96. Selden ad Fletam pag. 538.]

XVIII.

18. Naturalization makes the incapacity of Foreigners to ceaſe.

The incapacity of Foreigners may ceaſe by Naturalization. For the effect of Naturalization is, to give them the ſame Rights and Privileges with thoſe who are Natural Born Subjects of the Prince who grants them that favour[u].

[u] Cives allectio facit. *l. 7. C. de incol.*

Although this Text does not relate directly to Letters of Naturalization, yet theſe words may be applied to the effect of the ſaid Letters. See the twenty third and thirty firſt Articles.

[*The diſtinction which the Law makes in* England *between Naturalization by Act of Parliament, and Denization by the King's Letters Patents, has been already explained in the Remark on the eleventh Article of the ſecond Section of the ſecond Title of the Preliminary Book.*]

XIX.

19. The incapacity of Monks ceaſes by the Nullity of their Vows.

The incapacity of Profeſſed Monks may ceaſe if their Vows happen to be null, and that having proteſted againſt the ſame in due time, they procured them to be declared null by a Court of Juſtice, which they may do if they made Profeſſion before they attained the age preſcribed by Law, or within their year of Probation, or if they have any other juſt cauſe to ſhew[x]. But if their Profeſſion cannot be annulled, their incapacity will laſt always.

[x] *The vows would be null, if they were not preceded by one year of Probation, and if he who makes Profeſſion was not ſixteen years of Age compleat.* See the Council of *Trent*, Seſſion 25. Chap. 15. and the Ordinance of *Blois*, Article 28. See touching the Incapacity of Profeſſed Monks, the twenty fourth and thirty ſecond Articles.

XX.

20. That of a condemned perſon ceaſes by a Remiſſion, and in other caſes.

The incapacity incurred by the Civil Death of the perſon condemned may ceaſe, if he gets his Sentence of Condemnation to be reverſed. And if he died before the Accuſation, or even before Sentence of Condemnation, he would have been under no incapacity[y].

[y] *See hereafter the twenty fifth and thirty third Articles, and the others that follow.*

XXI.

21. Incapacities which ceaſe both for the time paſt and the time to come, or only for the time to come.

Among the Incapacities which may ceaſe, it is neceſſary to diſtinguiſh between thoſe which ceaſe in ſuch a manner as that the perſon whom they rendered incapable ceaſes to be ſuch only for the time to come, without having any change made in his condition as to the time paſt; and thoſe which ceaſe ſo as that the perſon is conſidered as if he had never been incapable, and is reſtored ſo fully to his Rights that he becomes capable even of the Succeſſions which fell to him within the time that his Incapacity ſeemed to ſubſiſt. And this difference between theſe ſeveral ſorts of Incapacities is a natural effect of their Cauſes, which conſiſts in this, that the cauſes of ſome of them may be annulled in ſuch a manner as if they never had exiſted; ſuch as the entring into a Religious Order, which cauſes the Incapacity of a Profeſſed Monk, and the Sentence of Condemnation, which occaſions the incapacity of the condemned perſon. For if the Profeſſion of a Religious be declared null, and the Sentence of Condemnation be repealed, both the one and the other return to their firſt condition in the ſame manner as if the one had never made any Profeſſion, nor the other been condemned. But the Cauſes of the Incapacity of a Baſtard, and of that of a Foreigner, cannot be aboliſhed in the ſame manner. For the blemiſh that is in the Birth of a Baſtard cannot be repaired in ſuch a manner as to make his Birth to be the ſame as if it had been lawful: neither can the defect of the Original Extraction of a Foreigner be ſupplied in ſuch a manner as that his Extraction ſhould be the ſame as if he were a Natural Born Subject of the Country in which he is Naturalized. Thus, when a Baſtard is legitimated by the ſubſequent Marriage of his Father with his Mother, and a Foreigner Naturalized by the Letters Patents of the Prince, theſe changes do not aboliſh the blemiſh that is in the Birth of the Baſtard, nor the defect that is in the Extraction of the Foreigner, but they make only the Incapacity, which was the Effect of thoſe Cauſes, to ceaſe. And for this reaſon they cannot become capable of ſucceeding but for the time to come. We ſhall ſee in the following Articles the Uſe of this Diſtinction in each ſort of Incapacity [z].

[z] *See the Articles which follow.*

XXII.

22. The Incapacity of Baſtards can only ceaſe for the time to come.

When a Baſtard is legitimated by the marriage of his Father with his Mother, ſeeing his Legitimation does not reinſtate him in a capacity which was natural to him, as has been ſaid in the foregoing Article, it does not make him capable of ſucceeding but for the time to come, and has not the effect to acquire to him the Succeſſions which fell in the time that his Incapacity ſubſiſted [a]. Thus, for inſtance, if we ſuppoſe that one who has a Baſtard, and no other Children, renounces a Succeſſion fallen to him, and that afterwards this Baſtard comes to be legitimated by a ſubſequent Marriage between his Father and Mother, the Succeſſion which by the Renunciation of the Father would have gone to this Baſtard, if he had been legitimated at that time, and had been willing to accept of it upon the Fathers refuſal; will not accrue to him by his Legitimation, which happened only afterwards: but this Succeſſion will remain to the Heir, who being the neareſt of Kin, and capable of inheriting, was willing to take it. And it would be the ſame thing, in the caſe of a Succeſſion falling to a Foreigner, who ſhould happen to have a Baſtard not as yet legitimated, but who is a Natural Born Subject of the Country, or Naturalized. For if this Foreigner who was incapable of the Succeſſion, ſhould afterwards intermarry with the Mother of the ſaid Baſtard, and thereby legitimate him, this Legitimation would not have the effect to give him right to this Succeſſion, of which he was incapable, not being legitimated at the time when the Succeſſion fell, and of which his Father, as being a Foreigner, was likewiſe incapable. But this Succeſſion would remain to him who had inherited it in default of them.

[a] *This is a conſequence of the defect in the birth of the Baſtard.*

XXIII.

23. As likewiſe that of a Foreigner.

It is the ſame thing as to the Incapacity of a Foreigner. For when he is Naturalized, he is only made capable of the Succeſſion which may fall to him for the future. But all thoſe which fell before his Naturalization, and might have come to him if he had been capable of inheriting, remain the Property of thoſe who, by reaſon of his Incapacity, were called to the Succeſſion. For this Incapacity, as well as that of a Baſtard, was natural to the ſtate and condition of his Extraction. So that the capacity of inheriting, which the benefit of Naturalization gives him, can have its effect only for the time to come [b], as has been ſaid in the one and twentieth Article.

[b] *This is a conſequence of the ſtate of a Foreigner.* See the thirty firſt Article, and the Remark that is there made on it.

XXIV.

24. The Incapacity of a Profeſſed Monk may ceaſe both for the time

The Incapacity of a Profeſſed Monk is in this reſpect different from that of a Baſtard, and of a Foreigner. For as the Monk could not have been rendred incapable, but by the Vows which are *paſt, and for the time to come.* called ſolemn, and which have no nullity in them; the nullities which are in his Vows being diſcovered, the Judgment which vacates and annuls his Profeſſion, removes the cauſe of his Incapacity, and puts him again in the ſame condition he was in before he took upon him the Vows. Thus he recovers his former Right, and his Incapacity ceaſes with its cauſe, both for the time paſt, and for the time to come. Which diſtinguiſhes his condition from that of a Baſtard, and of a Foreigner[c].

XXV.

25. As likewiſe that of a Condemned Perſon. The Incapacity of one Condemned to ſome Puniſhment which carries along with it Civil Death, having no other cauſe but the Sentence of Condemnation; if this cauſe happens to ceaſe, the perſon who was condemned is reſtored to his former ſtate, as the Profeſſed Monk is, who has got his Vows to be declared null. And this condemned Perſon recovers all his Rights in the ſame manner as if he had never been under Sentence of Condemnation[d].

XXVI.

26. Divers times to be conſidered with regard to the effect of Incapacities. All the Rules which we have juſt now explained, reſpect the nature and differences of the ſeveral ſorts of Incapacities, which it was neceſſary to diſtinguiſh, that we might the better know how to make a right uſe of the Rule explained in the fourteenth Article. And we muſt likewiſe for the ſame reaſon diſtinguiſh the times in which the Incapacity ought to be conſidered, whether it be in Succeſſions by Teſtament, or to Inteſtates[e]. And this depends on the Rules which follow.

XXVII.

27. Three times to be conſidered for the Incapacity of Teſtamentary Succeſſions. As for Teſtamentary Succeſſions, the capacity or incapacity of the Teſtamentary Heir or Executor may be conſidered at three different times. To wit, at the time of making the Teſtament; at the time of the death of the Teſtator, and at the time of his entring to the Succeſſion, that is to ſay, when the Heir or Executor declares his willingneſs to accept of that quality[f]. We ſhall ſee hereafter the uſe of the diſtinctions of theſe ſeveral times.

XXVIII.

In Succeſſions to *Inteſtates*, the capacity or incapacity of the Heir is to be conſidered only at the time of the death of the perſon to whom he ſucceeds. For it is this death that lays the Succeſſion open: and by our Rule, *That the dead man gives Seiſin to the living, his next Heir of Blood who is capable of ſucceeding to him*, the Right of the Heir of Blood veſts in him at the moment of the ſaid Death, and in ſuch a manner, that if he comes to die immediately thereafter, without knowing any thing of the death of that other perſon, or that he had the right of ſucceeding to him; yet nevertheleſs he tranſmits his right to his Heirs[g]. From whence it follows, that if the Heir to whom an Inheritance fell by the death of one dying *Inteſtate*, whilſt he was capable of inheriting the ſame, becomes afterwards incapable before he has exerciſed, or even known his Right, as if he enters into ſome Religious Order, or is Condemned to Death, or to ſome other Puniſhment which is attended with Civil Death, this incapacity happening after the Succeſſion fell to him, will not have the effect of tranſmitting the Goods of this Succeſſion to the other Heirs, who next to him had the Right of ſucceeding; but it will only have the effect which is explained in the following Article[h]. *28. One time only to be conſidered in the Succeſſion of* Inteſtates.

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[c] *This is a conſequence of the Nullity of the Vows.* See the two preceding Articles touching the difference between this Incapacity, and that of a Baſtard, and of a Foreigner.

[d] *See the thirty third and the other following Articles.*

[e] *See the following Articles.*

[f] In extraneis hæredibus illa obſervantur, ut ſit cum eis teſtamenti factio: ſive ipſi hæredes inſtituantur: ſive hi qui in poteſtate eorum ſunt. Et id duobus temporibus inſpicitur: teſtamenti facti, ut conſtiterit inſtitutio, & mortis teſtatoris, ut effectum habeat. Hoc amplius & cùm adibit hæreditatem, eſſe debet cum eo teſtamenti factio: ſive purè, ſive ſub conditione hæres inſtitutus ſit. Nam jus hæredis eo vel maximè tempore inſpiciendum eſt: quo adquirit hæreditatem. Medio autem tempore inter factum teſtamentum & mortem teſtatoris, vel conditionem inſtitutionis exiſtentem mutatio juris hæredi non nocet: quia ut dixi tria tempora inſpicimus. *l. 49. §. 1. ff. de hæred. inſtit.*

Solemus dicere media tempora non nocere, ut putà, civis Romanus hæres ſcriptus vivo teſtatore factus peregrinus: mox civitatem Romanam pervenit: media tempora non nocent. *l. 6. §. 2. eod. d. l. 49. §. 2. eod.*

We have not ſet down in the Article, what is contained in theſe Texts, that the incapacity which happens in one of theſe three times excludes the Heir. For it is neceſſary to mitigate a little this Rule of the Roman *Law by the temperaments which reſult from the following Rules, and the Remarks which ſhall be there made upon them, and particularly from what ſhall be ſaid on the thirty firſt Article.*

See on the ſame ſubject the Preamble to the tenth Section of Teſtaments.

[g] *This is a conſequence of the Rule,* The Dead Man gives Seiſin to the Living.

We have conceived this Rule in a manner agreeable to the Uſage of France, *and purſuant to the Maxim,* That the Dead Man gives Seiſin to the Living, his next Heir that is capable of ſucceeding to him, *although in the* Roman *Law this Rule was not common to all Heirs of Inteſtates, as ſhall be explained in the Preamble to the tenth Section of Teſtaments.*

[h] *See upon this and the next Article, the thirty firſt Article, and the Remarks made there upon it.*

In this and the following Article we have made mention only of the Incapacity of a Profeſſed Monk, and of that of a perſon condemned to Death, and not of that of a Foreigner, becauſe of the difficulties which are taken notice of in the Remarks on the following Article.

XXIX.

29. *Effect of the Incapacity happening after the Succeſſion of an Inteſtate is open.*

If the Heir to an *Inteſtate* who was capable of inheriting at the time of the death which lays the Succeſſion open, becomes afterwards incapable of ſucceeding by his entring into a Religious Order, or by virtue of a Sentence of Condemnation, before he has taken any ſtep to aſſert his Right, or even before he knew of it, the Goods of the ſaid Inheritance having been veſted in him as well as his other Goods, they will paſs to thoſe who ſhall have his Rights, whether they be Creditors or others[i]. Thus, the Goods of a Profeſſed Monk will go to his Heirs; and thoſe of the Condemned Perſon will fall to the King, or to the Lord of the Mannor who ſhall have the Right to his Eſcheat.

[i] *This is alſo a conſequence of the Rule,* The Dead Man gives Seiſin to the Living.

¶ We muſt obſerve on this and the foregoing Article, that the Incapacity of ſucceeding to *Inteſtates* which happens after the death which lays the ſaid Succeſſions open, and before the Entry to the Inheritance, can relate only to the Foreigner, the Profeſſed Monk, and the Condemned Perſon. For as to the Baſtard, ſince he cannot ceaſe to be legitimated after he has been once legitimated, no Incapacity of this kind can afterwards happen to him. And as for the others, it is neceſſary to diſtinguiſh their conditions in what concerns the effect of the ſaid Incapacity which happens to them after the Succeſſion is open, and conſider therein a difference between the Incapacities of a Profeſſed Monk, and of a Condemned Perſon, and that of a Perſon who falls under the condition of a Foreigner. This difference conſiſts in this, that the Incapacity happening to a Profeſſed Monk, and to a Condemned Perſon, diveſts them of the Succeſſions which they had acquired before their Incapacity, in the ſame manner as of all their other Goods, and makes them to paſs to thoſe who have their Right; whereas the Incapacity which he falls under who becomes a Foreigner, does not diveſt him of the Goods which he had acquired before the ſaid Incapacity. Thus, for example, if we ſuppoſe that a Stranger who is a Subject of a Country to which our Kings had granted the Right of Naturalization, having ſucceeded to one who died *Inteſtate*, and having taken poſſeſſion of his Inheritance, ſhould happen afterwards to loſe the Privilege of Naturalization, by a general Revocation of the Privilege of Naturalization which was given to the Inhabitants of that Country, and which would reduce all the Inhabitants thereof to the condition of Foreigners, that change would not deprive him of the Succeſſion which he had already acquired; and he would retain the Goods of that Succeſſion as well as his other Goods. Thus on the contrary, the Incapacity happening to a Profeſſed Monk, and to a Condemned Perſon, makes the Inheritances which they had acquired, as well as their other Goods, to go to thoſe who have their Right, as is ſaid in the Article.

We make here this Remark touching the difference between the effect of the Incapacity under which he falls who becomes a Stranger, and the effect of the Incapacity happening to a Profeſſed Monk, and to a Condemned Perſon, that we may account why in this and the foregoing Article we have mentioned only the caſe of the Profeſſed Monk, and of the Condemned Perſon, and not that of the Stranger, becauſe of a difficulty that is peculiar to the Stranger, and which reſults from this difference between his condition and that of the others.

The ſaid difficulty conſiſts in this, that on one part it is certain, that by our Rule explained in the twenty eighth Article, the Succeſſion of one dying *Inteſtate* is acquired to the Heir at the moment of the death of the perſon to whom he ſucceeds, without any act on his part; from whence it follows, that although after his death the ſaid Heir ſhould become incapable, his Right either remains with himſelf, or paſſes to thoſe who ſucceed to him, or who have his Right, as it happens in the caſe of a Profeſſed Monk, and of a Condemned Perſon: and thus it would ſeem that the Heir, who is become a Stranger, in the caſe that has been juſt now obſerved, ought to reap the benefit of the Succeſſion which had fallen to him, and to retain an Eſtate which was his own, ſeeing he is not become incapable of holding poſſeſſion of what he had, as a Religious and a condemned Perſon are, and that even it would ſeem that if before the ſaid Incapacity, and without having done any act to declare his acceptance of the Succeſſion, he had aſſigned, given, or otherwiſe tranſferred his Right to a perſon that was capable, the ſaid diſpoſition would not be annulled by his Incapacity happening afterwards. But on the other hand conſidering the thing under another view, it might be queſtioned whether the Incapacity happening to him before his entry to the Succeſſion, might not hinder him from reaping the benefit of it; for it might be urged againſt him, that he not having entred to the Succeſſion before his incapacity, he would be within the meaning and intendment of the Law, which renders the Stranger incapable of ſucceeding. Becauſe the motive and inducement for making that Law was, to prevent the Wealth of the Kingdom from paſſing into the hands of Strangers, which would happen in his perſon, if after he is become a Stranger he ſhould be allowed to have the Goods of that Succeſſion. And that therefore this Law, which is a part of the Publick Law, ought, with reſpect to him, to ſet aſide the effect of the Law which declares the Heir to be ſeized of the Inheritance at the moment of the death of the perſon to whom he ſucceeds, which is only a Rule of the Private Law, that is to ſay, which regards only the Intereſt of particular perſons. To which it might be added, that it is the Uſage in *France*, even with reſpect to Natural Born *Frenchmen*, who have been for a long time ſettled in a Foreign Country, although they have not been there Naturalized, that if they return into *France* to reap a Succeſſion that is fallen to them, they oblige them to ſettle again in *France*, and not to alienate the Goods of the Succeſſion which they claim. From whence this conſequence might be drawn, that if in caſes of this nature ſuch precaution is taken with reſpect to a Natural Born *Frenchman*, for fear he ſhould remove into a Foreign Country the Effects belonging to that Succeſſion, and the Price which he might raiſe from the Sale of the Immoveables; there would be as much, or rather more reaſon, to exclude from a Succeſſion one who is actually a Foreigner at the time when he would enter upon it, unleſs they ſhould think it ſufficient to forbid him to alienate it, or unleſs he ſhould obtain Letters of Rehabilitation to reinſtate him in his former capacity; for in that caſe he would without doubt ſucceed.

This difficulty leads us to another, which would happen if he who was become a Stranger had died in that ſtate, and in the Interval between the time that the Succeſſion fell which veſted in him, he being capable of it, and his Entry to the Succeſſion which his Death had prevented. The difficulty which would ariſe in this ſecond caſe, would be between thoſe who ſhould exerciſe the King's Right to the Succeſſion of Aliens, and claim the Succeſſion of this perſon who having become a Foreigner died in that ſtate, and thoſe who would diſpute with them the ſaid Inheritance, claiming it as their Right to ſucceed thereto in default of the ſaid Foreigner, in caſe the Incapacity which he had incurred ought to be a bar to him. In this diſpute it would be the intereſt of the King, that the Succeſſion ſhould belong to the Heir who was become a Stranger, that it might be a part of the Stranger's Eſtate, and ſo encreaſe the Eſcheat that falls to the King. And in order to ſupport this pretenſion, it might be alledged that the Motive of the Law which excludes Strangers from Succeſſions would ceaſe in this caſe, ſeeing the Goods would remain in the Kingdom, and would go to the King. So that there would be no pretence for derogating from the Rule, *The Dead Man gives Seiſin to the Living*, as there is in the caſe where this Heir becoming a Stranger, and remaining alive, ſhould pretend to inherit the Succeſſion. That thus this Stranger being dead ſeized of the ſaid Inheritance, it would fall to the King, in the ſame manner as the other Goods which he ſhould leave behind him. That it would not be the conſideration of favouring the Right of the Crown to the Eſcheat of Aliens that would be the foundation of a Judgment given in this manner, but that this Deciſion would be a natural Effect of the Rules of Law. For ſeeing the Profeſſed Monk and Condemned Perſon who are capable at the time when the Succeſſion falls which they have a right to, are not exluded from it by the Incapacity which happens before their entry to the Inheritance: and that that Incapacity has not the effect of tranſmitting the ſaid Succeſſion to the other Heirs who have a right to ſucceed in default of them, but that on the contrary it remains in their Eſtate, and paſſes to thoſe who have their Right; it ought to be the ſame thing in the Succeſſion fallen to this Heir, who becomes afterwards a Stranger, and that it ought to accrue to him ſo as to remain his during his life, in the ſame manner as all the other Goods which he might have acquired by any other way, and which he would not loſe on account of this change, and that after his death this Succeſſion ought, as his other Goods, to paſs to thoſe who ſhould have his Right.

We do not mention here theſe different caſes barely out of curioſity; but in order to ſhew by the difficulties which occur in them, and by the Principles which have been juſt now explained, and from which it would ſeem that the Deciſions thereof ought to be taken, what have been the reaſons which have induced us to think, that although by the *Roman* Law the capacity of ſucceeding be neceſſary at the time of entring to the Inheritance, even in the Succeſſions of *Inteſtates* [a]; yet that the Rule of this Article ought to be conceived in terms conformable to the Rule obſerved in *France*, *That the Dead Man gives Seiſin to the Living*, which makes the capacity neceſſary for theſe Succeſſions, only at the time of the death which lays the Succeſſion open, as appears in the caſes of the Profeſſed Monk, and Condemned Perſon. So that it was not proper to put it down in the Article as a Rule in uſe with us; that in Succeſſions to *Inteſtates* the capacity of the Heir is neceſſary at two times; to wit, at the time of the death which lays the Succeſſion open, and at the time of the Entry to the Succeſſion. And although it ſhould be adjudged in the caſe of the incapacity of the Perſon who became a Stranger before he entred to the Inheritance, that he could not ſucceed to it; yet it could not be inferred from thence, that the ſaid Judgment was founded on the Rule of the *Roman* Law which requires the capacity at the time of the Entry to the Inheritance, ſeeing notwithſtanding that Rule, thoſe who have the Rights of the Profeſſed Monk and of the Condemned Perſon, reap the Succeſſions which fell to them before their incapacity, although they did not ſo much as know of their Right, and were become incapable before their Entry to the Inheritance. And therefore ſeeing the ſaid Rule proves to be falſe in two caſes of three which it may comprehend, as to what relates to Incapacities, it cannot be placed in the number of Rules, and cannot be aſſigned as a reaſon for excluding the perſon who became a Stranger before his entry to the Inheritance. But if it ſhould be in fact decided that he ought to be excluded, it would certainly be for other reaſons, ſuch as thoſe which have been remarked.

All that has been ſaid hitherto in this Remark on the time at which we are to conſider the Capacity or Incapacity of the Heir, relates only to Succeſſions of *Inteſtates*, of which only mention is made in the Article. And as for the three times in which the Rule of the *Roman* Law requires a capacity for Teſtamentary Succeſſions [b], it is neceſſary to ſee the end of the Remark on the thirty firſt Article, and the Preamble of the tenth Section of Teſtaments, where we have treated of Tranſmiſſion, which implies a neceſſity of knowing at what time the Right of the Heir accrues to him, in order to know whether he tranſmits it to his Heirs, or not. Thus, it is neceſſary to join together all that is ſaid in thoſe two places, where we have endeavoured to explain the different Principles of the *Roman* Law, and of the Uſage in *France* with regard to this matter, and to add thereto the Principles of the Law of Nature and of Equity, which we have judged might be of ſervice to ſet this matter in a clearer light.

XXX.

30. *Effect of the Incapacity of Baſtards.*

Seeing the Incapacity of Baſtards reſpects only the Succeſſions of *Inteſtates*, they are either capable or incapable of them according to the ſtate they are in at the time of the death which lays the Succeſſion open. Thus, the Baſtard who is not legitimated by the Marriage of his Father with his Mother before this death, would not ſucceed, although he ſhould happen to be legitimated before the Succeſſion were entred to. For his Incapacity at the time when the Succeſſion fell having excluded him from inheriting, it would paſs immediately to the perſon who had the Right to ſucceed in his default [c]. But he would be capable to reap the benefit of the Succeſſions of *Inteſtates*, which ſhould fall to him after his Legitimation by the ſaid Marriage.

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[a] *By the* Roman *Law, the Heir to an Inteſtate, who died before his Entry to the Inheritance, did not tranſmit his Right to his Heirs: ſo that he did not acquire the Inheritance but by his Entry to it. From whence it follows, that the Incapacity which did afterwards happen excluded him from the Inheritance.* See the Preamble to the tenth Section of Teſtaments.

[b] *See the twenty ſeventh Article.*

[c] This is a conſequence of the nature of that Incapacity. We preſuppoſe in this Article the capacity of Baſtards to ſucceed by Teſtament, but it is neceſſary to remark on this ſubject what has been ſaid on the eighth Article.

XXXI.

31. Effect of that of Foreigners. The Incapacity of a Stranger reſpects equally the Succeſſions of *Inteſtates*, and Succeſſions by Teſtament. Thus, he who being a Foreigner at the time of the death of the perſon to whom he had a right to ſucceed, if he had not been under that incapacity, and is not naturalized till after the ſaid death, would not carry away the Succeſſion, whether the ſame was left by Will, or came by the death of an Inteſtate, from the Heir who ſucceeded to it becauſe of the Incapacity he was under[d].

[d] This is a conſequence of the Incapacity, and of the Teſtamentary Succeſſion's being laid open by the death of the Teſtator, as the Succeſſion of an Inteſtate is laid open by the death of the perſon whoſe Inheritance is the matter in diſpute. For it is from the moment of that death that every Heir ought to have his Right. Inſomuch that even the Child which was not born at the time of the death of the Perſon to whom it has a Right to ſucceed, and the Heir who does not enter to the Eſtate for a long time after it is fallen to him, are conſidered as if they had ſucceeded at the moment of that death, according to the Rule explained in the fifteenth Article of the firſt Section. Thus, the Heir who is incapable at the time of the ſaid death, is excluded from the Inheritance by him to whom it ought to paſs.

¶ We muſt not here paſs over in ſilence ſome Reflections on the difficulties which ariſe from the Rule explained in this Article, and from that which is laid down in the twenty ſeventh Article, whether they relate to Succeſſions of *Inteſtates*, or to Succeſſions by Will.

If we ſuppoſe, for a firſt difficulty, with reſpect to the Succeſſions of *Inteſtates*, that a Son of a natural born Subject of *France*, having taken up his abode out of the Kingdom, and being become a Stranger by his Engagements in a Country that is ſubject to another Prince, returns to *France* with a deſign to get Letters of Rehabilitation, that is to ſay, to reinſtate him in his firſt condition, and that he could not obtain the ſaid Letters till ſome days after the death of his Father: would he be excluded from his Father's Succeſſion by a Collateral Heir, or even by his own Brothers, in caſe he had any? And would it not be juſt in this caſe, that by the effect of the ſaid Letters he being reſtored to his firſt eſtate, in the ſame manner as the Profeſſed Monk who gets his Vows to be annulled re-enters into his former ſtate, ſhould ſucceed as if he had always continued a Natural Subject of *France*, ſuch as he was by his birth? And even although he had been born a Foreigner, the Son of a Foreigner who had been naturalized without him, would it not be ſufficient that he ſhould be naturalized after the death of his Father, to enable him to take his Succeſſion, which no body had as yet entred to, ſeeing the Incapacity of Strangers is no part of the Law of Nature, and that it would be contrary to it in this caſe, where it would be neceſſary to prefer to this Son the Exchequer, or Collateral Relations, if there ſhould be any who ſhould lay claim to the Succeſſion? And would it not on the contrary be more agreeable to Humanity and Equity, to apply in this caſe, for the benefit of the Son, the Spirit of the Laws which diſpenſes with their Rigour, when Equity demands ſomething elſe than what is enacted by the Letter of the Law, and eſpecially in caſes ſuch as this, where the Spirit of the Law ſubſiſts together with the temperament of Equity? For the motive of the Law which excludes a Foreigner from Succeſſions, is to hinder the Wealth of the Kingdom from being carried into Foreign Countries, which would not happen in the perſon of this Son who is Naturalized, although it be only after the death of his Father. It is for the like reaſon of Equity, that although thoſe who die Strangers can have no Heirs, as ſhall be ſhewn in the third Article of the fourth Section, yet the Children of Strangers who die in *France* ſucceed to their Fathers, if the ſaid Children are born in *France*, or have been naturalized there. And not only are Children excepted from this Rule, but it would ſeem that Uſage excepts from it likewiſe the Collateral Heirs of Strangers, if the ſaid Heirs be Natural Born Subjects of *France*, or have been Naturalized there, for the motive of the Law ceaſes with reſpect to them. And there are ſome Cuſtoms in *France* which call to the Succeſſion of Aliens their Heirs whatſoever who are capable of ſucceeding to them.

We might propoſe other queſtions, by ſuppoſing, for example, that inſtead of a Son it were a Brother, who being Naturalized only after the death of his Brother, whoſe Succeſſion he claims jointly with the other Brothers, or in oppoſition to a Couſin who would exclude him from it; which might happen ſeveral ways, according as he puts in his claim whilſt all things are yet entire, no body having entred to the Succeſſion, or only after another Heir has been for ſome time in poſſeſſion of the Goods, and has even diſpoſed of them. But it is not our buſineſs to enter here into the detail of queſtions of this nature; and we have only touched upon this, becauſe of the difficulties which frequently ariſe in the uſe and application of the Principles, in that they ſeem to demand Deciſions which may at firſt ſight appear to be contrary to the ſaid Principles. For if the Rule is abſolute and without exception, that every Heir who is incapable at the time of the death of the perſon to whom he has right to ſucceed, ought to be excluded from the Succeſſion, then the Son who, as has been already mentioned, happens to be a Foreigner at the moment of his Father's death, he not having had the opportunity of being Naturalized till ſome days after, will be excluded from having any ſhare in his Father's Eſtate, either by his Brothers, or if he has no Brothers, by his Collateral Relations. Which appears to be ſo contrary to Equity, that it ſeems but reaſonable in this caſe, that the matter ſhould be decided againſt this Rule. Since it is therefore the deſign of this Book to explain in as clear a manner as is poſſible, the Principles and Rules on which depend the Deciſions of the difficulties which ariſe in the matters treated of here, and ſince it ſeems reaſonable that the caſe of this Son ſhould be an Exception to the Rule, we did not think fit to paſs over in ſilence a Remark of this Conſequence, and the Reflection which was proper to be made on ſuch a difficulty. We ſee that it conſiſts in this, that the Rule which excludes a Foreigner from inheriting; and which is only an arbitrary Rule of the Poſitive Law, being literally applied to this Son who ſhould happen to be a Foreigner at the moment of his Father's death, would be repugnant to a Principle of Natural Equity, which calls the Son to the Succeſſion of his Father. So that in a difficulty of this nature, it ſeems but reaſonable to ſay that the Spirit of the Laws demands in favour of this Son, that in order to preſerve to him his Right, we ſhould give to the Act of his Naturalization the effect of reinſtating him in the Right of Succeſſion which he had by Nature, and which was as it were ſuſpended in his perſon by that Arbitrary Rule, the effect whereof is ſuperſeded by the Act of Naturalization. Thus, in this caſe by giving the Succeſſion to the Son, we do nothing elſe but obſerve the firſt Principles of the Interpretation of Laws, which require that we ſhould reconcile them by the univerſal Spirit of Equity which reigns in them all, and on which depends the good uſe both of the Natural and Arbitrary Laws, according to the Rules which have been explained in the Title of the Rules of Law.

The ſame conſideration which hath induced us to make this Remark on the caſe of this Son, obliges us likewiſe to conſider the ſame caſe under circumſtances where the difficulty would be much greater; as if he ſhould not come to demand his Father's Inheritance till many years after his Brothers, or even his Collateral Relations, had been in poſſeſſion of it; would it be juſt in this caſe to reeſtabliſh the Son that is Naturalized in his primitive and natural Right? To trouble the quiet of the Families of thoſe who had ſucceeded to the Eſtate by reaſon of his Incapacity? To turn topſy turvy the ſtate of their Affairs? To revoke the Alienations which they have made? Or would it be juſt to give to this Son a ſhare of his Father's Eſtate, and upon what foot ought this ſhare to be adjuſted?

We ſee by theſe kinds of difficulties, and others which may be ſuppoſed in the caſes of Children and Brothers demanding a ſhare in Succeſſions after their Naturalization, how much it is to be wiſhed that all ſuch difficulties were adjuſted by ſome certain Rules, according to the diverſe circumſtances of the time that is paſt ſince the Inheritance fell, the changes which may have happened, and others of the like nature. As to which it would not be improper to examine, which of the ways to be taken for adjuſting ſuch difficulties would be moſt uſeful; whether to render altogether inflexible the Rule which excludes the Heir when he happens to be a Foreigner at the time that the Succeſſion falls, and to limit the effect of all Acts of Naturalization to Succeſſions which ſhall afterwards fall; or to give to the ſaid Acts of Naturalization the effect of Removing the Incapacity as well for the time paſt, as for the time to come; and to make the condition of a Foreigner in this particular equal to that of a Profeſſed Monk, and of a Condemned Perſon, who are reſtored to their Rights when the Profeſſion of the one, and the Condemnation of the other are annulled, as ſhall be ſhewn in the two following Articles: or to leave the application of the Rule, and the effect of the Naturalization, to the diſcretion of the Judges, that they may determine therein as they ſhall ſee cauſe according to the circumſtances, or to limit a certain time, ſuch as a year, or any other term ſhorter or longer, beyond which the Naturalization ſhould have no effect for the time paſt, allowing a longer term for Succeſſions in the Direct Line, than for thoſe in the Collateral. Of all theſe ways the firſt would contain ſomething of hardſhip in relation to the Son, for the reaſons which we have already mentioned: the ſecond would be attended with two miſchievous conſequences, by putting Families into great confuſion and diſorder, which is not to be apprehended in the caſe of Profeſſed Monks and Condemned Perſons, ſeeing their condition is always known, and can never be ſo long in ſuſpenſe as the condition of a Foreigner who is abſent and unknown: the third way would have the inconvenience of making the Law altogether uncertain, which as well as other Sciences ought to have certain and fixed Principles: and the laſt of theſe ways would ſeem to be the moſt equitable, and attended with the feweſt inconveniencies. But theſe difficulties are of ſuch a nature, that to enter into a particular diſcuſſion of them, would be to exceed the bounds of the deſign of this Book, and perhaps we have already enlarged too much upon them.

As for the Teſtamentary Succeſſions, we ſhall confine our ſelves to one Reflection upon the Rule of the *Roman* Law, which requires that the Perſon who is inſtituted Heir ſhould be capable not only at the time of the death of the Teſtator, and at the time of his entring to the Inheritance, but likewiſe at the time of making the Teſtament, in order to make the Inſtitution valid in its Origin, *ut conſtiterit Inſtitutio*; theſe are the words of the Text quoted on the twenty ſeventh Article. And this Rule has a relation to two other Rules in the *Roman* Law, one whereof is general, which declares that whatever is null or defective in its beginning can never become valid by length of time[e]: The other Rule, which is a conſequence of the former, and is called the *Catonian* Rule, ordains that the Diſpoſitions of a Teſtator which would have been null, if the Teſtator had died at the time when he made his Will, ſhall always remain ſuch at whatever time the Teſtator ſhall happen to die[f]. From whence it follows, that as the Inſtitution of one to be Heir who is a Foreigner at the time of making the Teſtament would be null, if the Teſtator ſhould die immediately after having made his Will, becauſe this Heir would be found incapable at that time of acquiring the Inheritance; his Incapacity at the time of making the Teſtament would nevertheleſs exclude him from the Succeſſion, although he ſhould happen to be naturalized at the time of the Teſtator's death. We ſhall not here enter on the diſcuſſion of the uſe of this *Catonian* Rule, of which we ſhall ſpeak more fully in another place[g]. We ſhall only obſerve here in relation to the Rule of the *Roman* Law, which requires that the Teſtamentary Heir ſhould be capable at the time of making the Teſtament, that if we were to examine the Juſtice of this Rule, either by the Principles of Natural Equity, and of our Uſage, which is directly oppoſite to the Niceties of the *Roman* Law, or even by ſome Principles of the *Roman* Law it ſelf, we might have reaſon perhaps to ſay, that as thoſe who invented the *Catonian* Rule, have owned it to be falſe in certain caſes[h], ſo that Rule which requires that the Heir ſhould be capable at the time of making the Teſtament, may likewiſe be the ſame.

If we conſider the Principles of Natural Equity, and thoſe of the *Roman* Law which are the moſt conformable thereto, we ſhall find by theſe two ſorts of Principles that Teſtaments have not their effect but by the Death of the Teſtator; and that as until that time they are always revocable, ſo it is only at that moment that they have their validity. And conſequently it is only at that moment that Teſtaments have their effect, and that the diſpoſitions of the Teſtator begin to have the force of Laws which the Law gives them. From whence it follows, that the Heir who is inſtituted by a Teſtament, begins only to have his Right by the ſaid death. Which proceeds from this Principle, which we may call Natural, and which is agreeable likewiſe to the Spirit of the *Roman* Law, that every Teſtament implies in it the condition that the Teſtator ſhall perſevere in the ſame mind until the time of his death. Thus, it is a real truth without any fiction or nicety, that the Will of the Teſtator hath not, even according to his own intention, any other force than that which his Teſtament ſhall receive from his perſeverance in his diſpoſitions until the time of his death; in the ſame manner as if he had ſaid expreſſly in his Teſtament, that his meaning was that his diſpoſitions ſhould have their effect, in caſe he ſhould die in the ſame intention, without making any alteration in them. For although this condition were expreſſed in this manner, yet it would not make the Teſtament to depend any more upon it, than it does when the condition is only tacitly implied. And it is alike true with reſpect to all Teſtaments, that they will be of no validity unleſs the Teſtators die without revoking them, which they may do. From whence it follows, that it is always the death of the Teſtator, which by fulfilling the condition of his perſeverance in the ſame Will until the laſt moment of his life, gives at that very moment to the Teſtament its force and validity. Which has the ſame effect, as if the Teſtator had reiterated his Teſtament at the time of his death, or had only then made it; in which caſe his Heir who was formerly an Alien, and happens to be Naturalized at that time, would ſucceed without any difficulty. We ſee likewiſe that it is certain by an expreſs Rule in the *Roman* Law, that if a Foreigner was inſtituted Heir on condition that he ſhould be Naturalized at the time of the death of the Teſtator, this diſpoſition would have its effect if the caſe ſhould happen[i]: notwithſtanding that the Heir was incapable at the time when the Teſtament was made, and for no other reaſon but that the condition would be expreſſed by the Teſtator, and becauſe the *Catonian* Rule does not take place in conditional Inſtitutions[l], as ſhall be explained in the place were we ſhall treat more fully of it, as has been already mentioned. Thus, ſince this condition when it is expreſſed hath this effect, might not we ſuppoſe that the Teſtator who has not expreſſly mentioned it, has tacitly meant it, ſeeing he was deſirous that his Will ſhould be executed in whatever manner it could? And where would be the Inconvenience in conſidering the Inſtitution of an Heir who ſhould be an Alien at the time of making the Teſtament, as implying the condition that he ſhould ceaſe to be ſuch at the time of the death of the Teſtator? For might not this Heir ſay, that his Inſtitution was not null, and ought not to continue ſo, but in caſe he were not Naturalized at the time of the Teſtator's death? And that in the mean while it remained in ſuſpenſe, either to have its effect, or not to have it, according to the ſtate in which he ſhould happen to be at the time of the ſaid death, which ought to give to the Diſpoſitions of the Teſtator the character of a Laſt Will; ſince it is this eſſential character which is conſidered in all Diſpoſitions made in proſpect of death, and which by giving them their validity, gives them the effect which they are to have. To which we may add, that there are ſeveral caſes in the *Roman* Law in which this general Rule, *That whatever is null in its beginning, remains always ſo*, is falſe, as well as the *Catonian* Rule. Thus, for example, Deeds of Gift between Huſband and Wife were null by the *Roman* Law[m], but if the donation was not revoked before the death of the Donor, the ſaid death ratified it in favour of the ſurvivor[n]. Thus, for another example, if a *Roman* Senator had married a Woman who had been made free from ſlavery, the Marriage was null; but if the ſaid Senator happened to loſe his Dignity, the Marriage began to have its effect[o]. Thus, for a third example, which is a caſe in point to the preſent ſubject, taken out of the ſame Body of the *Roman* Law; if a Teſtator had left a Legacy in truſt in favour of a Slave, whoſe Maſter had been condemned to ſome Puniſhment which rendred him incapable thereof, as by the Uſage in *France* a perpetual Baniſhment out of the Kingdom would do, this Legacy in truſt, which was to accrue to the Maſter through the Slave, had its effect if the Maſter who was condemned was reſtored to his former condition[p], although his Incapacity at the time when the Teſtament was made ought to have rendred it null. And if it ſhould be ſaid, that in this example the Prince's favour had reſtored him who was incapable to his former capacity in the ſame manner as if he never had been condemned; yet it is ſufficient for the conſequence which we pretend to draw from it, that although the diſpoſition of the Teſtator was not conditional, and that if he had died at the time he made his Teſtament, the Legacy in truſt would have been null, yet it ceaſed to be ſo by the ſaid change. Thus the ſaid Rules ceaſed to take effect in this caſe, and proved to be falſe with reſpect to it. And in fine it may be ſaid, that this Rule which requires that the Heir ſhould be capable at the time of making the Teſtament, has been in all appearance a conſequence of that antient form of Teſtaments which for a long time was the only one uſed at *Rome*, and which they called *per æs & libram*[q], where the Teſtator made an imaginary Sale of his Succeſſion to his Heir, who was preſent in perſon, and was the Purchaſer for a certain Price in Money which he put into a Scale. Thus it was neceſſary that the Purchaſer ſhould be a Citizen of *Rome*, and capable of purchaſing a Right to the Succeſſion; and as this was a meer ſuperfluous nicety which was at laſt aboliſhed, ſo this Rule which requires the capacity of the Heir at the time of making the Teſtament being a remainder of that nice formality in the ancient *Roman* Teſtaments, might likewiſe very well be aboliſhed, and that with the greater Equity, becauſe it ſeems that the Rule which makes void the Inſtitution of an Heir, and the Legacies, which would have been null if the Teſtator had died at the time when he made his Will, was a Fiſcal Law, made with a view to extend the effect of this Incapacity in favour of the Exchequer, which reaped the benefit thereof, and which is directly contrary to the Spirit of our Laws.

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[e] *L. 29. ff. de reg. jur.*

[f] *V. l. 1. ff. de reg. Caton.*

[g] *See the eleventh Section of Legacies, the fifth Article.*

[h] *L. 1. ff. de reg. Caton.*

If we ſuppoſe then that a Foreigner who is Naturalized, having no Children of his own, but having ſeveral Brothers who are likewiſe Naturalized, except one who remains ſtill a Foreigner, ſhould in his Teſtament inſtitute all his Brothers his Heirs, and that the Brother who was not Naturalized at the time of making the Teſtament, is Naturalized before the death of the Teſtator, could the Brothers who were Naturalized before the Teſtament was made, exclude from the Succeſſion the Brother who was Naturalized only afterwards, and alledge againſt him that his incapacity at the time of making the Teſtament rendred his Inſtitution null, although he was capable of ſucceeding at the time when his Father died: and that thus the Teſtament ſubſiſting with reſpect to the Brothers who were Naturalized before it was made, the other Brother's portion ought to belong to them by the Right which is called the Right of Accretion, and which ſhall be explained in its proper place[r]? It muſt certainly be that the ſaid Brothers ſhould be thoroughly verſed in the *Roman* Laws before it could ever enter into their minds to call in doubt their Brother's Right to his ſhare in the ſaid Inheritance. And it ſeems to be certain that without this knowledge it would not only never enter into the mind of any perſon to raiſe ſuch a diſpute, but on the contrary, whoever would act naturally, and follow the bare dictates of Reaſon, would cry out againſt a Rule which ſhould have this effect to exclude the ſaid Brother. And it would be the ſame thing if inſtead of Brothers we ſhould ſuppoſe them to be other Collateral Relations, who having all of them an equal right to ſucceed as Heirs if there were no Teſtament, are called to the Succeſſion by a Teſtament. Thus, it may be ſaid that this Rule has in it more of the character of the Niceties of the *Roman* Law than of Equity, and that for this reaſon it ſeems that our Uſage would reject it. And although it be true that this Rule, the application whereof appears odious in the caſes where the perſons called to the Succeſſion by a Teſtament are the Heirs of Blood, yet it would not be ſo hard in the caſe where the Teſtamentary Heir is another perſon than the Heir of Blood, or might be leſs intitled to favour according to the circumſtances, yet ſeeing the Rule is pure and ſimple, and general for all ſorts of Teſtamentary Heirs, without any diſtinction, whether they be Relations or Strangers, it would be neceſſary to have an expreſs Rule which might ſet bounds to it. From whence it ſeems that we may reaſonably conclude, that it would be juſt and is much to be wiſhed for, either that this Rule were entirely aboliſhed, or that the uſe of it were regulated by ſome Law which might prevent the Inconveniencies thereof.

All that has been hitherto ſaid concerning the Inſtitution of an Heir, reſpects likewiſe Legacies, and the other diſpoſitions made in proſpect of death; which, as well as the Inſtitution of the Heir,

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[k] *V. l.* 26. *ff. de hered. inſt.*

[l] Placet Catonis regulam ad conditionales inſtitutiones non pertinere. *l. penult. ff. de reg. Caton.*

[m] *L.* 1. *ff. de donat. int. vir. & uxor.*

[n] *L.* 32. §. 1. *& ſequent. ff. de donat. int. vir. & ux.*

[o] *L.* 27. *ff. de rit. nupt.*

[p] *L.* 7. *ff. de legat.* 3.

[q] §. 1. *inſt. de teſtam. V. Ulp. tit.* 20. Hodie ſolum in uſu eſt quod per æs & libram fit. *d. t. Ulp.* §. 2.

[r] *See the ninth Section of Teſtaments.*

Heir, were null according to the Rules of the *Roman* Law which have been mentioned. So that a Legacy, for inſtance, of a Sum of Money to a Friend of the Teſtator's, or to ſome poor perſon, would be null, according to theſe Rules, if the Legatary who was capable of it at the time of the Teſtator's death, had not been alſo capable at the time when the Will was made.

We have thought our ſelves to be under a neceſſity of making all theſe Reflections, not only becauſe of the conſequence of all theſe difficulties, but likewiſe that we might give a reaſon why in the twenty ſeventh Article we have only mentioned, that in Teſtamentary Succeſſions it is neceſſary to conſider with reſpect to the capacity or incapacity of the Teſtamentary Heir, the time of making the Teſtament, the time of the death of the Teſtator, and the time of the Heir's entring to the Inheritance, without laying it down as a Rule, that the capacity is neceſſary in all the ſaid three times. And we may gather from all theſe Remarks, and from thoſe which have been made on the twenty ninth Article, and likewiſe from what reſults from the obſervations which have been made on the Right of Tranſmiſſion, in the Preamble of the tenth Section of Teſtaments, that as to what concerns Teſtamentary Succeſſions, it ſeems to be agreeable to the Spirit of our Uſage, which is directly oppoſite to the Niceties of the *Roman* Law, not to conſider the Incapacity of the Teſtamentary Heir but at the time of the death of the Teſtator, as in the Succeſſions of *Inteſtates*, and to apply even to that Rule the temperaments which may appear to be neceſſary from the Reflexions which have been made in all theſe Remarks, and which it is needleſs to repeat here.

XXXII.

32. *Effect of the Incapacity of a Profeſſed Monk.*

The incapacity of a Profeſſed Monk, as well as that of Foreigners, reſpects the two kinds of Succeſſions, both Teſtamentary and that of *Inteſtates*. And he who happens to be in that ſtate at the time of the death of the perſon to whom he has right to ſucceed, whether it be as Heir of Blood, or by vertue of a Teſtament, has no ſhare in the Inheritance. Thus, he does not tranſmit it to his Heirs, but it paſſes to thoſe who have the Right to ſucceed in his default. But if the Profeſſed Monk gets his Vows to be declared null; ſeeing in that caſe he is reſtored to the ſame condition as if he had never made any Profeſſion, ſo he becomes capable not only of the Succeſſions which may fall to him afterwards, but likewiſe of thoſe which fell after his making Profeſſion[n]; provided that he brought his Action in due time to have his Vows annulled, and that he made thoſe perſons Parties to the Suit, who claim an intereſt in the Succeſſion which is in diſpute.

XXXIII.

33. *Effect of the Incapacity of condemned Perſons.*

The incapacity of Perſons condemned to Death, or to other Puniſhments which import Civil Death[o], excludes them, in the ſame manner as the incapacity of Profeſſed Monks, from both the kinds of Succeſſion[p]. And the Succeſſions which might have come to them had they not been incapable, paſs to thoſe perſons who have the right of Succeſſion in their default, in the ſame manner as if the condemned Perſons had died before the Succeſſion fell. Thus the Son of a condemned Perſon ſucceeds to his Grandfather, to whom the Father cannot ſucceed[q]. But if their incapacity comes to ceaſe, they will be reſtored to their former condition, and will be equally capable of all Succeſſions, and even of thoſe which fell before their incapacity was aboliſhed[r].

XXXIV.

34. *This Incapacity takes place only from the time of Condemnation.*

Seeing the perſon that is condemned is rendred incapable only by the Sentence of Condemnation, which puts him in the ſtate of Incapacity which is produced by the Civil Death; the Succeſſions, whether they be of *Inteſtates*, or by Teſtament, which may have fallen to him before his Condemnation, and even after his Accuſation, belong to him in the ſame manner as his other Goods, until he is ſtripped of them by his Condemnation[ſ]. For till then it is uncertain whether he may not die before

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[n] *This is a conſequence of the nullity of the Vows.*

[o] *See in the Remark on the eleventh Article, what are the Condemnations which have this effect.*

[p] Edicto prætoris bonorum poſſeſſio his denegatur, qui rei capitalis damnati ſunt, neque in integrum reſtituti ſunt. *l. 13. ff. de bonor. poſſeſſ.*

[q] Si qua pœna pater fuerit affectus, ut vel civitatem amittat vel ſervus pœnæ efficiatur: ſine dubio nepos filii loco ſuccedit. *l. 7. ff. de his qui ſui vel al. jur. ſ.*

Si deportatus patronus ſit, filio ejus competit bonorum poſſeſſio in bonis liberti, nec impedimento eſt ei talis patronus, qui mortui loco habetur. *l. 4. §. 2. ff. de bon. libert.*

[r] *See on this whole Article, the Rules which follow.*

fore he receives Sentence, whether he may not be acquitted, or whether he may not procure his pardon from the Prince. Thus, his condition does not imply any incapacity, until his Condemnation.

[r] Si quis poſt accuſationem in cuſtodia fuerit defunctus, teſtamentum ejus valebit. *l. 9. ff. qui teſt. fac. poſſ. l. 1. §. 3. ff. de legat. 3. l. 3. ff. de publ. judic.*

The capacity of making a Teſtament, and of ſucceeding, is the ſame. So that this text proves the one by the other. See the fourteenth Article of the ſecond Section of Teſtaments.

XXXV.

35. *If the Condemnation ſubſiſts, it makes the Incapacity to ſubſiſt likewiſe.*

If after a Sentence of Condemnation which might be reverſed, the caſe ſhould happen of a Succeſſion which ſhould go to the perſon condemned, if he were capable thereof, his Right would remain in ſuſpenſe until the event ſhould either ratify or annul the Condemnation; and if it ſubſiſts it will make the incapacity to ſubſiſt likewiſe. As on the contrary, the Succeſſion would belong to him, if the effect of the Condemnation ſhould happen to ceaſe, as it may by any one of the Cauſes explained in the following Article.

[s] *See the text quoted on the thirty third Article.*

XXXVI.

36. *This Incapacity ceaſes in ſeveral caſes.*

The effect of the Condemnation may ceaſe either by the Prince's Pardon[u], or by a Decree of a Superior Court which annuls the Sentence of Condemnation[x], or by the bare Appeal it ſelf, if the condemned perſon dies before the ſaid Appeal has been decided[y]. And in all theſe caſes the Incapacity ceaſes for all the time that is paſt. Thus, the Succeſſions which may have fallen to the ſaid condemned perſon, will belong to him, or to thoſe who ſhall have his Right.

[u] Oblatus eſt ei (Antonino) Julianus Lucianus ab Opilio Ulpiano tunc legato in inſulam deportatus: tunc Antoninus Auguſtus dixit, *reſtituo te in integrum provinciæ tuæ:* & adjecit, *ut autem ſcias, quid ſit in integrum reſtituere: honoribus & ordini tuo & omnibus cæteris te reſtituo.* l. 1. C. de ſent. paſſ. & reſt.

[x] *The Sentence of Condemnation may be annulled by a Decree of a Superior Court, which acquits the Party, or which mitigates the Puniſhment, and decrees another Puniſhment which does not imply Civil Death.*

[y] Provocationis remedio condemnationis extinguitur pronunciatio. *l. 1. §. ult. ff. ad Senat. Turpil.* Si quis cùm capitali pœna, vel deportatione damnatus eſſet, appellatione interpoſita, & in ſuſpenſo conſtituta, fati diem functus eſt, crimen morte finitum eſt. *l. ult. C. ſi reus vel accuſ. mort. fuer. l. 2. C. ſi pend. app. m. int.* Si quis in capitali crimine damnatus appellaverit, & medio tempore pendente appellatione fecerit teſtamentum, & ita deceſſerit, valet ejus teſtamentum. *l. 13. §. 2. ff. qui teſt. fac. poſſ. l. 6. §. 6. ff. de injuſt. rupt. This laſt text proves the capacity by the effect of the Appeal.*

☞ See at the end of the following Remark, another way of annulling a Sentence of Condemnation which is received in *France*, when the condemned perſon dies during his delay to purge his Contumacy.

We muſt obſerve on this and the three preceding Articles, a difference there is between the Rules of the *Roman* Law, and thoſe of the *French* Law, as to what relates to the matter of Condemnations. By the *Roman* Law, no Sentence of Condemnation could paſs againſt the Party accuſed, unleſs he were heard in his own defence, but his Eſtate was irrevocably confiſcated, if he did not appear within a certain time, and the giving Judgment on the Accuſation was deferred till he ſhould give an appearance*. By the Rules obſerved in *France*, which are the Ordinances, there are two ſorts of Condemnations: that which is pronounced when the party accuſed is preſent in Judgment, and that which is given in his abſence, by which he is condemned to the Puniſhments which the Law inflicts, for the Crime; which is called a Condemnation on account of Contumacy, becauſe of the diſobedience which the Party accuſed ſhews to the Decree pronounced againſt him. Both theſe ſorts of Condemnations have this belonging to them in common, that both the one and the other import the Civil Death of the perſon condemned, and by conſequence his Incapacity. But whereas the Condemnation which is paſt againſt the Party who is preſent in Judgment, is executed on his perſon by Corporal Puniſhments, and on his Eſtate with regard to the Forfeitures, Fines, and the Civil Intereſt of the adverſe Party, ſo that his Incapacity is reckoned from the day of his Condemnation: the Incapacity which ariſes from a Condemnation on account of Contumacy, depends on what happens afterwards, and on the Rule eſtabliſhed by the Ordinances, which directs that the Condemnation on account of Contumacy ſhall have its effect on the Eſtate of the Condemned Perſon, as to the acquiſition of Forfeitures, Fines, and the Civil Intereſt of thoſe who have an intereſt, only after the Condemned Perſon has ſuffered five years to lapſe from the time of his Condemnation without giving an appearance in Judgment, in order to make his Defence, and undergo his Trial. This is what reſults from the Ordinance of *Moulins*, Article 28;

by which Article the King reſerves to himſelf the power of receiving the accuſed Party to make his defence, even after the five years, *according to the circumſtances of the cauſes, the perſons, and the times, and other conſiderations*; theſe are the words of the ſaid Ordinance. And the ſame thing is ordained by the twenty eighth Article of the Title of Defaults and Contumacies, in the Ordinance of 1670; which makes the five years to run only from the day of the Execution of the Sentence, that is to ſay, from that Execution thereof which is by Effigie, and not from the day of the Condemnation. And by the twenty ninth Article of the ſame Ordinance of 1670, the condemned Perſon who dies after having ſuffered five years to lapſe without preſenting himſelf in Court, or yielding himſelf up priſoner in order to take his Trial, is reputed to be Civilly Dead from the day of the Execution of the Sentence for Contumacy. According to theſe Ordinances, if the condemned perſon happens to die within the five years, his Condemnation will be without effect, ſeeing it is to have its effect only by reaſon of the Contumacy of the condemned perſon, who has ſtood in contempt for five years, without giving an appearance. From whence it would ſeem to follow, that he dies without Incapacity, and that the Succeſſions which may have fallen to him after his Condemnation, go to his Heirs, or to thoſe who have his Rights. And it is in this ſenſe that the ſaid Ordinances are generally conſtrued, altho' in ſome places it is otherwiſe adjudged. So that we may add to the three Cauſes which make the Incapacity to ceaſe, as has been explained in the Article, and which are common both to the *Roman* Law and to the Uſage in *France*, this fourth Cauſe, which is peculiar to the Uſage in *France*, and that is the death of the perſon who is condemned for Contumacy, when he dies within the five years.

We muſt likewiſe remark on this Article, that we are not to underſtand what relates to the Appeal from the Sentence of Condemnation, of all ſorts of Condemnations without diſtinction. For we muſt except the Condemnations for Crimes, which are proſecuted after the death of the perſons accuſed, ſuch as the Crime of High Treaſon, and others which it would be needleſs to mention here. *V. l. ult. ff. ad l. Jul. Majeſtatis. l. 6. 7. 8. C. eodem. l. 5. Cod. ſi reus vel accuſat. mort. fuerit.*

XXXVII.

37. *One cannot give or bequeath to one that is incapable by the intervention of other perſons.*

All the ſorts of Incapacities have this effect, which is common to them all, that not only one cannot bequeath any thing to a perſon who is incapable, naming him expreſly in his Will; but likewiſe all thoſe diſpoſitions which are called *tacit Gifts, or Bequeſts in truſt*, where one leaves to ſome perſon whoſe name is made uſe of, in order to convey by his means to one that is incapable by Law, either the whole Inheritance, or ſome Legacy, are annulled both with reſpect to the perſon that is incapable, and alſo with reſpect to him who lends his name for the carrying on this fraud [a].

[a] Ex cauſa taciti fideicommiſſi bona ad fiſcum pertinent. *l. 3. § 4. ff. de jur. fiſc. l. 1. cod. l. 18. ff. de his quæ ut ind.*

It appears from theſe texts, that by the Roman *Law what was given by a* tacit Bequeſt in truſt, *was forfeited to the Exchequer, when the fraud was well proved. But by our Uſage, the Diſpoſitions of this kind are only annulled, and the Heir or Executor retains what was given in fraud of the Law, or of the Cuſtom.* See the eleventh Art. of the following Sect.

SECT. III.

Who are the Perſons that are unworthy of being Heirs, or Executors.

THere is this difference between the cauſes which render perſons incapable of ſucceeding, and thoſe which render them unworthy thereof, that the cauſes which render the Heir or Executor incapable of the Succeſſion have no particular relation to the duties which he owed towards the deceaſed, to whom he was to ſucceed; and that even of the four ſorts of Incapacity which have been explained in the foregoing Section, there are three the cauſes whereof have nothing in them that is a tranſgreſſion of any manner of duty whatſoever. But the cauſes which render the Heir unworthy of the Succeſſion, regard ſome particular duty, in which he may have failed towards the deceaſed whoſe Succeſſion he lays claim to, whether it was againſt his perſon while he was alive, or after his death againſt his memory: or even ſome other ſort of duty, as in the caſe of the eleventh Article. Thus, it is always on the account of ſome Crime, or of ſome kind of Offence, that an Heir is declared unworthy of a Succeſſion.

We muſt obſerve here in relation to the perſons who have rendred themſelves unworthy of the Succeſſion, a difference between the Uſage in *France* and the *Roman* Law, which conſiſts in this, that by the *Roman* Law, the Inheritance which the Heir was deprived of becauſe of his unworthineſs eſcheated to the Exchequer[a], which was obſerved likewiſe in the caſe of Heirs to *Inteſtates*, altho' they derived their right to the Succeſſion from the Law, and not from the will of the deceaſed[b]. But according to the Uſage in *France*, when the Heir is found to be unworthy of the Succeſſion, it paſſes to the perſon who has the right to ſucceed next after him, whether it be in the caſe of a Teſtamentary Succeſſion, or of a Succeſſion to an *Inteſtate*. For the puniſhment of the Heir that is unworthy ought only to fall upon himſelf, and not upon the perſon to whom the Inheritance ought to belong by reaſon of his excluſion. Thus, there appears to be in our Uſage more Humanity, and more Equity, than in the *Roman* Law.

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[a] *V. l.* 1. *ff. de jure fiſci. Toto titulo ff. &* C. *de his quæ ut indign.*

[b] Cùm fratrem tuum veneno peremptum eſſe aſſeveres, *ut effectus ſucceſſionis ejus tibi non auferatur*, mortem ejus ulciſci te neceſſe eſt, licet enim hæreditatem eorum qui clandeſtinis inſidiis perimuntur *hi qui jure vocantur* adire non vetantur: tamen ſi interitum non fuerint ulti, ſucceſſionem obtinere non poſſunt. *l.* 9. C. *de his quib. ut indign.*

Seeing the cauſes which render perſons unworthy of being Heirs, may regard either both the kinds of Succeſſion, the Teſtamentary as well as that of Inteſtates, or only the Teſtamentary alone, it will be eaſy to diſtinguiſh in each cauſe, either by the words of the Article, or by the remarks made upon it, to which of the two kinds of Succeſſion it relates.

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I.

1. The Heir that is unworthy is excluded from the Inheritance.

THoſe who being capable of ſucceeding do render themſelves unworthy thereof, are excluded from all Succeſſions, whether they come by the death of an *Inteſtate*, or by the Will of a Teſtator[a], and the Goods of the Succeſſion paſs to thoſe who, in default of them, have the next right to the Inheritance[b], as ſhall be explained by the Rules which follow.

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[a] *Toto titulo ff. & Cod. de his quæ ut indign.* See the following Articles, and the text which is quoted in the Preamble.

[b] *We have added theſe laſt words, that the Goods go to thoſe who have the next immediate right to the Inheritance, becauſe, as has been remarked in the Preamble of this Section, the Inheritances belonging to Heirs who render themſelves unworthy of them, do not by our Uſage fall to the Exchequer, as they did by the* Roman *Law; but paſs to the other Heirs who in default of the Heir that is unworthy, have the next immediate Right to ſucceed.*

II.

2. Cauſes which render the Heir unworthy.

The cauſes which may render the Heir unworthy of the Succeſſion, are indefinite, and the diſcerning of what may, or may not be ſufficient to produce this effect, depends on the quality of the facts, and the circumſtances[c]. Thus, we are not to limit theſe cauſes to ſuch as ſhall be explained in the following Articles, where we have only made mention of thoſe which are expreſly named in the Laws. But if there ſhould happen any other caſe where Good Manners and Equity ſhould require that an Heir ſhould be declared unworthy, it would be juſt to deprive him of the Inheritance. Thus, for Example, if one who has had an unlawful Commerce with a Woman of a bad life and converſation ſhould inſtitute her his Heir or Executrix, ſuch an Inſtitution ought to be annulled[d].

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[c] *See the following Articles.*

[d] Mulier in quam turpis ſuſpicio cadere poteſt, nec ex teſtamento militis aliquid capere poteſt, ut divus Hadrianus reſcripſit. *l.* 41. §. 1. *ff. de teſtam. mil. l.* 14. *ff. de his quæ ut indign.*

Although the Rule which reſults from this text *be limited to the Diſpoſitions of Soldiers, yet the Morality upon which it is grounded, ought to render it common to all other perſons. For there is no perſon whatſoever who is not bound as well as a Soldier, to abſtain from every thing that is contrary to Decency and Good Manners.*

III.

3. If he attempts to kill the perſon to whom he ſhould ſucceed.

If he who is to ſucceed as Heir, either by Teſtament, or to an *Inteſtate*, attempts any thing againſt the life of the perſon to whom he ſhould ſucceed, he ſhall be deprived of the Succeſſion, although the attempt had not its effect, provided it be ſufficiently proved[e].

[e] *This caſe renders the Heir unworthy, with much greater reaſon than thoſe which are explained in the following Articles.*

IV.

4. If he has any hand in his death, altho' it be only by neglect.

Although the Heir did not make any attempt upon the life of the perſon whoſe Eſtate was to come to him, yet if his death can be imputed either to the negligence, or any other fault of this Heir, as if he knew that others had a deſign to murder or poiſon him, and he did not diſcover it; or if ſeeing him in danger of his life, he neglected to give him the aid and ſuccour which he might have done; he ſhall be deprived of his Inheritance in the ſame manner as if he had been the Author of his death[f].

[f] Indignum eſſe D. Pius illum decrevit, ut & Marcellus refert, qui manifeſtiſſimè comprobatus eſt id egiſſe, ut per negligentiam & culpam ſuam mulier à qua hæres inſtitutus erat, moreretur. *l. 3. ff. de his quæ ut indig.*

Although this text ſpeaks only of the Teſtamentary Succeſſion, yet the Rule is equally juſt in both the kinds of Succeſſion.

V.

5. If he attempts any thing againſt his Honour.

The Heir at Law, or Executor, who makes an attempt upon the Honour of the perſon to whom he is to ſucceed, whether it be by becoming his Accuſer in a Court of Juſtice, or by joining in an Accuſation that is brought againſt him, is no leſs unworthy of ſucceeding to him than if he had attempted againſt his Life[g].

[g] Seia teſtamento ſuo legavit auri pondo quinque. Titius accuſavit eam quod patrem ſuum mandáſſet interficiendum. Seia poſt inſtitutam accuſationem codicillos confecit: nec ademit Titio privigno legatum: & ante finem accuſationis deceſſit. Acta cauſa pronunciatum eſt patrem Titii ſcelere Seiæ non interceptum. Quæro cum codicillis legatum quod teſtamento Titio dederat non ademerit, an ab hæredibus Seiæ Titio debeatur? Reſpondit ſecundùm ea quæ proponerentur, non deberi. *l. penult. §. penult. ff. de adim. vel transf. legat.*

We might place in the ſame rank the Heir who attempts upon the honour of the Wife of the perſon to whom he is to ſucceed.

Although the text quoted on this Article mentions only a Legatary, yet its deciſion ſeems nevertheleſs to be applicable, and with much greater reaſon, to Executors and Heirs at Law. See the Remark on the following Article. See the Texts cited on the two following Articles.

VI.

6. If there happens between them a mortal hatred.

If there had happened between the Teſtator and the perſon whom he had named his Executor, a mortal hatred and enmity to ſuch a degree as that there might reaſonably be preſumed from thence a change in the Will of the Teſtator, this would be a ſufficient cauſe to exclude the Executor from the Succeſſion, unleſs there was a reconciliation before the death of the Teſtator. But a ſlight quarrel or difference would not have this effect[h].

[h] Si inimicitiæ capitales intervenerunt inter legatarium & teſtatorem, & veriſimile eſſe cœperit teſtatorem noluiſſe legatum ſive fideicommiſſum præſtari ei cui adſcriptum relictum eſt, magis eſt ut legatum ab eo peti non poſſit. *l. 9. ff. de his quæ ut indign. aufer.* Si quidem capitales, vel graviſſimæ inimicitiæ interceſſerint, ademptum videri, quod relictum eſt. Sin autem levis offenſa, manet fideicommiſſum. *l. 3. in f. ff. de adim. vel transf. leg.*

Quòd ſi iterum in amicitiam redierunt, & pœnituit teſtatorem prioris offenſæ, legatum vel fideicommiſſum relictum redintegratur. Ambulatoria enim eſt voluntas defuncti uſque ad vitæ ſupremum exitum. *l. 4. eod. V. §. 11. inſtit. de excuſ. tut.*

☞ Although theſe Laws make mention only of a Legatary, and not of a Teſtamentary Heir, yet the Rule ſeems to be much more juſt and equitable with reſpect to the Teſtamentary Heir: ſeeing in his caſe as the kindneſs is greater on one ſide, ſo likewiſe is the ingratitude on the other; and he who is not worthy of a ſmall favour, is much leſs worthy of a greater.

This Rule is founded on a natural effect of Enmity. For as every Teſtator chuſes his Teſtamentary Heir only in conſideration of ſome merit which he diſcovers in him[a], and that nothing is more oppoſite to the merit which recommends any perſon to the eſteem of another, than that which may produce Hatred inſtead of Friendſhip; the Enmity therefore which falls out between the Teſtamentary Heir and the Teſtator, muſt neceſſarily produce this effect of changing the will of the Teſtator, who had named for his Heir a perſon whom he now looks upon as his greateſt Enemy, and conſequently of annulling a Diſpoſition which it is very probable the Teſtator would not be willing to have executed. This is a conſequence which naturally ariſes from the words of the firſt of the Laws quoted on this Article. And although it be true that Enmities containing a mutual hatred between two perſons, are always unlawful even on the part of thoſe who have not been the firſt aggreſſors, and that every man ought always to preſerve the Spirit of the ſecond Law towards all others[b]: Yet this truth does not deſtroy the Equity of the Law which annuls the Wills of Teſtators made in favour of perſons againſt whom they afterwards conceive a mortal hatred, even although the ſaid perſons ſhould be no ways to blame on their part. For it is always certain, that if this Enmity laſts to the death of the Teſtator, it has two effects which annul the Inſtitution of an Heir or Executor who is ſince become an Enemy. One is on the part of the Teſtator, by the proof which it furniſhes of his mind being changed with reſpect to the ſaid Heir: and the other is on part of the Heir, whom it renders unworthy of the Succeſſion. So that as this Heir by Teſtament has no other title beſides the good will of the Teſtator, and the favourable opinion which he had conceived of him, he has no longer either any title or right to the Succeſſion. Thus, altho' the hatred ſhould be much more unjuſt on the part of the Teſtator, than on that of the Teſtamentary Heir; yet the effect which it has by Law, of annulling the Inſtitution, is not upon that account any thing the leſs juſt. For as to him who is inſtituted Heir, he is juſtly deprived of the Succeſſion of which he is unworthy: and as to the Teſtator, the injuſtice of his hatred againſt the perſon whom he had inſtituted his Heir, does not conſiſt in the annulling of the Inſtitution, but only in this, that he is wanting in his duty in not loving him with that Brotherly Love which he owes to all Mankind in general. And ſince this duty of Brotherly Love does not oblige him to name for his Heir a perſon who not only has no manner of right to his Inheritance, but is even unworthy of it, and that on the contrary the ſaid duty leaves him at full liberty to leave his Eſtate either to his Heir at Law, or to any other perſon whom he pleaſes to chuſe; it is therefore without any injuſtice that the Law annuls the Inſtitution, when there falls out afterwards a mortal hatred between the Heir that is inſtituted and the Teſtator.

We have reſtrained this Rule to the Teſtamentary Heir. For beſides that the Laws quoted on this Article have relation only to the diſpoſitions of Teſtaments; the condition of thoſe who ſucceed as Heirs to Inteſtates ought to be diſtinguiſhed from that of Teſtamentary Heirs, as to what regards the effect of the Enmity that happens between the Heir and the Teſtator. Becauſe that whereas the Teſtamentary Heir owes the Succeſſion barely to the will of the Teſtator, the Heir of Blood who ſucceeds to an Inteſtate derives his Right from the proviſion of the Law. So that we may ſay, that an Enmity which does not go to that heighth which has been mentioned in the foregoing Articles, would not be ſufficient to exclude the Heir at Law from the Inheritance of his Kinſman, who by chuſing to die Inteſtate, would by that ſufficiently declare his mind, that he was not willing his Eſtate ſhould go to any others but to thoſe who ſhould be intitled to it by Law. And much leſs ought Enmity to exclude the Heir at Law in the Provinces of *France*, which are governed by their Cuſtoms, where it is not allowed to deprive the Heirs of Blood of that part of the Eſtate which is appropriated to them by the ſaid Cuſtoms; becauſe if Enmity were to have that Effect, it might happen that a Teſtator who ſhould chance to have ſome quarrel with his Heir at Law, might turn it into hatred, and ſo heighten it to ſuch a degree as might furniſh him with a pretext for making a Will to his prejudice, and for eluding the Law.

VII.

7. If he calls the ſtate of the Teſtator in queſtion.

If the Heir who is inſtituted by Teſtament has done any great injury to the Teſtator, or uſed him ſo baſely, as to render himſelf unworthy of the benefit he receives by his Will, he ſhall be deprived of it. And with much more reaſon will he be deprived of this benefit, if he was the Author of, or any way concerned in publiſhing a Defamatory Libel reflecting on the Teſtator's honour, or if he had commenced a Law-Suit againſt him in relation to his ſtate and condition. As if the Teſtator pretending to be a Gentleman, he had contributed to make him loſe that quality: or if he had attempted to get him declared a Baſtard[i].

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[a] Non ſine cauſa obveniunt (hæreditas, vel legatum, vel donatio mortis cauſa) ſed ob meritum aliquod accedunt. *l. 9. ff. pro ſocio.*

[b] *See the fourth and ſixth Chapters of the Treatiſe of Laws.*

[i] Sed & ſi palam & apertè teſtatori maledixerit (legatarius,) & infauſtas voces adverſus eum jactaverit, idem erit dicendum. Si autem ſtatus ejus controverſiam movit, denegatur ejus quod teſta-

mento acceperit, perſecutio. *l.* 9. §. 1. *&* 2. *ff. de his quæ ut indign. auf.*

Defamatory Libels are placed in the number of Capital Crimes. V. l. un. C. de fam. libel. *And they deſerve this puniſhment more than any injury, or any inſult whatſoever.*

We muſt likewiſe make the ſame remark here, that although the Text cited on this Article ſpeaks only of a Legatary, yet it may be applied with much greater reaſon to the Teſtamentary Heir.

If in the caſe of two perſons contending for the ſame Inheritance, one of them ſhould conteſt the ſtate of the other in order to exclude him from it, having ſome reaſon to believe him to be either a Baſtard, or an Alien, and incapable of ſucceeding, and that the perſon whoſe ſtate was called in queſtion was adjudged to be Lawfully Begotten, or a Natural Born Subject, and that afterwards he comes to die having for his Heir at Law the perſon who had called his ſtate in queſtion; the ſaid Heir would not upon this account be judged unworthy of ſucceeding to him. For his controverting the other's ſtate under theſe circumſtances ought not to be imputed to any deſign in him to do harm; ſince it tended only to diſcover the truth of a matter of fact, which was uncertain, and on which depended the Right of the contending parties. But as for Defamatory Libels, atrocious Injuries, and bad treatment, ſeeing they are Crimes puniſhable by Law, and ſuch as deſtroy mens Reputation, which is much dearer to them than Life it ſelf, it ſeems juſt that the Heir at Law who has been guilty of any of the ſaid crimes ſhould be declared unworthy of the Inheritance.

VIII.

8. *If he does not proſecute the Authors of his death.* The Heir, whether he ſucceed by Teſtament, or as Heir at Law, who neglects to bring to condign puniſhment the murderers of him to whom he has a right to ſucceed, renders himſelf by that neglect unworthy of the Succeſſion[l]. Unleſs he ſhould deſerve to be excuſed upon account of the tenderneſs of his years, as if the ſaid Heir was a Minor, or for ſome other reaſonable cauſe, according to the circumſtances[m].

[l] Hæredem qui ſciens defuncti vindictam inſuper habuit, fructus omnes reſtituere cogendum exiſtimavi. *l.* 17. *ff. de his quæ ut indign.*

Hæredes quos necem teſtatoris inultam omiſiſſe conſtiterit, fructus integros cogantur reddere. Neque enim bonæ fidei poſſeſſores ante controverſiam illatam videntur fuiſſe, qui debitum officium pietatis ſcientes omiſerunt. *l.* 1. *C. eod.*

[m] Minoribus viginti quinque annis hæredibus non obeſſe crimen inultæ mortis placuit. *l.* 6. *C. eod.*

IX.

9. *If he treats concerning the Succeſſion during the Teſtator's life, and without his knowledge.* If any one before the death of the perſon whoſe Eſtate is to come to him either by Teſtament, or by Right of Blood, ſhould in proſpect thereof diſpoſe of any of the effects belonging to the ſaid Eſtate, without the conſent of the ſaid perſon, he would thereby render himſelf unworthy of ſucceeding him[n].

[n] Donationem quidem partis bonorum proximæ cognatæ viventis nullum fuiſſe conteſtabat. Verùm ei qui donavit, ac poſtea jure prætorio ſucceſſit, quoniam adverſus bonos mores & jus gentium feſtinaſſet actiones hæreditarias in totum denegandas, reſpondit. Nam ei ut indigno aufertur hæreditas. *l.* 29. *& l.* 30. *ff. de donat.*

Si quis vivi *ignorantis* bona, vel partem bonorum alicujus cognati donaverit, quaſi indigno aufertur. *l.* 2. *in f. ff. de his quæ ut indign.*

X.

10. *If he hinders him from making a Teſtament.* If he who is named Heir in a Teſtament had hindred the Teſtator from making a ſecond Will, whether it were by force, or by any other unlawful means, he would be unworthy of ſucceeding to him. It would be the ſame thing if he to whom the Inheritance belongs by right of Blood ſhould make uſe of the ſame indirect means to hinder the perſon whoſe Succeſſion would fall to him by Law, in caſe there were no Teſtament, from making one. And he who ſhould uſe violence, or any other unlawful way, to extort a Teſtament in his own favour, or in favour of other perſons in truſt for him, would with much greater reaſon be debarred from reaping any benefit by the ſaid Teſtament. And in all theſe caſes, the Authors of ſuch unlawful ways, together with their accomplices, will be liable to be puniſhed, according to the quality of the facts and the circumſtances[o].

[o] Qui dum captat hæreditatem legitimam, vel ex teſtamento prohibuit teſtamentarium introire, volente eo facere teſtamentum, vel mutare: Divus Hadrianus conſtituit, denegare ei debere actiones. *l.* 1. *ff. ſi quis aliq. teſt. prohib. vel coeg.*

Si quis dolo malo fecerit ut teſtes non veniant, & per hoc deficiatur facultas teſtamenti faciendi, denegandæ ſunt actiones ei qui dolo fecerit, ſive legitimus hæres ſit, ſive priore teſtamento ſcriptus. *l.* 2. *eod.*

Eos qui ne teſtamentum ordinaretur impedimento fuiſſe monſtrantur, veluti indignas perſonas, à ſucceſſionis compendio removeri, celeberrimi juris eſt. *l.* 2. *C. eod.*

Civili diſceptationi crimen adjungitur, ſi teſtator non ſua ſponte teſtamentum fecit: ſed compulſatus ab eo qui hæres eſt inſtitutus, vel quolibet alio: quos noluerit ſcripſit hæredes. *l.* 1. *C. eod.*

See the fourth Article of the ſecond Section of Legacies. See the twenty fifth and following Articles of the fifth Section of Teſtaments.

XI.

11. *If he has lent his name for a tacit Bequeſt in truſt.* We may place in the rank of perſons unworthy of Succeſſions thoſe who lend their names to Teſtators, that they may be named Heirs in order to convey the Effects to perſons whom the Law has excluded. And theſe ſorts of Diſpoſitions, which are called *Tacit Fiduciary Bequeſts*, remain without effect, if the fraud appears. And he who is named Heir, as well as the perſon to whom he was to reſtore the Goods of the Succeſſion ſhall be deprived of them; the one as being incapable, and the other as being

ing guilty of a Cheat, which the Laws liken to a Robbery, or a Theſt[p].

[p] In fraudem juris fidem accommodat, qui vel id quod relinquitur, vel aliud tacitè promittit reſtituturum ſe perſonæ quæ legibus ex teſtamento capere prohibetur. Sive chirographum eo nomine dederit, ſive nuda pollicitatione repromiſerit. *l. 10. ff. de his quæ ut ind. auf.* Prædonis loco intelligendus eſt is, qui tacitam fidem interpoſuerit, ut non capienti reſtitueret hæreditatem. *l. 46. ff. de hæred. petit.* See the laſt Article of the foregoing Section.

XII.

12. *The Heir who is unworthy, reſtores the Fruits, and the Intereſt.* The Heir that is unworthy, and who has already enjoyed ſome part of the Inheritance, ought to reſtore all the Fruits thereof, and the other Revenues which he has received during the whole time of his poſſeſſion, as likewiſe the Intereſt of the Money which he has received, whether it be from perſons indebted to the Succeſſion, or from the Sale of ſome of the Moveables, or upon other accounts. For he is of the number of unjuſt poſſeſſors, even before any Action is brought againſt him[q].

[q] Hæredes, quos necem teſtatoris inultam omiſiſſe conſtiterit, fructus integros coguntur reddere. Neque enim bonæ fidei poſſeſſores ante controverſiam illatam videntur fuiſſe, qui debitum officium pietatis ſcientes omiſerunt. Ex hæreditate autem rerum diſtractarum, vel à debitoribus acceptæ pecuniæ poſt motam litem bonorum, uſuras inferant. Quod in fructibus quoque locum habere quos in prædiis hæreditariis inventos, aut exinde perceptos vendiderint, proculdubio eſt. *l. 1. C. de his quib. ut ind.*

Although this Text ſpeaks only of the Heir who has not revenged the death of the deceaſed, yet this Rule agrees to all the caſes of the other cauſes which may render the Heir unworthy.

Seeing the unworthy Heir is called in this Text an unfair Poſſeſſor, even before any Action is brought againſt him, Ante controverſiam illatam, *why ſhould he be accountable for the intereſt of the Money which he ſhall have received, either from the Debtors to the Succeſſion, or from the Sale of any of the Moveable Goods, only from the time that the Suit is commenced, as it is ſaid in this Text? Unleſs it were that the Text is to be underſtood of Money that is in being, or that is ſtill owing by thoſe who have bought any thing of the ſaid Heir.*

XIII.

13. *Difference between the cauſes which render Heirs unworthy.* Among all theſe cauſes which we have juſt now explained, and which may render an Heir unworthy of the Inheritance, we muſt diſtinguiſh between thoſe which may ceaſe to have their effect, and thoſe whereof the effect can never ceaſe. Which depends on the ſtate in which matters are at the time of the death of the perſon whoſe Succeſſion is in queſtion, and on the Rules which follow[r].

[r] *See the following Articles.*

XIV.

14. *Of thoſe which render the Heir unworthy at the time of the death of the Teſtator.* If the cauſe which may render the Heir unworthy, ſubſiſts at the time of the death which lays the Succeſſion open, and the Heir cannot juſtify himſelf againſt the charge, he ſhall be irrevocably excluded as unworthy. For being found to be ſuch at the moment that the Inheritance falls to him, he cannot acquire it, and the Eſtate goes to the perſon whom the Law calls to the Succeſſion[s].

[s] *This is the effect of the Cauſe which renders him unworthy.*

XV.

15. *Of thoſe which have ceaſed at the time of the death.* If the cauſe which might have rendred the Heir unworthy did ceaſe, as if it was a mortal hatred, or other cauſe, which a reconciliation with the deceaſed, or a juſtification of the Heir, had aboliſhed, the obſtacle ceaſing, he might ſucceed[t].

[t] *See the ſixth Article.*

XVI.

16. *Diſtinction of the Cauſes, with reſpect to the two ſorts of Succeſſions.* Among the cauſes which render the Heir unworthy, we muſt diſtinguiſh between thoſe which regard equally the Succeſſions of *Inteſtates*, and Teſtamentary Succeſſions, and thoſe which can have reſpect only to Teſtamentary Succeſſions. For this diſtinction is neceſſary to be obſerved in order to prevent our giving to the cauſes which render the Heir unworthy, another effect than that which they ought to have according to Law and Equity[u]. And it will be eaſy to judge by the reading of every Article, to which of the two Succeſſions each of the ſaid cauſes ought to be applied.

[u] *This Article is a conſequence of the former.*

SECT. IV.

Of thoſe who can have no Heirs, or Executors.

Having explained who are the perſons who cannot be Heirs, or Executors, Order requires that we ſhould in the next place ſhew who are the perſons who cannot have Heirs, or Executors. And this is different in Teſtamentary Succeſſions, from what it is in the Succeſſion of *Inteſtates*. For, as ſhall be explained in this Section, there are ſome perſons who are capable of having Heirs at Law, and cannot have Teſtamentary Heirs[a]. There are others, on the contrary, who cannot have Heirs at Law, and who are capable of having Heirs by Teſtament[b]. And there are ſome who can neither have Heirs at Law, nor Heirs by a Teſtament[c].

[a] *See the firſt Article of this Section, and the Remark that is there made upon it.*

[b] *See the ſecond Article.*

[c] *See the third Article.*

We might reckon in the number of perſons who cannot have Heirs, thoſe who poſſeſs only thoſe kinds of Eſtates which we ſee in ſome Cuſtoms, and which are ſaid to be of a ſervile Condition, or of Mortmain, of which we have already ſpoken in the Preface, N°. 15. For as to Eſtates of this nature, it is the Lord of the Mannor who ſucceeds when there are no Children: and he excludes all others, whether they be Heirs at Law, or Heirs by Teſtament; as has been remarked in the above-mentioned place.

The CONTENTS.

1. *Perſons incapable of making a Teſtament, cannot have an Executor or Teſtamentary Heir.*
2. *Baſtards can have no other Heirs, if they die inteſtate, but their Children.*
3. *Foreigners can neither have Executors, nor Heirs at Law.*
4. *Profeſſed Monks have either Teſtamentary Heirs, or Heirs at Law.*
5. *Condemned perſons have no Heirs.*
6. *Perſons who have no Relations, have no Heirs at Law.*

I.

1. Perſons incapable of making a Teſtament, cannot have an Executor, or Teſtamentary Heir.

ALL perſons who are incapable of making a Teſtament, whether it be for want of Age, or for other cauſes, which ſhall be explained in their proper place[a], cannot by conſequence have Executors, or Heirs by Teſtament. But their Inheritance goes neceſſarily to the perſon whom the Law calls to ſucceed[b].

[a] *See the ſecond Section of the firſt Title of the third Book.*

[b] *We may reckon, in one ſenſe, among the perſons who cannot have Teſtamentary Heirs, thoſe whoſe Eſtates are ſituated in the Provinces of* France *which are governed by their Cuſtoms. For there they know no other Heirs beſides thoſe of Blood; and they give the name only of Univerſal Legataries to thoſe who not being called to the Succeſſion by Law, are inſtituted Heirs by a Teſtament.*

II.

2. Baſtards can have no other Heirs, if they die inteſtate, but their Children.

Baſtards who have Eſtates may diſpoſe of them by Will, and their Children may ſucceed to them as their Heirs at Law, if they have any that are lawfully begotten. But if they die without Children, and inteſtate, as they have no legal Parentage with any perſon, ſo they can have no Heir at Law[c].

[c] Si ſpurius inteſtato deceſſerit jure conſanguinitatis aut agnationis hæreditas ejus ad nullum pertinet. *l.* 4. *ff. unde cogn.*

See the eighth Article of the ſecond Section, and the Remark that is there made on it.

The Succeſſions of Baſtards belong to the King, by vertue of that Right which is called Right of Baſtardy, or to the Lord of the Mannor.

III.

3. Foreigners can neither have Executors, nor Heirs at Law.

Foreigners who die without being naturalized, can have no Heir, neither Heir at Law, nor Teſtamentary Heir[d].

[d] *See the ninth Article of the ſecond Section, and the Articles which are there quoted.*

We muſt except from this Rule, Strangers who have Children, or Relations, born in France, *or naturalized; for they may ſucceed to them, as has been remarked in the thirty firſt Article of the ſecond Section. And we muſt likewiſe except the Strangers who come within the caſe of the* Ordinances *of* 1463. 1583. *and* 1569. *which allow foreign Merchants, who frequent the Fairs of* Lyons, *to make their Wills, and their Heirs at Law to ſucceed them when they die inteſtate.*

The Succeſſions of Foreigners belong to the King, by vertue of that Right which is called Right to the Eſtates of Aliens.

[*By the Law of* England, *Aliens cannot inherit Lands; neither can they ſo much as have Leaſes of Houſes,* Stat. 32. H. 8. cap. 16. *But an Alien, who is not an Enemy, may be an Executor, or Adminiſtrator, becauſe what he holds or enjoys in that quality, is in the right of another, and not to his own uſe.* Croke, 3 Rep. pag. 8.]

IV.

4. Profeſſed Monks have either Teſtamentary Heirs, or Heirs at Law.

Profeſſed Monks have for their Heirs, either the perſons whom they may inſtitute by a Teſtament, if they think fit to make any before their Profeſſion; or thoſe to whom their Inheritance belongs by Law, if they have not diſpoſed of it by Will. And the Eſtate which belong'd to them at the time of their Profeſſion, goes to their Heirs. For their Vows put them into the ſtate of a Civil Death, which rendring them incapable of poſſeſſing any Goods, has the ſame effect as a Natural Death in laying their Succeſſion open[e].

[e] *See the tenth Article of the ſecond Section, and the Remark that is there made on it.*

V.

5. Condemned persons have no Heirs. Perſons condemned to Death, or to other Puniſhments which imply Civil Death, and dying in that condition, can have no Heirs. For their Condemnation has ſtrip'd them of all their Goods, which go either to the King, or to the Lord of the Mannor who has Right to the Eſcheat[f]. But if their Condemnation is annulled by any one of the ways explained in the thirty ſixth Article of the ſecond Section, their Goods will deſcend to their Heirs.

VI.

6. Perſons who have no Relations, have no Heirs at Law. Thoſe who either have no Relations at all, or only ſuch as are Aliens not naturalized, have no Heirs if they die *Inteſtate*[g]. But they may diſpoſe of their effects by Will, if they are under no incapacity of making one.

SECT. V.

Of the Rights which are annexed to the quality of Heirs, or Executors.

THis whole Section which relates to the Rights of Heirs and Executors in general, and the three following Sections, which treat of the Charges of Heirs and Executors likewiſe in general, are as it were a Plan, in which it was neceſſary to diſtinguiſh the ſaid Rights, and the ſaid Charges, and to give this firſt view of them, that their Order may be the better underſtood, before we enter upon explaining the particulars. For this detail containing a great number of Rules, which are to be treated of in different places, and which make different matters, it is neceſſary to give the Idea of the ſaid Matters all in one place, and there to lay down the Principles and general Rules which are to enter into this Plan, and which ought to precede the detail of all the ſaid Matters, each of which will have its proper detail in its proper place; as ſhall be explained in the Remark ſubjoined at the end of the eighth Section.

The ſame reaſon which has induced us to make this Plan, obliges us likewiſe to acquaint the Reader, that he muſt not take thoſe things for repetitions, which are to be met with either in the foregoing Sections, or in the remaining part of this firſt Tome, which may ſeem to have any reſemblance with what ſhall be explained in theſe four Sections. For either there will be found ſome difference between the things themſelves, or if the ſame thing be repeated in different places, it will appear to have been neceſſary in both places, either for method's ſake, or for ſome other conſideration.

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1. *Right to accept the Succeſſion, and to take poſſeſſion of the Goods.*
2. *The entring to the Inheritance hath its effect from the day of the death.*
3. *The Heir may renounce the Inheritance.*
4. *The Heir may deliberate whether he ſhall accept of the Succeſſion, or not.*
5. *The Heir may accept the Succeſſion with the benefit of an Inventory.*
6. *He may demand that the Legacies and Bequeſts in truſt be reduced, when there is ground for it.*
7. *The Heir may ſell the Inheritance, make it over by Deed of Gift, or diſpoſe of it otherwiſe.*
8. *Right of tranſmitting the Inheritance to his Heir.*
9. *There are ſome Rights which do not go to the Heirs.*
10. *The Right of the Heirs of Blood to the Goods appropriated to them by Law.*
11. *Right of Partition among Co-heirs.*
12. *Right of Accretion among Co-heirs.*
13. *Right of Collation of Goods.*
14. *Right of Reverſion.*

I.

SEeing the Heir, or Executor, is univerſal Succeſſor, the firſt Right which this quality gives him, is to accept the Succeſſion, to take poſſeſſion of the Goods, to claim ſuch of them as ſhall happen to be in the hands of other perſons, to call in the Debts, and to diſpoſe of every thing belonging *1. Right to accept the Succeſſion, and to take poſſeſſion of the Goods.*

[f] *This is a neceſſary conſequence of the ſtate of thoſe condemned perſons.* See the eleventh Article of the ſecond Section, and the other Articles there quoted.

[g] Scire debet gravitas tua inteſtatorum res, qui ſine legitimo hærede deceſſerint, fiſci noſtri rationibus vindicandas. *l. 1. C. de bon. vacant.*

The Eſtates of thoſe who leave behind them no Heirs, neither Teſtamentary Heirs, nor Heirs of Blood, belong to the King, by virtue of that Right which intitles him to the Succeſſions of all thoſe who leave no Heir behind them. See the Preface to this ſecond Part, N°. 13. and the firſt Article of the thirteenth Section of this Title.

to the Succeſſion, as Owner and Maſter[a].

[a] Hæres in omne jus mortui, non tantùm ſingularum rerum dominium ſuccedit. *l.* 37. *ff. de reg. jur.* See the firſt Article of the firſt Section.

We muſt not confound the Right to accept the Succeſſion, which is ſpoken of in this Article, with the Right or Title which makes one Heir, or Executor. The Right of accepting the Inheritance depends on the will of the Heir, or Executor, but not the Title which makes him Heir, or Executor; to wit, the Teſtament in Teſtamentary Succeſſions, and the Proximity of Blood, in the Succeſſion of Inteſtates.

See concerning the accepting of the Inheritance, and the difference between the Right to the quality of Heir, or Executor, and the Right of accepting that quality, what is ſaid thereof in the Preamble to the third Title of this firſt Book, and in the places quoted at the end of the ſaid Preamble.

II.

2. The entring to the Inheritance hath its effect from the day of the death. This Right of the Heir, or Executor, hath this effect, that altho' he does not know that the Succeſſion is fallen to him until a long time after, or that knowing it he delays to accept it, yet from the moment that he begins to intermeddle with it, he acquires all the Rights belonging to the Succeſſion, in the ſame manner as if he had entred to it at the time of the death of the perſon to whom he ſucceeds. And whatever may have augmented the Succeſſion during that interval, will belong to him[b].

[b] Omnis hæreditas quamvis poſtea adeatur, tamen cum tempore mortis continuatur. *l.* 138. *ff. de reg. jur.* See the firſt Article of the eighth Section.

III.

3. The Heir may renounce the Inheritance. Seeing Succeſſions may be ſometimes more chargeable than profitable, the Heir, whether he be Teſtamentary Heir, or Heir at Law, who does not think it convenient to accept of that quality, has a right to renounce it[c]; but this he muſt do whilſt things are ſtill intire; that is, before he has done any Act which implies his acceptance of the Succeſſion. For, as has been ſaid in another place, he who has once been Heir, or Executor, can never ceaſe to be ſuch[d].

[c] Is qui hæres inſtitutus eſt, vel is cui legitima hæreditas delata eſt, repudiatione hæreditatem amittit. *l.* 13. *ff. de acquir. vel omitt. hæred.*

Nec emere, nec donatam aſſequi, nec damnoſam quiſquam hæreditatem adire compellitur. *l.* 16. *C. de jure deliber.* See the fourth Section of the third Title of this firſt Book.

[d] *See the tenth Article of the firſt Section of this Title.*

IV.

4. The Heir may deliberate whether he ſhall accept of the Succeſſion, or not. If the Heir is in doubt whether the Succeſſion be advantagious, or not, he may take a time to deliberate, whether he ſhall accept, or renounce it[e]; as ſhall be explained in the firſt Section of the ſecond Title.

[e] Ait prætor *ſi tempus ad deliberandum petet, dabo. l.* 1. §. 1. *ff. de jure deliber.* Ut inſtruere ſe poſſint, expediet necne, agnoſcere hæreditatem. *l.* 5. *eod.*

V.

5. The Heir may accept the Succeſſion with the benefit of an Inventary. In the ſame caſe with that of the foregoing Article, the Heir may without deliberating, if he does not think fit to take that method, declare himſelf Heir with the Benefit of an Inventary, that is, by getting an Inventary of all the Goods, to be made in due form. Which will have this effect, that he will be anſwerable for the Debts no farther than to the value of the Goods, and be only accountable for them; and if he himſelf has any demand on the Inheritance, the ſame will be preſerved intire to him[f]. It is this Benefit of an Inventary, which ſhall be the ſubject matter of the ſecond Title.

[f] Sin autem dubius eſt (hæres) utrumne admittenda ſit necne defuncti hæreditas, non putet ſibi eſſe neceſſariam deliberationem, ſed adeat hæreditatem, vel ſeſe immiſceat, omni tamen modo inventarium ab eo conficiatur. *l. ult.* §. 2. *C. de jure delib.*

Si verò & ipſe aliquas contra defunctum habebat actiones, non hæ confundantur: ſed ſimilem cum aliis creditoribus per omnia habeat fortunam: temporum tamen prærogativa inter creditores ſervanda. *d. l.* §. 9. *inf.* See the ſecond Title.

VI.

6. He may demand, that the Legacies, and Bequeſts in truſt, be reduced, when there is ground for it. Altho' the goods of the Succeſſion exceed the debts that are owing by the deceaſed, yet if the Heir, whether he be Heir by Teſtament, or Heir of Blood, be charged, by a Teſtament, or Codicil, with Legacies, Bequeſts in truſt, Subſtitutions, or other Diſpoſitions, which diminiſh the portion of the Goods of the Inheritance that is appropriated by Law to the Heir, or Executor, he has a right to demand that theſe ſorts of diſpoſitions be moderated; as ſhall be explained in the proper place[g].

[g] Quicumque civis Romanus poſt hanc legem rogatam teſtamentum faciet, is quantam cuique civi Romano pecuniam jure publico dare legare volet, juſque poteſtaſque eſto. Dum ita detur legatum, ne minùs quàm partem quartam hæreditatis eo teſtamento hæredes capiant. *l.* 1. *ff. ad leg. falc.* See the third Title of the fourth Book, and the fourth Title of the fifth Book.

VII.

7. The Heir may ſell the Inheritance, make it over by Altho' the Heir who has once taken upon him this quality, cannot afterwards diveſt himſelf of it, in ſuch a manner as not to be any more ſubject to the charges

Deed of Gift, or diſpoſe of it otherwiſe. of the Succeſſion which he had accepted; yet he has nevertheleſs the Right to ſell it, to make it over by Deed of Gift, or to diſpoſe of it by any other Title, for the behoof of another perſon, who enters to his Rights, and who obliges himſelf to acquit the charges[h]. But altho' this Heir has ſtrip'd himſelf of the Goods of the Succeſſion, yet he remains ſtill bound for all the debts, and has only his recourſe againſt the perſon who having got the Succeſſion, ought to warrant him againſt them.

VIII.

8. Right of tranſmitting the Inheritance to his Heir. We may place in the number of the Rights belonging to the Heir, that of tranſmitting after his death, the Inheritance which had fallen to him, to the perſons who ſhall ſucceed to him, altho' he had not declared his acceptance of the Succeſſion, nor done any act as Heir. This is the Right which is called Right of Tranſmiſſion, and which ſhall be explained in its proper place[l].

IX.

9. There are ſome Rights which do not go to the Heirs. We muſt not reckon among the Rights belonging to the Heir, all thoſe which the perſon had to whom he ſucceeds. For there are many Rights which are reſtrained to the perſons themſelves, and do not go to their Heirs[m].

X.

10. The Right of the Heirs of Blood to the Goods appropriated to them by Law. It is neceſſary to remark among the Rights belonging to Heirs, the peculiar Right which Children, and other Deſcendants, and Aſcendants, have, to a Legitime, or certain Portion of the Goods, which cannot be taken away from them, and of which we ſhall treat in its proper place[n]. And alſo the Right which the Collateral Relations have in the Provinces of *France* governed by their Cuſtoms, to the Goods which are appropriated to them, and which cannot be diſpoſed of to their prejudice[o].

XI.

11. Right of Partition among Co-heirs. When there are ſeveral Heirs, each of them has a right to oblige the others to come to a Partition of the Effects and Charges of the Inheritance[p].

XII.

12. Right of Accretion among Co-heirs. In the ſame caſe where there are many Heirs, they have among them reciprocally that Right which is called, Right of Accretion, which hath this effect, that in default of any one of them his Right paſſes to the others, purſuant to the Rules of this matter, which ſhall be explained in their proper place[q].

XIII.

13. Right of Collation of Goods. Among ſeveral Co-heirs to an Aſcendant, whether they ſucceed by Right of Blood, or be called by Teſtament, every one has a right to oblige his Co-heirs who may have received any Goods from this Aſcendant to whom they ſucceed, to bring them in; that is to ſay, to put them into the Maſs of the Eſtate, that they may be likewiſe comprized in the Partition. This is called the Right of Collation of Goods, which makes a matter by it ſelf; the Rules whereof ſhall be explained in its proper Title[r].

XIV.

14. Right of Reverſion. When Aſcendants ſucceed to their Deſcendants, and chance to have Co-heirs, as it happens in the caſes which ſhall be explained in their proper places[ſ], if the ſaid Aſcendants had made any Donations to their Deſcendants to whom they ſucceed, that which they had given them does not enter into the Partition, but returns to them by that Right which is called, Right of Reverſion; which ſhall be explained in its place[t].

* * *

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[h] *Toto titulo ff. & C. de hæreditat. vel act. vend.*

[i] Quamvis hæres inſtitutus hæreditatem vendiderit, tamen legata & fideicommiſſa ab eo peti poſſunt. Et quod eo nomine datum fuerit, venditor ab emptore vel fidejuſſoribus ejus petere poterit. *l. 2. C. de legat.*

[l] *See the tenth Section of Teſtaments.*

[m] *See the fifth Article of the firſt Section.*

[n] *See the third Title of the third Book.*

[o] *See the Preface to this ſecond Part, N°. 7.*

[p] *See the fourth Title of this firſt Book.*

[q] *See the ninth Section of Teſtaments.*

[r] *See the fourth Title of the ſecond Book.*

[ſ] *See the firſt Section of the ſecond Title of the ſecond Book.*

[t] *See the third Section of the ſame ſecond Title of the ſecond Book.*

SECT. VI.

Of the ſeveral ſorts of Engagements of Heirs, or Executors.

The CONTENTS.

1. *Engagement to the Succeſſion by the bare effect of acceptance.*
2. *Several ſorts of Engagements of Heirs.*
3. *The firſt general Engagement for all the charges of the Inheritance.*
4. *All the particular Engagements are reduced to two kinds.*
5. *Several charges which may be impoſed on the Heir.*
6. *Charges to which the Heir is liable, altho' the deceaſed has not expreſly obliged him to them.*
7. *Two ſorts of Engagements of the deceaſed which do not paſs to the Heir.*
8. *The firſt ſort of Engagements which do not paſs to the Heir.*
9. *The ſecond ſort of Engagements which do not go to the Heir.*

I.

1. Engagement to the Succeſſion, by the bare effect of acceptance.

THE Heir, whether it be the Heir at Law, or Heir by Teſtament, who has accepted of this quality, or who has done any Act which makes him Heir, as ſhall be explained in the firſt Section of the third Title, enters into a general Engagement, which obliges him to all the conſequences of this quality of Heir, and to all the charges of the Inheritance, by the bare effect of his acceptance. For the act which makes him Heir, is as it were a Contract between him and the perſons to whom this quality may oblige him, by which he takes the Goods on condition to acquit the Charges[a].

[a] Is qui miſcuit ſe (hæreditati) contrahere videtur. *l. 4. ff. quib. ex cauſ. in poſſ. eat. l. 3. in f. eod. l. 5. §. 2. ff. de oblig. & act. §. 5. inſt. de oblig. quæ quaſ. ex contr. naſc.* See the firſt Article of the eighth Section.

II.

2. Several ſorts of Engagements of Heirs.

The Engagements of Heirs are of ſeveral ſorts, in the ſame manner as the Charges of the Inheritance. And in order to underſtand aright the nature of each Engagement, and the Order of them all, it will be neceſſary to make the following diſtinctions[b].

[b] *See the following Articles.*

III.

3. The firſt general Engagement for all the charges of the Inheritance.

The firſt Engagement of an Heir, or Executor, is that general and indefinite Obligation which he contracts with all thoſe who may have any demand on the Inheritance; altho' he be ignorant who thoſe perſons are, and what their demands are: and that even altho' the Goods of the Succeſſion be not ſufficient to ſatisfy them all; unleſs he has taken the precaution which has been mentioned in the fifth Article of the fifth Section[c].

[c] *This is a conſequence of the firſt Article.*
Hæreditas quin obliget nos æri alieno, etiam ſi non ſit ſolvendo, pluſquam manifeſtum eſt. *l. 8. ff. de acquir. vel omit. hæred.*

IV.

4. All the particular Engagements are reduced to two kinds.

All the particular Engagements which may be compriſed under this general and indefinite Obligation, are diſtinguiſhed into two kinds, which include them all without exception. The firſt is, of thoſe which the perſon to whom the Heir ſucceeds may impoſe upon him: and the ſecond is, of all thoſe which are independent of the will of the ſaid perſon. Thus, the Legacies are of the firſt of theſe two kinds; and the paſſive debts of the deceaſed, that is, thoſe which are owing by him, are of the ſecond kind[d].

[d] *There can be no Engagement but what belongs to one or other of theſe two kinds.*

V.

5. Several charges which may be impoſed on the Heir.

The charges which one may impoſe on his Heir, or Executor, are of ſeveral ſorts, ſuch as Legacies and Donations made in view of death, which we ſhall treat of in the fourth Book: Subſtitutions and Fiduciary Bequeſts, which ſhall be the ſubject matter of the fifth Book. And all other Diſpoſitions which the deceaſed may have made, and which put his Heir under ſome Engagement; ſuch as that which may regard any Reſtitutions to be made by him, his Funeral Expences, if he has given any directions about them, and others of the like nature[e].

[e] *See the fourth and fifth Books, and the eleventh Section of this Title.*

VI.

6. Charges to which the Heir is liable, altho' the deceaſed has not expreſly obliged him to them.

The charges to which the Heir, or Executor is liable, altho' the perſon to whom he ſucceeds has ordered nothing concerning them, are likewiſe of ſeveral ſorts; ſuch as the Debts owing by the deceaſed, whether he owed them upon the account of his own affairs, or for other perſons for whom he was bound; the duties of the Lands and Tenements which are part of the Inheritance; the debts and other charges of the Succeſſions which the deceaſed may have inherited; the reparation of the Damages which he may have been the cauſe of through ſome fault, or other means; the Funeral Expences, and all other Engagements whatſoever, either of the perſon, or the Goods of the deceaſed, which may affect his Inheritance, altho' he has not obliged his Heir to them expreſly by any Diſpoſition[f].

VII.

7. *Two ſorts of Engagements of the deceaſed, which do not paſs to the Heir.*

As we muſt not comprehend indifferently under the Goods of a Succeſſion, all that may have belonged to the deceaſed perſon, to whom the Heir or Executor ſucceeds, as has been ſaid in the fifth Article of the firſt Section; ſo neither muſt we indifferently reckon among the Engagements of the Heir, or Executor, all thoſe which the deceaſed may have been under: For there are two ſorts of Engagements which end with the perſon, and which do not paſs to his Heirs, as will appear in the two following Articles[g].

VIII.

8. *The firſt ſort of Engagements which do not paſs to the Heir.*

The firſt ſort of Engagements which do not paſs to the Heirs, or Executors, of the deceaſed, contains certain Functions which the Publick Order of Society requires that ſome perſons ſhould be engaged in, whether they will or not. Thus the Engagement of thoſe who are called to the Offices of Sheriff, Conſul, Collector, and to other Offices which are called Municipal Offices, or to the Adminiſtration or Government of an Hoſpital, or any other Endowment of Charity, the Engagement of a Tutor or Guardian, the Commiſſions that are appointed for Functions which the Order of Juſtice makes neceſſary, ſuch as thoſe perſons into whoſe hands litigious Goods are ſequeſtred, and others of the like nature, are ſo many Engagements, the exerciſe of which ends by the death of the perſons who were choſen for the ſaid Functions[h]. For they are of ſuch a nature, that the Heir, or Executor, may either be incapable of them, or may have ſome privilege which may exempt him from them. But altho' theſe Charges do not paſs to the Heirs, or Executors, and that they ceaſe upon the death of thoſe who were engaged in them; yet the Heirs, or Executors will be liable for the conſequences which may regard them, according to the Rules which have been explained in another place[i].

IX.

9. *The ſecond ſort of Engagements which do not go to the Heir.*

The ſecond ſort of Engagements which do not paſs to the Heirs, or Executors, contains ſome of thoſe into which people cannot enter but voluntarily, and by mutual conſent of all parties, and which are ſuch that the parties concerned chooſe reciprocally one another upon ſome conſiderations which are limited to their perſons. Thus perſons who give to their Attorneys, or Agents, the charge either of all their Affairs in general, or of ſome Affair in particular, and the Attorneys or Agents who accept of this charge, enter into a voluntary and mutual Engagement, by the truſt and confidence which they have in one another[l]. Thus, thoſe who enter into Partnerſhip together, whether it be a Partnerſhip of all their Goods, or a particular Partnerſhip for carrying on any Trade or Commerce, form among themſelves a voluntary Tie or Engagement, in proſpect of the advantages which they may reap from one another, by the induſtry, fidelity, and other qualities that each of them conſiders in the other[m]. Likewiſe thoſe who having ſome differences with one another, agree to refer the matter to Arbitrators, may perhaps take this way of adjuſting matters, only becauſe of the particular friendſhip, or other conſiderations, which they may perhaps have one for the other[n]. So that in all theſe caſes the Engagements of the one towards the other are founded upon Motives which are limited to the perſons: for which reaſon it is juſt, that their Ties and Engagements ſhould end by their death. But their Heirs, or Executors, in the ſame manner as thoſe of Tutors, are bound for all the conſequences which may regard them; purſuant to the Rules which have been explained in their proper places[o].

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[f] *Theſe charges are eaſily underſtood of themſelves, and that which may have any difficulty in it, ſhall be explained in its proper place.* See the ſixteenth Article of the firſt Section, and the tenth Section of this Title.

[g] *See the two following Articles.*

[h] *See the fifth Article of the ſixth Section of Tutors. See the Title of Syndicks, Directors, &c.*

[i] *See the fifth, ſixth, ſeventh and eighth Articles of the fourth Section of Tutors.*

[l] *See the ſixth Article of the fourth Section of Proxies.*

[m] *See the fourteenth Article of the fifth Section of Partnerſhip.*

n *See*

[a] *See the ſixth Article of the firſt Section of Compromiſes.*

[b] *See the ſixth Section of Partnerſhip, the ſixth, ſeventh and eighth Articles of the fourth Section of Proxies, and the ſixth Article of the firſt Section of Compromiſes.*

SECT. VII.

Of the Engagements which may be impoſed on an Heir, or Executor, and by what kind of Diſpoſitions.

The CONTENTS.

1. *Charges which may be impoſed on an Heir.*
2. *By what Diſpoſitions the ſaid Charges may be impoſed.*
3. *What theſe Diſpoſitions ought to be.*
4. *Firſt Rule, that the perſons who diſpoſe be capable of diſpoſing.*
5. *Second Rule, that the perſons who are to receive the benefit thereof, be not incapable of it.*
6. *Third Rule, that the Diſpoſitions be made in due form.*
7. *Fourth Rule, that the Diſpoſitions do not exceed the bounds preſcribed by Law.*
8. *Difference between that which is defective by the fourth Rule, and that which is ſo by the others.*
9. *The detail of what particulars relate to theſe four Rules, ſhall be explained in its proper place.*
10. *In what manner theſe Diſpoſitions ought to be performed.*

I.

1. Charges which may be impoſed on an Heir. ONE may impoſe on an Heir, whether he be Heir by Teſtament, or Heir at Law, all thoſe kinds of Charges which have been mentioned in the fifth Article of the foregoing Section, and in general all manner of Charges without diſtinction; provided they be poſſible, honeſt, and lawful. For whatever is impoſſible, or contrary to good manners and decency, or is declared to be unlawful by any Law, the ſame can be of no force to oblige any one[a].

[a] Diſponat unuſquiſque ſuper ſuis ut dignum eſt, & ſit lex ejus voluntas. *Nov. 22. C. 2.*

Publicè expedit ſuprema hominum judicia exitum habere. *l. 5. ff. teſt. quemad. aper.* Impoſſibilium nulla obligatio eſt. *l. 185. ff. de reg. jur.*

II.

2. By what Diſpoſitions the ſaid Charges may be impoſed. All the Charges in general which may be impoſed on Heirs, or Executors, are regulated by two ſorts of Diſpoſitions. One is of thoſe which are called Diſpoſitions in view of death, which are revokable, and which have not their effect but by the death of the perſon who has made the Diſpoſition, ſuch as Teſtaments, Codicils, and Donations made in view of death; which comprehends Legacies, Fiduciary Bequeſts, Subſtitutions, and whatever elſe may be ordained by theſe ſorts of Diſpoſitions. The other kind is of thoſe which are irrevokable, ſuch as Donations which are to have their effect in the life-time of the Donor, and other Acts of the ſame nature, which may contain ſome Engagement that one impoſes on his Heir. Thus, for example, he who in his life-time ſhould make a Donation of a Houſe, or other Tenement, may by the ſame Contract charge his Heir, or Executor, to ſuffer after his death a Service on another Houſe or Tenement which is part of his Inheritance, for the behoof of the ſaid Houſe or Tenement which he had made over by Deed of Gift, not being willing to ſubject himſelf to that Service, during his own life-time. Thus one may make a Contract for founding a College, or Hoſpital, the execution whereof ſhould not commence till after the death of the Founder, altho' the Contract be irrevokable.

[b] *This is a conſequence of the preceding Article.*

III.

3. What theſe Diſpoſitions ought to be. To oblige the Heir, or Executor, to the performance of the charges which the perſon to whom he ſucceeds has a mind to impoſe upon him, it is neceſſary, that the Diſpoſitions by which the ſaid Charges are enjoined, be ſuch as may have effect. And in order to give them their effect, it is neceſſary that they be made according to the Rules which follow. After which they are in the place of Laws, to the Heir, or Executor[c].

[c] *See the following Articles.*

IV.

4. Firſt Rule, that the perſons who diſpoſe, be capable of diſpoſing. The firſt Rule for the validity of the Diſpoſitions which contain the charges that are impoſed on Heirs, or Executors, is that the ſaid Diſpoſitions be made by perſons who have power to make them, and in whom the liberty of diſpoſing does not meet with any obſtacle, by their being under any of the Incapacities which have been explained in the ſecond Section, or others which ſhall be explained in their proper places.

[d] *See the ſecond Section of Teſtaments.*

V. We

V.

5. Second Rule, that the perſons who are to receive the benefit thereof be not incapable of it.

We may lay it down as a ſecond Rule, that the Diſpoſitions by which any charge is impoſed on an Heir, or Executor, in favour of ſome perſon, ſuch as a Legacy, a Fiduciary Bequeſt, and others of the like kind, ought to be made in favour of perſons capable of receiving theſe ſorts of Benefits[e].

[e] *We cannot give to thoſe whom the Laws have made incapable of receiving.* See the ſecond Section of Teſtaments.

VI.

6. Third Rule, that the Diſpoſitions be made in due form.

The third Rule is, that the ſaid Diſpoſitions be made according to the form preſcribed by Law. Thus, as to Diſpoſitions made in view of Death, it is neceſſary to obſerve therein the number of Witneſſes, and the other formalities, which ſhall be explained in their places[f]. So likewiſe as for Diſpoſitions which are to take effect in the life-time of the parties, it is neceſſary that they be ſuch as the Laws preſcribe. As if it is a Donation which is to take effect in the life-time of the Donor, it is neceſſary that it ſhould be accepted by the Donee, and regiſtred[g].

[f] *See the third Section of Teſtaments, and the firſt Section of Codicils.*

[g] *See the ſecond and fifteenth Articles of the firſt Section of Donations.*

VII.

7. Fourth Rule, that the Diſpoſitions do not exceed the bounds preſcribed by Law.

The fourth Rule is, that the Charges impoſed by the ſaid Diſpoſitions, do not exceed the bounds which the Laws have ſet to the Liberty of diſpoſing, in order to preſerve to the Heirs, whether they be inſtituted by Teſtament, or ſucceed to an Inteſtate, the Portion of the Goods of the Succeſſion, which the Law has reſerved to them. Thus, the Teſtator cannot by any charge or impoſition whatſoever, diminiſh the Legitime of his Children, or Parents. Thus, in the Provinces of *France* which are governed by the *Roman* Law, the Teſtator cannot bequeath above three Fourth Parts of the Eſtate which he leaves behind him; and the Heir, or Executor may get the Legacies to be reduced, ſo as that there may remain to him at leaſt one Fourth Part of the Succeſſion. And the Fiduciary Bequeſts have likewiſe their bounds[h]. And in the Provinces of *France* which have their particular Cuſtoms, one cannot bequeath more than what the ſaid Cuſtoms allow of.

[h] *See the Title of the Legitime, that of the Falcidian Portion, and that of the Trebellianick Portion.*

VIII.

8. Difference between that which is defective by the 4th Rule, and that which is ſo by the others.

There is this difference between the Diſpoſitions which are defective by one of the three firſt Rules which have been juſt now explained, and thoſe which are contrary to the fourth; that theſe are not altogether null for having exceeded the bounds of the Liberty which every one has to diſpoſe, but are reduced within the ſaid Bounds. And that the Diſpoſitions which are made contrary to one of the three other Rules, that is, either by perſons who have not the power of making them, or in favour of perſons who are not capable of receiving any benefit by them, or if they are defective in ſome formality, the want whereof is ſufficient to annul them, ſuch Diſpoſitions have no effect at all, and are no ways obligatory[i].

[i] *This is a conſequence of the four preceding Articles.*

IX.

9. The detail of what particulars relate to theſe four Rules ſhall be explained in its proper place.

All theſe cauſes which may either annul Teſtaments and other Diſpoſitions, or hinder them from having their entire effect, ſhall be explained in their proper places[l]. And it is ſufficient here to give this ſhort view of theſe general Principles, and to obſerve their Order.

[l] *See the places quoted on the fourth, fifth, ſixth, and ſeventh Articles.*

X.

10. In what manner theſe Diſpoſitions ought to be performed.

When the charge impoſed upon the Heir, or Executor, whether it be a Legacy, or any other charge, ought to have its effect either in whole or in part, he ought to perform it in the manner preſcribed him by the Teſtament, or other Diſpoſition. And if there ariſe any difficulties concerning it, they are to be decided by the Rules which ſhall be explained in their proper place[m].

[m] *See the ſixth, ſeventh, and eighth Sections of Teſtaments, and the eleventh Section of the ſame Title.*

SECT. VIII.

Of the Engagements which ariſe from the Quality of Heir or Executor, although the perſon to whom he ſucceeds does not impoſe any.

The CONTENTS.

1. *The Heir is bound for all the charges of the Inheritance, altho' they were unknown to the deceaſed.*
2. *For the charges of the Inheritances which had fallen to the perſon to whom he ſucceeds.*
3. *For the Subſtitutions, or Fiduciary Bequeſts, with which the deceaſed was charged.*
4. *For all other Charges, Claims, and Demands on the Succeſſion.*
5. *For the damages occaſioned by any offence or crime of the deceaſed.*
6. *For the Debts which are payable only after his death.*
7. *For the Funeral Expences.*

I.

1. The Heir is bound for all the charges of the Inheritance, altho' they were unknown to the deceaſed.

Every Heir, whether he be Heir at Law, or inſtituted by a Teſtament, who accepts an Inheritance, engages himſelf thereby to all the charges of the Inheritance without diſtinction, and even to thoſe which perhaps the perſon to whom he ſucceeds was ignorant of. And as he has all the Effects, and all the Rights of the Inheritance, even thoſe which have fallen to it ſince the death of the perſon to whom he ſucceeds, ſo he is alſo bound for all the charges which have happened ſince the ſaid death [a].

[a] *See the ſecond Article of the fifth Section; the firſt Article of the ſixth Section; and the ſecond Article of the following Section.*

II.

2. For the charges of the Inheritances which had fallen to the perſon to whom he ſucceeds.

If in the Succeſſion which paſſes to an Heir or Executor, there happen to be other Succeſſions which the deceaſed or his Authors had inherited, all the charges of thoſe ſeveral Succeſſions, are confounded and united in the perſon of this Heir or Executor, and he becomes liable for them all [b].

[b] *See the ſixteenth Article of the firſt Section.*

III.

3. For the Subſtitutions, or Fiduciary Bequeſts, with which the deceaſed was charged.

If there are any Goods in a Succeſſion which are ſubject to ſome Fiduciary Bequeſt, or Subſtitution, with which the deceaſed or his Authors had been charged, the Heir or Executor will be bound to reſtore them to the perſons who ſhall appear to have the right to them when the caſes thereof ſhall happen [c].

[c] *See the Title of Subſtitutions in the fifth Book.*

IV.

4. For all other Charges, Claims, and Demands on the Succeſſion.

The Heir or Executor is bound in general and without diſtinction for all the Debts owing by the deceaſed, and for all other kinds of charges whatſoever, and for the Claims and Demands which Creditors or others may have againſt the deceaſed, or on the Goods of the Inheritance [d].

[d] Hæredes onera hæreditaria agnoſcere —— placuit. *l. 2. C. de hæred. act.* See the following Section.

V.

5. For the damages occaſioned by any offence or crime of the deceaſed.

We muſt reckon among the charges for which the Heir or Executor is bound, altho' the deceaſed may have ordered nothing about them, the reſtitution and ſatiſfaction which the deceaſed may owe for damages he has done by ſome Crime or Offence [e]. This ſhall be the ſubject matter of the tenth Section.

[e] *See the tenth Section.*

VI.

6. For the debts which are payable only after his death.

We may likewiſe place in the ſame rank the debts which could not be demanded from the deceaſed during his life-time; as if he had bound himſelf for a Sum of Money which was not to be paid till after his death: or if the perſon who was Surety for him having paid the debt after his death, demands his reimburſement from the Heir or Executor, which he could not demand from the deceaſed [f].

[f] Hæreditarium æs alienum intelligitur etiam id de quo cum defuncto agi non poterit: veluti quod is cum moreretur daturum ſe promiſiſſet. *l. 7. ff. de reb. auth. jud. poſſid.* Item quod is qui pro defuncto fidejuſſit poſt mortem ejus ſolvit. *d. l. in f.*

VII.

7. For the Funeral Expences.

Laſtly the Heir or Executor is bound for the Funeral Expences of the perſon to whom he ſucceeds [g], which ſhall be the ſubject matter of the eleventh Section.

[g] *See the eleventh Section.*

A TABLE

A TABLE of the Plan of the Rights and Charges of Heirs, *or* Executors.

We muſt add here by way of concluſion, or recapitulation of this and the three foregoing Sections, that, as has been remarked in the Preamble to the fifth Section, we have endeavoured to lay down in theſe four Sections, as it were in a Plan, a general Idea of the Rights of Heirs and Executors, and of their Engagements, in which one might ſee them all together, and in order, without adding the detail of the Rules of all thoſe different matters which ought to be explained in different places. And it is now neceſſary that we ſhould ſubjoin here a Summary View of the ſaid Rights and Engagements, as it were in a Table, of the ſaid Plan, and there mark the places where the particular Rules relating to each matter are to be met with.

Some may perhaps think, that it would have been more proper to have placed this Table at the head of the fifth Section, immediately after the Remark which is there made; but we have judged it more convenient, that we ſhould firſt explain the ſaid Rights and Engagements, in order to avoid confuſion and obſcurity, being perſuaded that this Table will be more eaſily underſtood here, after the reading of thoſe four Sections, than it would have been had it been placed before them.

The Rights of Heirs and Executors, and the places where they are treated of.

1. The Right of accepting or renouncing the Inheritance, which includes the Right of deliberating. *See the firſt Section of the ſecond Title of this firſt Book, and the third Title of the ſame Book.*
2. The Right of accepting the Succeſſion with the benefit of an Inventory. *See the ſecond Title of the ſame Book.*
3. The Right of a Legitime, for the Heirs to whom it is due. *See the third Title of the third Book.*
4. The Right of getting the Legacies, Fiduciary Bequeſts, and Subſtitutions reduced to what is regulated by the Law. *See the third Title of the fourth Book, and the fourth Title of the fifth Book.*
5. The Right of ſelling, or making over by Deed of Gift to others the Inheritance, or diſpoſing of it otherwiſe. *See the ſeventh Article of the thirteenth Section of this Title, the ſecond Article of the fourth Section of the Contract of Sale, and the twenty fourth and twenty fifth Articles of the tenth Section of the ſame Title.*
6. The Right of tranſmitting the Succeſſion to their Heirs. *See the tenth Section of Teſtaments.*
7. The Right of Co-heirs to come to a Partition of the Inheritance among them. *See the fourth Title of this firſt Book.*
8. The Right of Accretion among the Co-heirs. *See the ninth Section of Teſtaments.*
9. The Right of Collation of Goods among Co-heirs. *See the fourth Title of the ſecond Book.*
10. The Right of Reverſion to thoſe who ought to have it. *See the third Section of the ſecond Title of the ſecond Book.*

Charges impoſed upon the Heir or Executor by the Will of the perſon to whom he ſucceeds, and the places where they are treated of.

1. The Charge of paying the Legacies. *See the ſecond Title of the fourth Book.*
2. The Charge of reſtoring Fiduciary Bequeſts. *See the ſaid ſecond Title of the fourth Book, and the third Title of the fifth Book.*
3. The Charge of executing all the other Diſpoſitions of the perſon to whom the Heir ſucceeds. *See the eleventh Section of Teſtaments, and the Title of Legacies, and that of Subſtitutions, both Direct and Fiduciary.*

Charges of the Heir or Executor which are independent of the Will of the perſon to whom he ſucceeds, and the places where they are treated of.

1. The Charge of acquitting the debts due from the Succeſſion, and whatever elſe may be due from the Heir or Executor. *See the following Section.*
2. The Charge of acquitting the Damages occaſioned by any Crime or Offence of the perſon to whom the Heir ſucceeds. *See the tenth Section of this Title.*
3. The Charge of acquitting the Funeral Expences. *See the eleventh Section of this Title.*

◆

SECT.

SECT. IX.

In what manner the Heirs or Executors are bound for the paſſive Debts, and for all the other Charges of the Inheritance.

Although all the Articles of this Section make mention of no other charges in particular, beſides the paſſive Debts, that is, the Debts owing by the deceaſed; yet the Rules which are here explained ought to be applied to the other ſorts of charges, ſuch as Legacies of different kinds of things, Funeral Expences, and all others. For there are none of them which may not be converted into paſſive debts by reducing their Eſtimation to a certain Sum of Money, if the Heirs or Executors fail to acquit them[a]. Thus, the Rules of this Section are common to all the kinds of Charges of an Inheritance, according as they may be applied to them.

[a] Ubi quid fieri ſtipulemur, ſi non fuerit factum, pecunia dari oportere. *l. 72. ff. de verb. obl.* See the firſt Article of the eighth Section of Legacies.

The CONTENTS.

1. *Divers kinds of Charges.*
2. *The Heir is bound for the debts, altho' they exceed the value of the Goods of the Inheritance.*
3. *Three ſorts of debts, thoſe which are merely Perſonal, thoſe which have a Mortgage, and thoſe which are Privileged.*
4. *Definition of theſe three kinds of Debts.*
5. *Preference of the Creditors of the deceaſed to thoſe of the Heir, in the Goods of the Inheritance.*
6. *Preference of the Creditors of the Heir to thoſe of the deceaſed in the Goods belonging to the Heir.*
7. *Creditors who have neither Mortgage nor Privilege ſhare equally in proportion to their debts.*
8. *The Creditors of the deceaſed come in all alike on the Goods of the Heir.*
9. *Separation of the Goods of the Inheritance from thoſe of the Heir.*
10. *The Heirs are bound perſonally for their portions in the Inheritance, and ſuch of them as have the Goods which are mortgaged for a Debt, are bound for the whole Debt.*
11. *The debt ſecured by Mortgage or Privilege, is divided with reſpect to the Heirs.*
12. *How all the debts are divided among the Co-heirs.*
13. *The debts are divided among the Co-heirs, even againſt the Exchequer.*
14. *The inſolvency of one of the Heirs does not hinder this diviſion.*
15. *The debts are divided according to the portions of the Inheritance.*

I.

1. Divers kinds of Charges.

We muſt comprehend under theſe words of Paſſive Debts and Charges of an Inheritance which the Heir or Executor is bound to acquit, not only all that was owing by the deceaſed upon his own account, and all that which he has impoſed on his Heir or Executor, but in general all the Rights which may affect the Inheritance[a].

[a] *All theſe different Charges are acquitted by the Heirs according to the Rules which ſhall be explained in this Section.*

II.

2. The Heir is bound for the debts, altho' they exceed the value of the Goods of the Inheritance.

The Heir or Executor who accepts the Inheritance purely and ſimply, that is to ſay, who does not take the benefit of an Inventory, of which mention has been made in the fifth Article of the fifth Section, is bound indefinitely and without diſtinction for all the debts owing by the deceaſed, and for all the other charges of the Inheritance, whatever Sum they may amount to, and altho' they exceed very far the value of the Goods of the Inheritance. For it depended only on him either not to accept the Succeſſion at all, or to take the benefit of an Inventory. And having entered to the Inheritance without this precaution, he has engaged himſelf irrevocably for all the Charges whatever they are[b].

[b] Hæreditas quin obliget nos æri alieno, etiamſi non ſit ſolvendo, plus quàm manifeſtum eſt. *l. 8. ff. de acquir. vel omitt. hæred.*

III.

3. Three ſorts of debts, thoſe which are merely Perſonal, thoſe which have a Mortgage, and thoſe which are Privileged.

The Engagements of Heirs or Executors for the paſſive debts are different, according to three different kinds of debts. The firſt is of thoſe which are called purely Perſonal: The ſecond is of thoſe which have a Mortgage for their ſecurity: And the third is of thoſe which are Privileged. We muſt diſtinguiſh theſe three different ſorts of debts, in order to diſtinguiſh likewiſe the Rights of the Creditors againſt the Heir or Executor, and the different

Engagements which the Heir is under to the Creditors[c].

[c] *See the following Articles.*

IV.

4. Definition of theſe three kinds of debts.

The purely perſonal debts are thoſe which conſiſt only in a bare Promiſe, or other Title or Security, which obliges only the perſon of the Debtor[d]; without having any Mortgage or Privilege on any part of his Eſtate. The Hypothecary Debts are thoſe for the ſecurity of which the Creditor has a Mortgage[e]. And the privileged Debts are thoſe which have ſome of the Privileges that have been explained in the fifth Section of Pawns and Mortgages.

[d] Actiones in perſonam per quas intendit adverſarium ei dare, aut facere oportere, & aliis quibuſdam modis. §. 1. *inſt. de act. l.* 25. *ff. de oblig. & act.*

[e] *See the ſecond Article of the firſt Section of Pawns and Mortgages.*

V.

5. Preference of the Creditors of the deceaſed to thoſe of the Heir, in the Goods of the Inheritance.

The Creditors of the deceaſed for debts purely perſonal, ſuch as thoſe who are called Creditors by Bond or Note, that is, who have only a bare Promiſe under the Debtor's hand, and in general all thoſe who had no Mortgage on the Eſtate of the deceaſed their Debtor, are nevertheleſs preferred in the Goods of the deceaſed before the Creditors of the Heir or Executor, even although they may have Mortgages for the ſecurity of what is owing to them. For although the Goods of the deceaſed be mortgaged to the Creditors of the Heir, if he had mortgaged to them all the Goods which he ſhould acquire for the future, yet the Goods of this Inheritance are in the firſt place appropriated for the payment of the debts of the deceaſed, and have been tranſmitted to the Heir only upon this condition, that he ſhould acquit the debts. And it is ſtill with much greater reaſon that the Creditors of the deceaſed are preferred, who have a Mortgage or Privilege on thoſe very Goods[f].

[f] Quoties hæredis bona ſolvendo non ſunt, non ſolùm creditores teſtatoris, ſed etiam eos quibus legatum fuerit, impetrare bonorum poſſeſſionem æquum eſt. *l.* 6. *ff. de ſeparat.* See the ninth Article.

VI.

6. Preference of the Creditors of the Heir to thoſe of the deceaſed, in the Goods belonging to the Heir.

The Creditors of the deceaſed, even thoſe who have Mortgages for the ſecurity of their debts, have no Mortgage on the proper Goods of the Heir or Executor, until he either engages his Eſtate to them, or that they get a Sentence of Condemnation againſt him. But this Mortgage which they may have on the Eſtate of the Heir, will take place only after the Mortgage of the proper Creditors of the Heir to whom he had engaged his Eſtate before. For the deceaſed who was their debtor neither did nor could give them a Mortgage on the Eſtate of his Heir[g].

[g] Paulus reſpondit generalem quidem conventionem ſufficere ad obligationem pignorum: ſed ea quæ ex bonis defuncti non fuerint, ſed poſtea ab hærede ejus ex alia cauſa acquiſita ſunt, vendicari non poſſe à creditore teſtatoris. *l.* 29. *de pign. & hypoth.*

Hypothecam eſſe non ipſius hæredis —— rerum, ſed tantummodo earum quæ à teſtatore ad (hæredem) pervenerint. *l.* 1. *in f. C. comm. de legat.*

VII.

7. Creditors who have neither Mortgage nor Privilege ſhare equally in proportion to their debts.

When there are ſeveral Creditors of the deceaſed who have neither Mortgage nor Privilege for their Debts, they come in ſhare and ſhare alike, both in the Goods belonging to the Heir, and on thoſe which belonged to the deceaſed, and every one receives his ſhare of them in proportion to his debt, if there are not Goods enough to ſatiſfy the whole Debts[h].

[h] Tributio ſit pro rata ejus quod cuique debeatur. *l.* 1. §. *ult. ff. de tribut. act.* See the ſecond Section of the Ceſſion of Goods.

VIII.

8. The Creditors of the deceaſed come in all alike on the Goods of the Heir.

If there are Creditors of the deceaſed who had Mortgages, they are paid out of the Effects which belonged to their Debtor, according to the Order of their Mortgages; but if the Goods of the deceaſed are not ſufficient to acquit them, and that they come upon the Goods of the Heir for their payment, in that caſe they come in jointly with the other Creditors of the deceaſed who had no Mortgage. For they have all of them their Right againſt the Heir, only from the ſame time, and from the day that he accepted the Inheritance. But the Creditors of the deceaſed, whether they had Mortgages, or no, who get firſt a Mortgage on the Eſtate of the Heir, whether it be that he engages himſelf to them in this manner, or that they obtain Judgment againſt him, will be preferred before the others in the Goods belonging to the ſaid Heir[i].

[i] Cum de pignore utraque pars contendit, prævalet jure qui prævenit tempore. *l.* 2. *in f. l.* 4. *C. qui potior. l.* 11. *ff. eod.* See the two preceding Articles.

We muſt not confound in this Article the Right which the Creditors of the deceaſed have againſt the Heir, with the Mortgage which they have on the Eſtate of the Heir.

For all the Creditors of the deceaſed, whether they had Mortgages from the deceaſed or not, acquire their Right againſt the Heir the very moment that he accepts the Inheritance, as is ſaid in the Article, but they have each of them their Mortgage on the Eſtate of the Heir, only from the time that he obliges himſelf to them in this manner, or that he is condemned by a Sentence.

IX.

9. *Separation of the Goods of the Inheritance from thoſe of the Heir.*

In all the caſes where there is a competition between the Creditors of the deceaſed and thoſe of the Heir, all the Creditors of the deceaſed are preferred in the Goods which belonged to the deceaſed before all the Creditors of the Heir. And in order to their exerciſing of their Right, they may demand a Separation of the Goods of the Inheritance from thoſe which belong properly to the Heir[l].

[l] Eſt juriſdictionis tenor promptiſſimus, indemnitatiſque remedium edicto prætoris creditoribus hæreditariis demonſtratum, ut quoties ſeparationem bonorum poſtulant, cauſa cognita impetrent. *l. 2. C. de bon. auth. jud. poſſid.* See the Title of the Separation of the Goods of the deceaſed, *&c.*

The Creditors of the Heir have the ſame preference on their part as to the Goods belonging to the Heir, and may demand this Separation, as has been remarked in the Preamble to the ſame Title of the Separation of Goods.

X.

10. *The Heirs are bound perſonally for their portions in the Inheritance, and ſuch of 'em as have the Goods which are mortgaged for a Debt, are bound for the whole Debt.*

When there are two or more Heirs, the Creditors of the deceaſed ought to divide their demands againſt every one of them according to the portions they have in the Inheritance, and they cannot ſue any of them for the portion of the debt that falls to the ſhare of the others, nor can they demand the whole debt from any one of them alone. But as for the debts which are ſecured by a Mortgage, or which have a Privilege, the Creditors may demand their payment out of the Effects which are ſubject thereto, altho' they have fallen to the lot of any one of the Heirs ſingly. And this is what is meant by the common ſaying, *That the Heirs are bound for the Debts of the Succeſſion perſonally every one for his proportion, and hypothecarily for the whole*[m]. Thus the Creditors preſerve their Rights entire on the Inheritance; for they exerciſe their Mortgage and their Privilege on the Goods which are ſubject thereto; and they uſe their Right againſt all the other Goods of the Succeſſion, having an Action againſt every one of the Heirs according to the ſhare which they have in the Inheritance.

[m] Pro hæreditariis partibus hæredes onera hæreditaria agnoſcere etiam in fiſci rationibus placuit. Niſi intercedat pignus vel hypotheca: tunc enim poſſeſſor obligatæ rei conveniendus eſt. *l. 2. C. de hæredit. act.*

Legatorum petitio adverſus hæredes pro partibus hæreditariis competit. Nec pro his, qui ſolvendo non ſunt, onerari cohæredes oportet. *l. 33. ff. de legat. 2.*

See the twelfth and fifteenth Articles of this Section, and the ſixteenth Article of the firſt Section of Pawns and Mortgages.

XI.

11. *The debt ſecured by Mortgage or Privilege, is divided with reſpect to the Heirs.*

Altho' the debt which is ſecured by a Mortgage, or Privilege, is not divided with reſpect to the Creditor, and that he may demand the whole from the Heir who is in poſſeſſion of the Goods which are ſubject to it, yet the debt is divided among the Heirs. And he who being in poſſeſſion of the Effects which are ſubject to the Mortgage, or Privilege, has paid the whole debt, or is ſued for payment of it, ſhall be indemnified by his Co-heirs, as ſhall be be ſhewn in the Article which follows[n].

[n] *This is a conſequence of the foregoing Article. See the following Articles, and the ſixteenth Article of the firſt Section of Pawns and Mortgages.*

XII.

12. *How all the debts are divided among the Co-heirs.*

All the debts, whether they be barely Perſonal, or ſecured by a Mortgage, or Privilege, are divided among the Heirs, ſo as that each of them ought to bear his part thereof according to the ſhare he has in the Inheritance; unleſs it be that one of the Heirs has been charged by the deceaſed to acquit the whole debt, or to pay more than his proportion of it. Thus the Heir who is ſued for more than his proportion of a debt which is purely perſonal, cannot be condemned to the Creditor for more than his ſhare amounts to. For with regard to the Heirs, it would not be juſt that one of them ſhould be bound to pay the portion of the other. And as for the Creditor, he is at liberty to ſeize upon the whole Eſtate before any of the Heirs take their portions out of it, and if he does it not, it is but juſt that the Security which he had on all the Goods of the deceaſed for his whole debt ſhould follow the ſaid Goods, and be divided according as they are divided. But as for the debts ſecured by a Mortgage or Privilege, as it is juſt that the Creditor ſhould preſerve his Mortgage, or his Privilege, ſo he may either exerciſe his Right on the Effects which are ſubject to it, or without derogating from his Security, he may ſue each Heir for his Portion. And if the Heir who is in poſſeſſion of that part of the Eſtate which is ſubject to the Mortgage, or Privilege, is ſued for the whole debt, he may have his recourſe againſt his Coheirs, who ſhall indemnify him every one according to their ſhares[o].

[o] Actio quidem perſonalis inter hæredes pro ſingulis portionibus quæſitis ſcinditur: pignoris autem jure multis obligatis rebus quas diverſi poſſident, cùm ejus vindicatio non perſonam obliget, ſed rem ſequatur: qui poſſident tenentes non pro modo ſingularum rerum ſubſtantiæ conveniuntur, ſed in ſolidum, ut vel totum debitum reddant, vel eo quod detinent cedant. *l. 2. C. ſi unus ex plur. hæred. credit.* See the fifteenth Article.

XIII.

13. The debts are divided among the Co-heirs, even againſt the Exchequer. The liberty which the Heirs have of dividing among them the debts which are purely perſonal, hath its effect with reſpect to all ſorts of Creditors whatſoever, and even againſt the Exchequer[p].

[p] Pro hæreditariis partibus hæredes onera hæreditaria agnoſcere, *etiam in fiſci rationibus*, placuit. *l. 2. C. de hæred. act.*

XIV.

14. The inſolvency of one of the Heirs does not hinder this diviſion. The ſame liberty of dividing the debts purely Perſonal among the Co-heirs, hath its effect even in the caſe where one of them may prove inſolvent. For the Creditor ought to blame himſelf for not having taken his Security on the whole Goods of the Succeſſion before they were divided among the Co-heirs[q].

[q] Nec pro his qui ſolvendo non ſunt onerari cohæredes oportet. *l. 33. ff. de legat. 2.*

XV.

15. The debts are divided according to the portions of the Inheritance. Seeing the debts are divided among the Co-heirs according to the ſhares which they have in the Inheritance, it is therefore upon this foot that each of them pays his proportion of them; and altho' it may happen among Co-heirs, that beſides their Hereditary Portions, whether they be equal or unequal, there is ſome Legacy, or other advantage left to one more than to the others, yet he will not be charged with the debts, but in proportion to the ſhare which he has in the Inheritance[r].

[r] Neque æquam, neque uſitatam rem deſideras, ut æs alienum patris tui non pro portionibus hæreditariis exolvatis tu & frater cohæres tuus, ſed pro æſtimatione rerum prælegatarum: cùm ſit explorati juris hæreditaria onera adſcriptos hæredes, pro portionibus hæreditariis, non pro modo emolumenti pertinere. *l. 1. C. ſi certum pet.* See the twelfth Article.

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SECT. X.

Of the Engagements of the Heir or Executor, on account of Crimes and Offences committed by the perſon to whom he ſucceeds.

ALthough the principal Rules of the Engagement of Heirs or Executors for the Crimes and Offences of thoſe perſons to whom they ſucceed, are different according to our Uſage from what they are in the *Roman* Law, yet it was not proper to leave out this matter intirely, it being ſuch an eſſential part of the Matter of Succeſſions, and the Rules thereof being of ſuch a neceſſary and frequent uſe.

In order to underſtand aright the difference between the *Roman* Law and ours in this matter, and to know what are the Rules of the *Roman* Law which we retain, and thoſe which we reject, it is neceſſary to obſerve the Principles thereof, which follow.

It appears from the Laws of the Digeſts, and thoſe of the Code, which relate to this matter, and which are ſcattered up and down in divers places, that in relation to the Condemnation of the Heirs of thoſe who were guilty of Crimes and Offences, they made one firſt general diſtinction between Offences which were called private, in which every one could ſue only for his own particular intereſt, ſuch as Theft, Injury, and ſome others, and the Crimes which they called publick, becauſe all perſons were admitted to proſecute the Offender, in order to bring him to condign puniſhment, and even thoſe who had ſuffered no damage thereby, ſuch as the Crimes of High Treaſon, Parricide, Sacrilege, and others[a].

[a] *§. inſt. de publ. jud.*

As to private Offences, they diſtinguiſhed in them the ſatisfaction which was to be made to the perſon who had ſuffered the damage, and which is commonly called the Civil Intereſt, from the pecuniary Penalties to which the Offender was obnoxious, over and above the reparation of the damage. Thus, for example, in Theft, when he whoſe Goods were ſtolen did not proſecute the Thief in the extraordinary manner by an Accuſation, that is to ſay, Criminally, as he might have done if he had pleaſed[b], and that he ſued him only in a Civil Action, that is, for his Civil Intereſt, or the Damage which he had ſuſtained, and not for the puniſhment of the Crime which regards the Publick; the reparation that was due to the injured party conſiſted in the reſtitution of the thing which was ſtolen, or of its value, with damages, and he had over and above for the pecuniary Penalty the quadruple of the value of the thing ſtolen, if the Thief was taken in the fact, or the double if he was not taken in the fact[c]. They diſtinguiſhed likewiſe between the caſes where there had been an Action brought againſt the perſon who was guilty of the Offence in his life-time, and thoſe where the Action was only commenced after his death againſt his Heir. According to theſe diſtinctions, when the Offender had been cited into Judgment in his life-time, if he happened to die before Sentence paſſed againſt him, his Heir was condemned not only to make Reparation of the damages, but alſo to pay the pecuniary Penalty according to the nature of the Offence, as the double or quadruple in the caſe of a Theft. And it was judged that the deceaſed having been prevented by an Action, which in the event appeared to be well founded, he had incurred the Penalty, and that the Heir ought to pay it. But if there had been no Action brought againſt the deceaſed, and that it was only begun againſt the Heir, in that caſe he was not liable to the pecuniary Mulct[d]. And as for the Reparation of damages, they made another diſtinction between the caſe where the Heir of the Offender, who was not ſued in his life-time, reaped ſome advantage from the offence, as if the thing ſtolen was ſtill in being, and in his poſſeſſion, or if the Inheritance was any ways augmented thereby, and the caſe where the Inheritance was no ways bettered by it. In the firſt caſe, the Heir who reaped advantage from the Offence, was bound to reſtore all the clear profit which he had thereby; and in the ſecond caſe, the Heir having no advantage by the Offence, he was not bound to make any Reſtitution[e].

As for the Publick Crimes, ſeeing there are two ſorts of Puniſhments, thoſe which affect the Perſon of the Offender, ſuch as are all Corporal Puniſhments, the Deprivation of an Office, and others of the like nature, and Pecuniary Puniſhments, ſuch as Fines and Forfeitures[f]. And ſeeing it is only the Puniſhments of this ſecond kind that can paſs to the Heirs, the *Roman* Law made this difference between the Pecuniary Puniſhments of private Offences, and thoſe of publick Crimes, that as to the former, the Heirs, as has been already mentioned, were liable to them, if the Action was begun againſt the Offender himſelf in his life-time, altho' he died before Sentence of Condemnation, becauſe the death of the Offender in this caſe did not extinguiſh the Action for the Offence. But as for the Pecuniary Puniſhments of Publick Crimes, they did not fall upon the Heirs, unleſs there had been a Sentence of Condemnation againſt the deceaſed: And altho' there had been an Accuſation lodged againſt the Offender, yet if he died before Condemnation, as his death extinguiſhed the Crime it ſelf, ſo likewiſe its conſequences did not ſubſiſt any longer[g]. There were only two ſorts of Crimes excepted, for which the Criminals were proſecuted even after their death. One was the Crime of High Treaſon[h], and the Crime of thoſe perſons who to prevent their Condemnation made away with themſelves[i]. The other ſort was of thoſe Crimes, the Proſecution whereof regarded chiefly a Pecuniary Intereſt, ſuch as the imbezzelling of the Publick Money, Extortion, and the Crime of thoſe perſons who having been intruſted with the Adminiſtration of the Publick Money detained part of it in their hands[l].

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[b] *V. l. ult. ff. de furt. l. 15. ff. de condict. cauſ. dat.*

[c] *§. 5. & §. ult. inſtit. de obl. quæ ex delict. naſc.*

[d] Conſtitutionibus quibus oſtenditur hæredes pœna non teneri placuit, ſi vivus conventus fuerat, etiam pœnæ perſecutionem tranſmiſſam videri, quaſi lite conteſtata cum mortuo. *l. 33. ff. de obl. & act. l. 58. eod. §. 1. in f. inſt. de perpet. & tempor. act. l. 164. ff. de reg. jur. l. 139. eod. l. 87. eod.*

Seeing the Heir of him againſt whom an Action was commenced in his life-time, was obliged to pay the pecuniary Mulct, he was with much more reaſon bound to make Reparation for the Damage.

[e] Sicuti pœna ex delicto defuncti hæres teneri non debeat, ita nec lucrum facere, ſi quid ex ea re ad eum perveniſſet. *l. 38. ff. de reg. jur.*

In hæredem eatenus daturum ſe actionem (de dolo) Proconſul pollicetur, quatenus ad eum pervenerit. Id eſt, quatenus ex ea re locupletior ad eum hæreditas venerit. *l. 26. ff. de dolo.*

Toties in hæredem damus de eo quod ad eum pervenit, quoties ex dolo defuncti convenitur, non quoties ex ſuo. *l. 44. ff. de reg. jur.*

Poſt litis conteſtationem eo qui vim fecit, vel concuſſionem intulit, vel aliquid deliquit, defuncto, ſucceſſores ejus in ſolidum: alioquin in quantum ad eos pervenit conveniri, juris abſolutiſſimi eſt: ne alieno ſcelere ditentur. *l. un. C. ex delict. def. in quant. hæred. conven. V. l. 2. §. ult. ff. vi bon. rapt. V. l. 4. in f. ff. de incend. ruin. naufr. l. 2. §. ult. ff. vi bon. rap.*

hands[l]. In the two Crimes of the firſt ſort, it was the nature of the Crime it ſelf, which demanded the proſecution thereof after the death of the Criminal: and in the other Crimes of the ſecond ſort, it was the quality of the effect of the Crime which cauſed a Loſs that was neceſſary to be repaired. And it was for the ſame reaſon, that in ſome other Crimes the conſequence of the Pecuniary Intereſt made it neceſſary to ſue for the ſaid Pecuniary Intereſt even after the death of the Offender. Thus in the Crime of Adultery, ſeeing the Huſband of the Wife who was found guilty of this Crime had a right to his Wife's Portion, and that the Heir of the Wife could not demand it back of the Huſband; he was allowed to bring proofs of his Wife's Adultery, even after her death[m]. Thus the Heir was ſued in relation to the Confiſcation of Merchandize which the Exchequer had acquired a right to on account of the Crime of the deceaſed, who had defrauded the Publick of the Cuſtoms due for the ſaid Goods[n]. Thus in the caſe of an Heir who had neglected to proſecute the Murderers of the perſon to whom he had ſucceeded, ſeeing the ſaid Inheritance was for that reaſon forfeited to the Exchequer, this Pecuniary Intereſt therefore was the cauſe why the ſaid Heir was proſecuted for this neglect even after his death[o]. Thus in the Crime of Forgery, it was neceſſary after the death of the party accuſed, to prove the Crime, in order to recover againſt the Heir the profit which he had made by the Forgery[p]. And in theſe and the like caſes, ſeeing after the death of the party accuſed, the Proſecution was not for perſonal Puniſhments to be inflicted on the perſon of the Offender, but only for the Pecuniary Intereſt; the Cognizance thereof was therefore in that caſe taken away from the Criminal Judge, and left to the determination of the Judge who had Cognizance of the Civil Intereſt, that being the ſingle matter in queſtion after the death of the Offender[q]. We may further obſerve in relation to this ſubject, that there was in the *Roman* Law another ſort of Crime, for which the Son of the Offender was proſecuted, even altho' he was not Heir to his Father. It was the caſe where an Officer of the Army, who was intruſted with the Money appointed for the ſubſiſtence of the Soldiers, died, having part of the ſaid Monies in his hands which he had not accounted for[r]. And this was ſo eſtabliſhed, becauſe of the great importance it was to the Publick that ſuch Monies ſhould be ſecure; and it is not improbable but that this Law may have been founded on the preſumption that the Children of this Officer had reaped the benefit of the Money which had been thus diverted from its true uſe, and upon a kind of Equity in making the Children as it were Sureties for their Fathers in a Debt that is ſo ſingularly privileged, becauſe of the benefits and advantages which the Children have received from their Parents, even thoſe who refuſe to enter Heirs to them: And the ſaid Law may likewiſe have had this for its motive, to engage Parents not to be guilty of an Infidelity which might be puniſhed in the perſon of their Children. As to which it may be obſerved, that both in the *Roman* Law, and in the Uſage of *France*, there are Crimes of which even ſome Perſonal Puniſhments paſs to the Children of the Criminals, as in the crime of Treaſon, and Imbezzlement of the Publick Money[ſ].

We muſt further obſerve upon what has been ſaid concerning the Puniſhment of Crimes, that in the *Roman* Law we muſt not confound Capital Crimes, that

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[f] Pœnæ bonorum ademptionis. *l.* 20. *ff. de accuſ.* Pœnæ pecuniariæ. *l.* 1. *in f. ff. de pœnis.*

[g] Ex judiciorum publicorum admiſſis non alias tranſeunt adverſus hæredes pœnæ bonorum ademptionis, quam ſi lis conteſtata, & condemnatio fuerit ſecuta, excepto repetundarum, & majeſtatis judicio, quæ etiam mortuis reis, cum quibus nihil actum eſt, adhuc exerceri placuit, ut bona eorum fiſco vindicentur. Adeo ut Divi Severus & Antoninus reſcripſerint. *Ex quo quis aliquod ex his cauſis crimen contraxit, nihil ex bonis ſuis alienare aut manumittere eum poſſe.* Ex cæteris verò delictis pœna incipere ab hærede ita demum poteſt, ſi vivo reo accuſatio mota eſt, licèt non fuit condemnatio ſecuta. *l.* 20. *ff. de accuſat. l.* 2. *C. ad leg. Jul. repet.*

[h] *V. d. l.* 20. *ff. de accuſat. l. ult. ff. ad leg. Jul. maj.*

[i] *L. penult. C. ſi reus vel accuſ. mort. fuer. toto tit. C. de bon. eor. qui mort. ſibi conſc.*

[l] Publica judicia peculatus, & de reſiduis, & repetundarum ſimiliter adverſus hæredem exercentur. Nec immeritò, *cùm in his quæſtio principalis ablatæ pecuniæ moveatur. l. ult. ff. ad leg. Jul. pecul.*

[m] *L. ult. C. ad leg. Jul. de adult.*

[n] Fraudati vectigalis crimen ad hæredem ejus qui fraudem contraxit commiſſi ratione tranſmittitur. *l.* 8. *ff. de publican.*

[o] *L.* 22. *ff. de ſenat. ſilan. l.* 9. *ff. de jure fiſci.*

[p] *L.* 12. *ff. de lege Corn. falſ.*

[q] Defuncto eo qui reus fuit criminis, & pœna extincta, in quacunque cauſa criminis extincti debet is cognoſcere cujus de pecuniaria re cognitio eſt. *l.* 6. *ff. de publ. jud.*

[r] Cùm ex ſola Primipili cauſa liberos, etiamſi patribus hæredes non exiſtant, teneri Divus Aurelianus ſanxerit, &c. *l. ult. C. de Primipilo.*

[ſ] *V. l.* 5. *C. ad leg. Jul. Majeſt.* See the Ordinance of *Blois*, Art. 183. And that of *Francis* I. in *March* 1545. Art. 1.

is, thoſe which are puniſhed by Natural or Civil Death, with thoſe Crimes which were called Publick. For there were Capital Crimes which were not Publick, that is to ſay, the Accuſation whereof was not permitted to all perſons indifferently; and there were likewiſe ſome Publick Crimes which were not Capital: which it is neceſſary to take notice of, in order to obviate ſome difficulties which might perplex thoſe who not being ſufficiently inſtructed in theſe Principles, might have a mind to inform themſelves more fully in the Body of the *Roman* Law of all this detail, which it would be needleſs to explain here.

To conclude theſe Remarks on the *Roman* Law touching this matter, we ſhall only add, that as for the Civil Intereſt, and the Reparation of the Damage occaſioned by all other Crimes, except thoſe in which the principal concern was a Pecuniary Intereſt, as has been juſt now explained, the Party accuſed happening to die before his Condemnation, the Crime was extinguiſhed; And altho' he had been accuſed before his death, yet his Heir, who reaped no benefit by the Crime, was not liable to make any ſatisfaction; but it was thought ſufficient to hinder the Heirs of the Offenders, and of their Accomplices, from reaping any benefit thereby[t].

According to the Uſage in *France*, which is partly conformable, and partly oppoſite to the *Roman* Law, the Heirs are never ſubject to the Pecuniary Puniſhments, which we call Fines, nor to Forfeitures, except when there is a Sentence of Condemnation againſt the deceaſed, from which there lies no Appeal, even altho' the Accuſation had been brought againſt the Offender in his life-time. And all Proſecutions for Crimes ceaſe by the death of the party accuſed, unleſs it be the Crime of Treaſon, whether it be againſt God or Man, Duelling, Self-Murder, even although there was no precedent Crime, and Rebellion againſt Juſtice with open force, if the perſon accuſed was killed in the ſcuffle[u]. But as for the Civil Intereſt, and the Reparation of the Damage occaſioned by a Crime or Offence, the Heirs of the perſon who has cauſed the damage are bound for it indifferently, whatever nature the Crimes and Offences be of, and without any diſtinction between the caſes where the deceaſed himſelf has been judicially accuſed and proſecuted, and the caſes where the Action has been brought only againſt the Heir: and likewiſe without diſtinguiſhing between the caſes in which the Heir has ſome benefit from the Crime or Offence, and thoſe where he reaps no manner of advantage.

This Law is ſo natural and ſo juſt, that it ſeems ſtrange that any perſons ſhould have followed other Rules. For altho' that an Heir does not reap any manner of profit from the Crime of the perſon to whom he ſucceeds, and that there has been no Accuſation, nor any Action commenced againſt the deceaſed for the Damage which he had cauſed; yet it is enough to oblige the Heir to repair the damage, that he ſucceeds to all the Effects of the deceaſed; ſeeing he is by that means bound for all the Charges, and that the ſaid Goods, which being in the poſſeſſion of the deceaſed, were to be reſponſible for all his Engagements of what nature ſoever, cannot paſs but with this Condition to his Heir who ſucceeds in the place of the deceaſed, and repreſents him. And if it is juſt to reckon among the charges of an Inheritance, not only all thoſe which can be inſtructed by expreſs Titles or Deeds againſt the deceaſed, ſuch as Bonds, Promiſſory Notes, and others of the like nature, but likewiſe all thoſe charges of which there was no Specialty at the time of his death, provided only that they can be verified by ſuch proofs as the Law admits. It is likewiſe equally juſt to reckon among thoſe charges the Obligation which is contracted by him who cauſes any damage by a Crime, or an Offence, ſeeing he obliges himſelf as effectually by his Deed, as by his Word. And if his will engages him when he makes a promiſe, or obliges himſelf to any one for juſt cauſes, and which turn only to the advantage of thoſe to whom he becomes bound; it engages him much more when he does any harm or damage, ſince by that he obliges himſelf not only to the perſon to whom he does the damage to repair it, but he likewiſe engages himſelf towards the Publick, to ſuffer the Puniſhment which his Crime or Offence may deſerve. So that of all the ways in which it is poſſible for one to oblige himſelf, the validity of none of them does ſo much concern both the Publick and private Perſons, as does that of the Engagement into which one enters by the commiſſion of Crimes or Offences; ſince it is of infinitely greater importance to the Society of Mankind, and to the particular perſons who ſuffer the damages occaſioned by Crimes and Offences, that the ſaid damages ſhould be repaired as much as is poſſible, than it concerns either the Publick, or private Perſons, that other Engagements, even the moſt lawful, ſhould be performed.

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[t] Nam eſt conſtitutum, *Turpia lucra hæredibus quoque extorqueri, licet crimina extinguantur:* ut putà ob falſum, vel judici ob gratioſam ſententiam datum, & hæredi extorquebitur ſi quid aliud ſcelere quæſitum. *l. 5. ff. de calum.* Ne alieno ſcelere ditentur. *l. un. C. ex del. def. in quant. hæred. conven.* See the laſt of the texts quoted under the letter [e].

[u] *See the firſt Article of the twenty ſecond Title of the Ordinance of the Month of* Auguſt, 1670.

It follows from theſe Truths, which may be ranked among the firſt Maxims of Equity, that the Heir, who by virtue of this quality being in poſſeſſion of all the Goods of the Inheritance, is bound for all the Engagements of the perſon to whom he ſucceeds, cannot be diſcharged from the Obligation to repair the damages which the deceaſed has cauſed by his Crimes or Offences, neither under pretext that there accrues no benefit to the ſaid Heir, nor becauſe there has been no Condemnation, Accuſation, or Action againſt the deceaſed. For as to the pretext of the Heir's not having reaped any advantage, beſides that in the Crimes where the deceaſed did reap profit, ſuch as that of Robbery, Theft, Forgery, or others of the like kind, although the things themſelves that were thus unlawfully acquir'd by the deceaſed, are not perhaps extant in the Inheritance, yet it is reaſonable to preſume that the Inheritance has been thereby increaſed, ſince it may contain ſome Goods and Effects which have been purchaſed with the Monies got by the Theft or Robbery. And although the Offence committed by the deceaſed were of ſuch a nature as never to have yielded any profit, ſuch as the ſetting a Houſe on fire, Murder, or other Crimes of the like kind, yet the advantages which the Heir reaps by the Goods of the Inheritance are to him in lieu of a Profit, which was bound for the reparation of the damages occaſioned by the Crime or Offence of the perſon whoſe Eſtate he has: and this Engagement ought not to be diſtinguiſhed from the others. And as to the caſe where there has been no demand made againſt the deceaſed, it is true, that where the Reparation of the Damage has not been demanded from the deceaſed, but only from his Heir, this circumſtance may ſerve to acquit him, if the demand was not made until a long time, or ſome time at leaſt, after the death of the perſon who had committed the Crime or Offence, and who was never proſecuted for it, although he lived ſome conſiderable time after he had committed the Crime. For in this caſe the delay may have proceeded from fear leſt the deceaſed ſhould have been able to have juſtified himſelf, if the Action had been brought againſt him, or the Proſecution begun, during his life: And it is by the circumſtances that one ought to judge of the effect which this delay ought to have. But ſince it may readily fall out, that the perſon who has done ſome damage by a Crime, or an Offence, dies before any Action can be brought againſt him, and that it may happen likewiſe that for a long time the Author of the Crime or Offence was unknown; theſe and ſuch like circumſtances may be juſt reaſons for the excuſing the delay of the perſon who has ſuffered the damage, and who has brought his Action only againſt the Heir of the perſon who did it. Thus, it is with very good reaſon that our Uſage has rejected the general and indefinite Rule which acquitted the Heir from the demand of Reparation of Damages, when it was only brought againſt him, and when it appears that he has not reaped any benefit from the act of the deceaſed who cauſed the damage. And it is likewiſe the Uſage with us, that in caſes where Actions for the Civil Intereſt, even in Capital Crimes, are brought only againſt the Heir, and have not been adjudged againſt the deceaſed, the Heir is obliged either to make good the damage, or to juſtify the deceaſed, that is, to vindicate his memory. So that our Law is in one ſenſe leſs indulgent to Heirs than the *Roman* Law, with reſpect to the Reparation of Damages; and it is on the contrary leſs ſevere in another ſenſe, in regard to Pecuniary Puniſhments, to which the Heir is not liable according to our Uſage, not even for bare Offences, unleſs Sentence of Condemnation has paſſed againſt the deceaſed. And both the one and the other of theſe two Rules, which are directly oppoſite to thoſe of the *Roman* Law, are founded on the Principles of Equity, which on one ſide, as to what concerns the Reparation of Damages, obliges the Heir to perform the Engagement under which the deceaſed was to repair the damage which he had done, and which on the other ſide, in what relates to Fines or Pecuniary Puniſhments, frees the Heir from a Puniſhment which ought to be purely perſonal againſt the Author of the Crime or Offence, and which ought not to paſs to the Heir, except after that a Sentence of Condemation paſſed againſt the deceaſed has conſtituted it a Debt which may be demanded, and made it a charge or burden of the Inheritance. But if the Offender dies before his Condemnation, the Proſecution ceaſes with reſpect to all Puniſhments, unleſs it be in thoſe Crimes which are puniſhable by Law after the death of the Offenders, as has been already obſerved.

Theſe Rules of our Uſage, which charge the Heirs with the Civil Intereſt, and Reſtitutions due on account of Crimes and Treſpaſſes committed by thoſe perſons to whom they ſucceed, whether there has been any demand made againſt the deceaſed, or that it has been made only againſt the Heir, and whether the Heir have reaped any benefit by the Crime of the deceaſed, or not, are likewiſe conformable to the Canon Law, which obliges the Heirs to make Reſtitution and Reparation of Damages without theſe diſtinctions[x]. So that theſe Rules being equally agreeable to the Laws of the Church and of the State, and alſo to the Law of Nature, we have thought proper, notwithſtanding they are different from the Rules of the *Roman* Law, to rank them in their order in this Section, which is their proper place; it being no ways inconſiſtent with the deſign of this Book, which is to give us upon each particular Matter, all the ſeveral Rules that are conformable to the Law of Nature, and to our Uſage. We may likewiſe obſerve in relation to the Engagements of Heirs for the Crimes and Treſpaſſes of thoſe to whom they ſucceed, that the Lawyer *Julian*, one of the moſt renowned Authors of the Laws of the *Digeſts*, was of opinion, that the Heir of a Judge, who had taken Money, or ſome Preſent, or been guilty of ſome other Miſdemeanour in the Execution of his Office of a Judge, was accountable for the ſame. But the opinion of this Lawyer, agreeably to our Principles and to Equity, was rejected by all the other Lawyers; and it has been taken notice of in the Body of the *Roman* Law, only to ſhew that *Julian* was the only Lawyer who was of this opinion[y].

We ſhall add by way of Concluſion two Reflections on the *Roman* Law concerning this matter. One ariſes from the remarks which have been mentioned of the ſeveral caſes where one might, purſuant to the Principles of the ſaid Law, ſue the Heirs for Reparation of Damages in certain Crimes, altho' there had been no Accuſation brought againſt the Offender, becauſe the principal matter in diſpute was in relation to a Pecuniary Intereſt. It may be ſaid of this Rule, that if it was juſt when this Pecuniary Intereſt was the principal matter in queſtion, it was no leſs juſt in an Action where a Pecuniary Intereſt was ſtill demanded, altho' the demand of the ſaid Intereſt was joined with ſome other principal matter, of which the Pecuniary Intereſt was only an Acceſſory. For the reality in a Pecuniary Intereſt, whether it be as a Principal, or as an Acceſſory, is equally eſſential to him who ſuffers the loſs. And the nicety which diſtinguiſhes between theſe two ways of conſidering this Intereſt, either as a Principal, or as an Acceſſory, can never be a juſt Principle to favour the Heir, and ruine him who ſuffers the loſs.

The other Reflection relates to another Principle of the *Roman* Law, according to which even in thoſe caſes where the Pecuniary Intereſt of the perſon who ſuffers the damage is an Acceſſory, yet the Heir of him who has cauſed the damage, is nevertheleſs anſwerable for it. It is in all the caſes of the ſeveral Engagements, whether they be contracted by Covenant, or any other manner of way, in which there is fraud or deceit, by which one ſuffers ſome loſs or damage. In all theſe caſes the Heir was liable for the damage[z]. Thus, the Heir of a perſon into whoſe hands any thing was depoſited, was accountable for the fraud of the deceaſed, who in breach of the Truſt committed to him, had either imbezzell'd or damaged the thing which was depoſited with him. Thus, the Heir of a Tutor was obliged to repair the damage which the Tutor had cauſed to the Minor by any miſdemeanour during the Tutorſhip. Thus, the Heir of him who had ſold one thing for another, or ſome Merchandize that was adulterated, was bound to make good the damage which the buyer might ſuffer by the ſaid fraud. And it appears from the laſt of the Texts quoted here, that the Engagement of the Heir in theſe ſorts of caſes was founded on this, that there was a Fraud committed againſt the faith of a Contract; as if it were not equally juſt to puniſh the Iniquities, the Violences, the Crimes, and to repair the Damages occaſioned by them, which deſtroy the general Engagement that is contracted among Mankind in general by the Union which forms their Society, as to puniſh and repair the Infidelities which are contrary to the particular Engagements of Covenants, and as if the precept of doing harm to no perſon were not univerſal, and for all ſorts of caſes without diſtinction. Since thereſore there can be no perſon who is not bound to all others in all the duties which the Society that unites all Mankind together does require[a]; it follows, that the ſame duty which obliges Heirs to repair the damages which the perſon to whom they ſucceed may have cauſed, when the deceaſed was obliged by ſome particular Engagement, lays them under no leſs an obligation to repair the damages occaſioned by deeds which are a violation of the general Engagement of doing harm to no mortal whatever.

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[x] *See the third Article.*

[y] Judex tunc litem ſuam facere intelligitur, cùm dolo malo in fraudem legis ſententiam dixerit. Dolo malo autem videtur hoc facere, ſi evidens arguatur ejus vel gratia, vel inimicitia, vel etiam ſordes: ut veram æſtimationem litis præſtare cogatur. Julianus autem in hæredem judicis, qui litem ſuam fecit, putat actionem competere. Quæ ſententia vera non eſt, & à multis notata eſt. *l.* 15. §. 1. & *l.* 16. *ff. de judiciis.*

[a] Ex contractibus venientes actiones in hæredes dantur, licet delictum quoque verſetur. Veluti cùm tutor in tutela gerenda dolo fecit, aut is, apud quem depoſitum eſt. *l.* 49. *ff. de oblig. & act.*

Et depoſiti, & commodati, & mandati, & tutelæ, & negotiorum geſtorum ob dolum malum defuncti hæres in ſolidum tenetur. *l.* 12. *eod.*

Datur actio depoſiti in hæredem ex dolo defuncti in ſolidum. Quamquam enim alias ex dolo defuncti non ſolemus teneri, niſi pro ea parte quæ ad nos pervenit; tamen hic dolus ex contractu, reique perſecutione deſcendit. Ideóque in ſolidum unus hæres tenetur: plures verò pro ea parte qua quiſque hæres eſt. *l.* 7. §. 1. *ff. depoſ.*

[a] For we are members one of another. *Epheſ.* iv. 25.

He gave every man commandment concerning his neighbour. *Ecclus.* xvii. 14.

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1. *We muſt diſtinguiſh between the Pecuniary Puniſhment and the Civil Intereſt.*
2. *How the Heir may be liable to the Pecuniary Puniſhment.*
3. *The Heir is always bound for the Civil Intereſt.*

I.

1. We muſt diſtinguiſh between the Pecuniary Puniſhment and the Civil Intereſt.

In all the caſes where the queſtion is concerning the Engagement of an Heir for the Crimes and Offences of the perſon to whom he ſucceeds, it is neceſſary to diſtinguiſh that which concerns the Puniſhment inflicted on account of the Publick Intereſt, from the Reparation of the damage which the Crime or Offence may have occaſioned. Thus, Corporal Puniſhments, and Pecuniary Puniſhments[a], which are called Fines, regard the Publick Intereſt: and the Reſtitutions, and the Satisfaction which is made for the Loſſes and Damages ſuſtained, relate to the Reparation that is due to the perſons who have ſuffered the damage[b].

[a] Pœnæ bonorum ademptionis. *l.* 20. *ff. de accuſation.* Pœna pecuniaria. *l.* 1. *in f. ff. de pœnis.*

[b] Rei perſecutio. *inſt. vi bon. rapt.* Rei æſtimatio. §. 15. *inſt. de obl. quæ ex delict. naſc.* Quantum mea interfuit: quantum mihi abeſt. *l.* 13. *ff. ratam rem haberi.*

II.

2. How the Heir may be liable to the Pecuniary Puniſhment.

When the queſtion relates to the Pecuniary Puniſhment, and there has been no Sentence of Condemnation paſt againſt the deceaſed, the Heir cannot be liable thereto, unleſs he has been an Accomplice in the Crime or Offence. For this Puniſhment regards only the perſon who has deſerved it, and his death prevents his Condemnation. But if there had been a Sentence of Condemnation againſt the deceaſed, the Pecuniary Puniſhment in which he had been condemned, would be a charge and debt on the Inheritance, which the Heir would be bound to acquit as well as the other debts[c].

[c] Ex judiciorum publicorum admiſſis non alias tranſeunt adverſus hæredes pœnæ bonorum ademptionis, quàm ſi lis conteſtata, & condemnatio fuerit ſecuta. *l.* 20. *ff. de accuſat.*

Altho' this Text relates only to Publick Crimes, yet, according to the Uſage in France, *the Rule is common to all Offences, as has been mentioned in the Preamble.*

III.

3. The Heir is always bound for the Civil Intereſt.

When the queſtion is about the Reparation of Damage cauſed by ſome Crime or Offence, whether the Succeſſion of the Offender has been increaſed thereby, or not, his Heir will be bound to make it good, although there had not been any Action or Proſecution commenced againſt the deceaſed[d]; provided that the fact be proved in the manner that is uſually obſerved in the like caſes[d].

[d] Cur enim quod in principalibus perſonis juſtum eſt, non ad hæredes, & adverſus eos tranſmittatur. *l.* 13. *C. de contr. & commit. ſtipul.*

Hæredis quoque ſuccedentis in vitium par habenda fortuna eſt. *l.* 2. *in fine C. de fruct. & lit. exp.*

Hæres vitiorum defuncti ſucceſſor eſt. *l.* 11. §. 2. *in fine ff. de publ. in rem act.*

Altho' theſe Texts relate to other matters, yet they may be applied here: ſeeing they have relation to that Truth of the Law of Nature that the Heir is bound for the act of the deceaſed to whom he ſucceeds. And becauſe this is the Rule obſerved with us in conformity to the Canon Law, and that we prefer it to the Roman *Law which is contrary to it; we have ſet it down in this Article, judging it more expedient, for the reaſons which we have explained in the Preamble, to place this Rule among the others, and to ſupport it with thoſe texts out of the Civil Law, and likewiſe with theſe which follow, taken out of the Canon Law, rather than to leave a matter of this conſequence in doubt.*

Si Epiſcopum talem culpam admiſiſſe conſtiterit (quod abſit) ut conſtet eum non irrationabiliter fuiſſe depoſitum, eadem ejus depoſitio confirmetur, & Eccleſiæ res ſuæ omnes reſtituantur quæ ablatæ claruerunt: quia delictum perſonæ in damnum Eccleſiæ non eſt convertendum. Si enim, ut dicunt, Comitiolus defunctus eſt, ab hærede ejus, quæ injuſtè ab illo ablata ſunt, ſine excuſatione reddantur. 16. *q.* 6. *c.* 3. *v.* 12. *q.* 2. *c.* 34. *c.* 3. *extr. de pign.*

Parochiano tuo, qui excommunicatus pro manifeſtis exceſſibus, videlicet homicidio, incendio, violenta manuum injectione in perſonas Eccleſiaſticas, Eccleſiarum violatione, vel inceſtu, fuit, dum ageret in extremis per presbyterum ſuum juxta formam Eccleſiæ abſolutus, non debent cœmeterium, & alia Eccleſiæ ſuffragia denegari. Sed ejus hæredes & propinqui ad quos bona pervenerunt ipſius, ut pro eodem ſatisfaciant, cenſura ſunt Eccleſiaſtica compellendi. *c. ult. de ſepult.*

In litteris tuis continebatur, quòd cùm H multis fuiſſet criminibus irretitus, qui Eccleſiarum incendium, diabolo inſtigante, commiſerat, tandem in ægritudine conſtitutus, accepta pœnitentia de commiſſis per manum Capellani ſui fuit à ſententia anathematis abſolutus: ſed moriens Eccleſiaſticam ſepulturam habere nequivit. Quapropter, ſi ita res ſe habet, mandamus ut corpus ejuſdem, appellatione ceſſante, facias in cœmeterio ſepeliri: & hæredes ejus moneas, & compellas, ut his quibus ille per incendium, vel alio modo, damna contra juſtitiam irrogaverat, juxta facultates ſuas, condignè ſatisfaciant, ut ſi à peccato valeat liberari. *c.* 5. *de raptor. & incend.*

It appears by theſe Texts, that not only there is no mention made in them of the diſtinctions of any Action brought againſt the deceaſed, or of the caſe in which the Heir has reaped ſome profit, but that this laſt Text obliges the Heirs to repair without any diſtinction all the damages which the deceaſed may have cauſed, which implies likewiſe the duty of enquiring into the damages, in order to make reparation. And we ſee by the caſe of Burning of Churches mentioned in this Chapter, that it is no matter whether the Heir reaps any benefit by the Crime of the deceaſed, or no.

* *When an Action for the Civil Intereſt, and the Reparation of Damages is brought againſt the Heir of a perſon who having committed the Crime or Offence, dies before he is proſecuted or condemned, the Plaintiff is neverthele ſs admitted to prove the Crime or Treſpaſs, and the Heir on his part is likewiſe received to vindicate the memory of the deceaſed, that is, to juſtify him from the Accuſation, if there be occaſion for it, either by ſhewing that the proofs of the Accuſation are not ſufficient, or by matters of fact, which may juſtify the deceaſed, and prove his innocency, and free the Heir from being condemned in the Civil Intereſt, or Reparation of the Damages in queſtion.*

SECT. XI.

Of Funeral Charges.

WE have explained in the ſixth Section, what are in general the different ſorts of charges to which the Heir may be liable, ſuch as the Debts owing by the deceaſed, Reſtitutions, Legacies, Funeral Expences, and others. And ſeeing every one of the ſaid charges contains a detail of ſeveral particulars which ought to be ſet down in their proper places, we ſhall treat of Legacies, of Fiduciary Bequeſts, and of Subſtitutions in the fourth and fifth Books, becauſe they are charges ordained by Teſtaments, or other Diſpoſitions. And as for the other charges which are common both to Succeſſions by Teſtament, and to thoſe of Inteſtates, they have been explained in the three foregoing Sections, except that of Funeral Charges which ſhall be the ſubject matter of this.

Altho' the Texts of the *Roman* Law quoted on the Articles of this Section, have relation to the Heatheniſh Ceremonies that were uſed in Funerals at *Rome*, before the Chriſtian Religion was known there; yet they agree nevertheleſs with the Rules explained in theſe Articles, which are to be underſtood of the Funeral Expences that are applied to the uſes approved of by the Church.

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1. *What are the Funeral Charges.*
2. *The Funeral Charges are privileged.*
3. *They ought to be regulated according to the Eſtate and Quality of the deceaſed, and other circumſtances.*
4. *Without regard to the unreaſonable diſpoſitions of Teſtators.*
5. *If any other beſides the Heir had laid out thoſe Expences, how he may recover them.*

I.

BY Funeral Charges is meant all the Expences neceſſary to be laid out after the death of any perſon, whether it be on the body of the deceaſed, as to embalm it, and to tranſport it, if there is occaſion for it, and to inter it, or for the Services and Honours which are uſual at Funerals[a]. *1. What are the Funeral Charges.*

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[a] Funeris ſumptus accipitur quidquid corporis cauſa, veluti unguentum, erogatum eſt: & pretium

loci in quo defunctus humatus eſt: & ſi qua vectigalia ſunt, vel Sarcophagi, & vectura: & quidquid corporis cauſa, antequam ſepeliatur conſumptum eſt: funeris impenſam eſſe exiſtimo. *l.* 37. *ff. de religioſ. & ſumpt. fun.* *V. l.* 14. §. 3. *& ſeq. eod.*

II.

2. *The Funeral Charges are privileged.*

The charge of the Funeral Expences affects all the Goods of the deceaſed, as much as if the perſon who furniſhes the things neceſſary had contracted for them with the deceaſed himſelf[b]. And he has moreover a Privilege on the ſaid Goods[c], as has been mentioned in the fourteenth Article of the fifth Section of Pawns and Mortgages.

[b] Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede. *l.* 1. *ff. de religioſ. & ſumpt. fun.*

[c] Impenſa funeris ſemper ex hæreditate deducitur: quæ etiam omne creditum ſolet præcedere, cùm bona ſolvendo non ſint. *l.* 45. *eod.*

III.

3. *They ought to be regulated according to the Eſtate and Quality of the deceaſed, and other circumſtances.*

If the ſaid Charges are regulated and advanced by any other perſon than the Heir, whether it be in his abſence, or without his knowledge, they ought to be moderated according to the circumſtances of the Quality and Eſtate of the deceaſed, the Uſage of the place, and other circumſtances which may juſtify the prudence and integrity of the perſon who advances them. And the Heir will not be bound to reimburſe that which has been laid out over and above what the ſaid circumſtances might demand[d].

[d] Hæc actio, quæ funeraria dicitur, ex bono & æquo oritur. Continet autem funeris cauſa tantùm impenſam, non etiam cæterorum ſumptuum. Æquum autem accipitur ex dignitate ejus qui funeratus eſt, ex cauſa, ex tempore, & ex bona fide. Ut neque plus imputetur ſumptus nomine quàm factum eſt: neque tantum quantum factum eſt, ſi immodicè factum eſt. Deberet enim haberi ratio facultatum ejus in quem factum eſt, & ipſius rei quæ ultra modum ſine cauſa conſumitur. *l.* 14. §. 6. *ff. de relig. & ſumpt. fun.* Sumptus funeris arbitrantur pro facultatibus, vel dignitate defuncti. *l.* 12. §. 5. *eod.*

IV.

4. *Without regard to the unreaſonable diſpoſitions of Teſtators.*

If the deceaſed himſelf had regulated what ſhould be laid out on his Funeral, the Heir would be obliged in that caſe to execute the ſaid will of the deceaſed, provided that it contained nothing contrary to Law, or good Manners, and that the Expence did not exceed the bounds which the Condition and Eſtate of the deceaſed would require, according to the uſual cuſtom, and the circumſtances. For Heirs are not bound to execute the unreaſonable diſpoſitions of thoſe to whom they ſucceed[e].

[e] Quid ergo ſi ex voluntate teſtatoris impenſum eſt, ſciendum eſt nec voluntatem ſequendam, ſi res egrediatur juſtam ſumptus rationem. Pro modo autem facultatum ſumptum fieri. *l.* 14. §. 6. *in f. ff. relig. & ſumpt. fun.*

V.

5. *If any other beſides the Heir had laid out thoſe Expences, how he may recover them.*

If any other perſon than the Heir lays out the Funeral Expences, with a deſign to do an act of civility, or charity towards the deceaſed, having no intention to apply for a reimburſement thereof, the Heir will in that caſe be diſcharged from it, provided that this intention be ſufficiently proved, for it would not be juſt to preſume it. But to obviate all uncertainties, the perſons who advance the Funeral Expences ought to make known their intention, whether it be to recover the Expences they lay out, or to give them, if the circumſtances might render their intention any way doubtful[f].

[f] Sed interdùm is qui ſumptum in funus fecit, ſumptum non recipit, ſi pietatis gratia fecit non hoc animo quaſi recepturus ſumptum quem fecit. Et ità imperator noſter reſcripſit. Igitur æſtimandum erit arbitro, & perpendendum, quo animo ſumptus factus ſit: utrùm negotium quis vel defuncti, vel hæredis gerit, vel ipſius humanitatis: an verò miſericordiæ vel pietati tribuens, vel affectioni. Poteſt tamen diſtingui & miſericordiæ modus; ut in hoc fuerit miſericors vel pius qui funeravit, ut eum ſepeliret, ne inſepultus jaceret, non etiam ut ſuo ſumptu fecerit. Quòd ſi judici liqueat, non debet eum qui convenitur abſolvere: quis enim ſine pietatis intentione alienum cadaver funerat? oportebit igitur teſtari quem quo animo funerat: ne poſteà patiatur quæſtionem. *l.* 14. §. 7. *ff. de religioſ. & ſump. fun.* See the fourth Article of the ſecond Section of the third Title.

SECT. XII.

Of the Engagements of Co-heirs to one another.

WHEN there are two or more Heirs who ſucceed jointly to an Inheritance, whether it be by Teſtament, or as next of Kin; there is formed between them divers ſorts of Engagements, by the bare effect of the quality of Co-heirs. For being to poſſeſs jointly, or to divide among them the Goods of the Succeſſion, they are mutually engaged to the conſequences of the Poſſeſſion which they have in common, and to thoſe of the Partition which they may make of the ſaid Goods among them.

Theſe Engagements of Co-heirs to one another, are of two ſorts. One is of thoſe which precede the Partition:

The other is of thoſe which are formed by the Partition it ſelf, or which are conſequences of it. The Engagement, for example, to divide the Inheritance, and that of taking care of the common thing, precede the Partition: and the Warranty againſt Evictions which one of the Co-heirs may ſuffer of the Lands and Tenements which fall to his ſhare, and the payment of the charges which fall upon him, are of the number of thoſe Engagements which follow after the Partition.

We ſhall explain in the fourth Title, the Engagements which relate to the Partition, for it is a matter of ſuch extent, that it requires a ſeparate Title in its proper place; and the others ſhall be the ſubject matter of this Section.

The CONTENTS.

1. *The Co-heirs ought to inform one another reciprocally of what they have, or know of the Inheritance.*
2. *The care which Co-heirs ought to take of the Goods belonging to them in common.*
3. *They ought to divide the profits which they have made.*
4. *And even what has been added to it by Induſtry, the Expences being deducted.*
5. *They ought to reimburſe one another the Intereſt of Money which has been advanced.*
6. *They ought to bring into the Maſs of the Inheritance the things which ought to be brought in.*
7. *One Heir cannot make any changes without the conſent of the others.*
8. *Engagement to come to a Partition.*

I.

1. The Co-heirs ought to inform one another reciprocally of what they have, or know of the Inheritance.

THE firſt Engagement of Co-heirs to one another before the Partition of the Inheritance, is to inform one another reciprocally of what each of them either has, or knows of the Goods and of the Charges of the Inheritance. And ſuch of them as happen to have in their poſſeſſion any of the Goods of the Inheritance, or have the charge of them, ought to take the care of them that is required by the following Rule[a].

II.

2. The care which Co-heirs ought to take of the Goods belonging to them in common.

Whoever of the Co-heirs is charged with any of the Goods of the Succeſſion, or a part of them, or with ſome affair, or other thing in particular, ought to take the ſame care thereof as he does of his own proper affairs; and he will be reſponſible to his Co-heirs for the conſequences which may be laid to his charge for not having taken that care. But if for want of underſtanding or experience, the ſaid Heir was not very capable of looking after his own affairs, and that by reaſon of this defect he had failed to do that for the Goods of the Inheritance which were committed to his charge, which any other more ſkilful and more diligent perſon would not have omitted to do, he ſhall not be accountable for it[b]; as one would be who ſhould intrude himſelf into the management of another man's affairs in his abſence, or without his knowledge[c]; or as a Tutor[d], a Curator[e], or an Attorney or Agent[f]; or others whoſe duties oblige them to the ſame diligence and watchfulneſs in other mens affairs, that a careful and diligent Maſter takes of his own. For whereas theſe ſorts of perſons either intrude themſelves, or are choſen and appointed for theſe kinds of Functions, under the neceſſity of acquitting themſelves well of their ſeveral Functions, becauſe they do not concern their own proper affairs, but thoſe of others, and that therefore they ought to diſcharge them with all imaginable application; Co-heirs do not make choice of one another, but happen to be bound one to the other, either by the will of a Teſtator, or by the Law, which calls them all jointly to the Inheritance. So that each of them ought to take his precautions as to the truſt he puts in the others, and to blame himſelf for the conſequences that may attend the conduct of his Co-heir in whom he has confided. And moreover, the affairs of the Inheritance belonging to them in common, each of them is bound only to take the ſame care of them as he does of his own affairs, in the ſame manner as a Co-partner[g].

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[a] *See the following Article.*

[b] Non tantùm dolum, ſed & culpam in re hæreditaria præſtare debet cohæres; quoniam cum cohærede non contrahimus, ſed incidimus in eum. Non tamen diligentiam præſtare debet, qualem diligens paterfamilias: quoniam hic propter ſuam partem cauſam habuit gerendi: & ideò negotiorum geſtorum ei actio non competit. Talem igitur diligentiam præſtare debet, qualem in ſuis rebus. *l. 25. §. 16. ff. fam. erciſc.*

[c] *See the ſecond Article of the firſt Section, of thoſe who manage the Affairs of others without their knowledge.*

[d] *See the ninth Article of the third Section of Tutors.*

[e] *See the firſt Article of the ſecond Section of Curators.*

[f] *See the fourth Article of the third Section of Proxies.*

[g] *See the ſecond and third Articles of the fourth Section of Partnerſhip.*

III.

3. They ought to divide the profits which they have made.

The Heir who before the Partition has had the enjoyment of any Lands or Tenements, of a Rent, or other thing belonging to the Inheritance, ought to divide with his Co-heirs the Fruits and other Revenues which he has received. And even the Heir who ſhall happen to have had the Enjoyment of the whole Inheritance, whilſt his Co-heirs were ignorant of their Right, or were abſent, ought to be accountable to them for the profits which he has made out of the common Eſtate[h].

[h] Non eſt ambiguum, cùm familiæ erciſcundæ titulus inter bonæ fidei judicia numeretur, portionem hæreditatis, ſi qua ad te pertinet, incremento fructuum augeri. *l. 9. C. fam. erciſc.*

Non ſolùm in finium regundorum, ſed & familiæ erciſcundæ judicio præteriti quoque temporis fructus veniunt. *l. 56. eod.*

Fructibus augetur hæreditas, cùm ab eo poſſidetur à quo peti poteſt. *l. 2. C. de petit. hæred.* Fructus omnes augent hæreditatem, ſive ante aditam, ſive poſt aditam hæreditatem acceſſerint. *l. 20. §. 3. in f. ff. de hæred. pet.*

Cohæredibus diviſionem inter ſe facientibus juri abſentis & ignorantis minimè derogari, ac pro indiviſo portionem eam, quæ initio ipſius fuit in omnibus communibus rebus, eum retinere certiſſimum eſt. Unde portionem tuam cum reditibus arbitrio familiæ erciſcundæ, percipere potes, ex facta inter cohæredes diviſione, nullum præjudicium timens. *l. 17. C. fam. erc.* See the ninth and tenth Articles of the third Section of Intereſt, Coſts and Damages, and Reſtitution of Fruits.

IV.

4. And even what has been added to it by Induſtry, the Expences being deducted.

If he who has enjoyed the Fruits and other Revenues of the Inheritance, had by his Induſtry made more thereof than his Co-heirs would have been able to do, he ſhall be bound nevertheleſs to reſtore the value of the profits which he has made. For there are no Fruits, or at leaſt but very few, which are reaped without ſome Induſtry; and it is ſtill the Land that has produced them[i]. But out of the profits which he has made, he is allowed to deduct the Expences he has been at, which would be allowed even to an unjuſt Poſſeſſor[l].

[i] Cùm hæreditas petita ſit, eos fructus quos poſſeſſor percepit, omnimodo reſtituendos, etſi petitor eos percepturus non fuerat. *l. 56. ff. de hæred. petit.*

[l] Fructus intelliguntur deductis impenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt. Quòd non ſolùm in bonæ fidei poſſeſſoribus naturalis ratio expoſtulat, verùm etiam in prædonibus, ſicut Sabino quoque placuit. *l. 36. §. ult. ff. eod.*

V.

5. They ought to reimburſe one another the Intereſt of Money which has been advanced.

If an Heir or Executor has laid out Money either neceſſarily or to advantage, on the Affairs of the Inheritance, he ſhall recover it, together with the Intereſt due from the time that he advanced it[m].

[m] Sumptuum quos unus ex hæredibus bonâ fide fecerit, uſuras quoque conſequi poteſt à cohærede, ex die moræ, ſecundum reſcriptum Imperatorum Severi & Antonini. *l. 18. §. 3. ff. fam. erciſc.* Si quid unus ex ſociis neceſſariò de ſuo impendit in communi negotio, judicio ſocietatis ſervabit, & uſuras, ſi fortè mutuatus ſub uſuris, dedit. Sed etſi ſuam pecuniam dedit, non ſine cauſa dicetur, quòd uſuras quoque percipere debeat. *l. 67. §. 2. ff. pro ſocio. l. 52. §. 10. eod.*

The condition of Co-heirs ought to be in this reſpect the ſame with that of Partners. See the eleventh Article of the fourth Section of Partnerſhip, and the fourth Article of the ſecond Section of thoſe who have, *&c.*

We have put down in the Article, that the Heir or Executor recovers the Intereſt of what he lays out neceſſarily, or to advantage: altho' it is ſaid in the firſt of the Texts cited on this Article, that if the Heir has disburſed any thing honeſtly and fairly, he ſhall have the Intereſt of it. For it may happen, that an imprudent Heir may lay out honeſtly fooliſh Expences. Thus the honeſty and integrity of the Heir ought to be reduced to Expences which it is juſt to allow; that is to ſay, ſuch as are neceſſary or profitable.

We have likewiſe ſaid in the Article, that the ſaid Intereſt is due from the time that the Money was advanced, altho' it be ſaid in the ſame Text, that it is due from the time of the delay, ex die moræ. *For this Intereſt is due to this Heir, in the ſame manner as to a Partner, as has been ſaid in the eleventh Article of the fourth Section of Partnerſhip, and the reciprocal honeſty and integrity which Co-heirs owe to one another demands this mutual Juſtice among them.*

VI.

6. They ought to bring into the Maſs of the Inheritance the things which ought to be brought in.

In the caſes where the Co-heirs may have any Goods which ought to be brought in into the Maſs of the Inheritance, they are obliged every one of them to bring in reciprocally all the Goods which they have of this kind, in order to augment thereby the Maſs of the Inheritance, and that they may be comprized in the Partition, according to the Rules of this matter explained in their proper place[n].

[n] *See touching this matter of bringing in Goods into the Maſs of the Inheritance the fourth Title of the ſecond Book. See the thirteenth Article of the fifth Section, and the fourth Article of the firſt Section of Partitions.*

VII.

7. One Heir cannot make any Changes without the conſent of the others.

Whilſt the Goods of the Inheritance remain undivided, none of the Co-heirs can make any change in them, againſt the will, or without the knowledge of the others; and much leſs can he alienate them. And any one of them that does not approve of the change, or alienation, may hinder it[o]; unleſs the ſame ſhould be neceſſary for the common good. As if any neceſſary Repairs were to be made, or things to be ſold which could not well be preſerved from periſhing. For in theſe caſes the Judge would have no regard to the unreaſonable oppoſition of a Co-heir[p].

VIII.

8. Engagement to come to a Partition. We may reckon among the Engagements which precede the Partition, that very Engagement which obliges the Heirs to come to a Partition, when any one of them demands it; for each of them has a right to have ſeparately to himſelf that which may fall to his ſhare of the Goods of the Inheritance, altho' the others ſhould be willing to keep them in common[q].

SECT. XIII.

Of thoſe who are in the place of Heirs or Executors, altho' they are not really ſo.

THere are, properly ſpeaking, only two kinds of Heirs, thoſe to whom the Law gives the Succeſſion, and thoſe who are called to it by a Teſtament: and the name of Heir is given only to thoſe who ſucceed by one or other of theſe two ways. But there are other Titles which tranſmit all the Goods of a perſon after his death to other kinds of Succeſſors, or rather Poſſeſſors, who altho' they are not Heirs, have nevertheleſs the ſame Rights, and are ſubject to the ſame charges. This ſhall be the ſubject matter of this Section.

The CONTENTS.

1. *The Exchequer is in the place of Heir to the Goods of a Condemned Perſon.*
2. *And to the Eſtates of Aliens, or Foreigners.*
3. *And of Baſtards.*
4. *And of thoſe who have no Relations.*
5. *All theſe ſorts of Goods go to the King with their burdens.*
6. *The univerſal Donee is in place of Heir.*
7. *The Purchaſer of the Inheritance is in the place of Heir.*
8. *The Curator to a vacant Succeſſion repreſents the Heir.*

I.

1. The Exchequer is in the place of Heir to the Goods of a condemned perſon. ALL the Goods of perſons condemned to Death, or to other Puniſhments which imply Forfeiture of Goods, accrue to the King, and he is in place of univerſal Succeſſor; but the quality of Heir does not ſuit with him. For whereas the Eſtate does not paſs to the Heir but by the death of the perſon to whom he ſucceeds; Forfeiture is a Title which deprives the condemned perſon of his Eſtate before his death, and appropriates it to the King, as exerciſing the Sovereign Authority of Juſtice, and the Rights which appertain to it. And the Lords of Mannors who have the Right of Forfeiture within their own Lands, have it only as an Acceſſory to the Right of Juſtice; and they are not lookt upon as Heirs, but become Maſters of the forfeited Goods[a].

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[o] Sabinus in re communi neminem dominorum jure facere quicquam, invito altero, poſſe. Undè manifeſtum eſt prohibendi jus eſſe. In re enim pari, potiorem eſſe cauſam prohibentis, conſtat. *l.* 28. *ff. comm. divid.*

[p] Alienationes poſt judicium acceptum interdictæ, dumtaxat voluntariæ, non quæ vetuſtiorem cauſam, & originem juris habent neceſſariam. *l.* 13. *ff. fam. erciſcund.*

Ne in totum diminutio impedita, in aliquo etiam utilitates alias impediat. *l.* 5. *ff. de hæred. pet.* Sed & res tempore perituras permittere debet prætor diſtrahere. *d. l. in f. pr.* See the ſixth, ſeventh, eighth, ninth, and tenth Articles of the ſecond Section of thoſe who happen to have any thing in common together, where other Rules on the ſame ſubject are explained.

[q] Arbitrium familiæ erciſcundæ vel unus petere poteſt. Nam provocare apud judicem vel unum hæredem poſſe palam eſt. Igitur & præſentibus cæteris, & invitis poterit vel unus arbitrium poſcere. *l.* 34. *ff. fam. erciſc.* See the eleventh Article of the ſecond Section of thoſe who happen to have any thing in common together.

[a] Damnatione bona publicantur, cùm vita adimitur, aut civitas. *l.* 1. *ff. de bon. dam.* See the Preface to this Second Part, N°. XIV.

Forfeiture had not the ſame effect by the Roman *Law that it has by our Uſage in* France. *For according to our Uſage the Children of thoſe perſons whoſe Goods are forfeited do not ſucceed to them, nor have they any ſhare in their Goods. But by the* Roman *Law they were allowed a ſhare of them. Which was founded on Motives of Equity and of Humanity, that the Children might not be puniſhed for the crime of their Fathers, in which they had no hand, and that they might not be deprived of a Succeſſion which Nature deſtined for them, nor be reduced to a neceſſity which might have fatal conſequences. Which is particularly pointed at by theſe words of a Law,* Cùm ratio naturalis, quaſi lex quædam tacita liberis parentium hæreditatem addiceret, velut ad debitam ſucceſſionem eos vocando, propter quod & in jure civili ſuorum nomen eis indictum eſt: ac ne judicio quidem parentis, niſi meritis de cauſis ſummoveri ab ea ſucceſſione poſſunt: æquiſſimum exiſtimatum eſt eo quoque caſu quo propter pœnam parentis aufert bona damnatio, rationem haberi liberorum, ne alieno admiſſo, graviorem pœnam luerent, quos nulla contingeret culpa: interdum

in ſummam egeſtatem devoluti. Quod cum aliqua moderatione definiri placuit, ut qui ad univerſitatem venturi erant, jure ſucceſſionis ex ea portiones conceſſas haberent. *l. 7. ff. de bon. dam. It is not neceſſary to draw a parallel here between the* Roman *Law and the Law of* France *in this matter, that being no part of the deſign of this Book. We ſhall only obſerve, that there are ſome Cuſtoms in* France *where Confiſcations do not take place.*

II.

2. And to the Eſtates of Aliens, or Foreigners. The Goods of Foreigners who die without being naturalized, and who leave behind them no lawful Heirs born in *France*, or Naturalized, who are capable of ſucceeding to them, belong to the King, by vertue of the Right which he has of ſucceeding to the Eſtates of Aliens[b]. And he takes the ſaid Goods, not as Heir, but as Maſter or Owner of Goods to which no perſon can have any right.

[b] *See the ninth Article of the ſecond Section of this Title, and the eleventh Article of the ſecond Section of Perſons.*

See the third Article of the fourth Section of this Title, and the remark that is there made on it.

III.

3. And of Baſtards. Baſtards who die without Children lawfully begotten, and without making a Will, having no Heirs, their Eſtates for this reaſon belong to the King, and he ſucceeds to them, not as Heir, but as poſſeſſing as Maſter an Eſtate which cannot paſs to any Succeſſor[c].

[c] *See the eighth Article of the ſecond Section of this Title, and the third Article of the firſt Section of Perſons.*

What is ſaid in this Article of the King's ſucceeding to Baſtards, is to be underſtood likewiſe of the Lords of Manners within the bounds of their reſpective Lands.

IV.

4. And of thoſe who have no Relations. Thoſe who die without Deſcendants or Aſcendants, and without any Relations either by Father or Mother, and who have not diſpoſed of their Eſtates by Will; they dying without Heirs, their Eſtates belong to the King by vertue of the Right which he has to ſucceed to all perſons who die without Heirs or Executors[d].

[d] Scire debet gravitas tua, inteſtatorum res, qui ſine legitimo hærede deceſſerint, fiſci noſtri rationibus vindicandas. *l. 1. C. de bon. vac. & de inc.*

Vacantia mortuorum bona tunc ad fiſcum jubemus transferri, ſi nullum ex qualibet ſanguinis linea, vel juris titulo legitimum reliquerit inteſtatus hæredem. *l. 4. eod.*

What is ſaid in this Article concerning the King's Right to the Succeſſions of thoſe who die without Heirs or Executors, is likewiſe to be underſtood of Lords of Manors within the bounds of their Lands.

It is neceſſary to remark on this Article what has been ſaid concerning the Succeſſion of the Husband to the Wife, and of the Wife to the Husband, in default of Relations, in the Preface to this Second Part, Nº. XI. *and what ſhall be ſaid on the ſame ſubject in the third Section of the third Title of the ſecond Book, that when there is no Teſtament, and where the deceaſed has left no Relations, the Husband ſucceeds to the Wife, and the Wife to the Husband, and exclude the Exchequer.*

It is to be obſerved likewiſe on the ſubject of Succeſſions for want of Relations, that there are ſome Cuſtoms in France, *where upon failure of Relations by one Stock, the Lord of the Manner is preferred to the Relations of the other Stock; ſo that in thoſe Cuſtoms thoſe who have only Effects which they have inherited of one Stock, and leaving behind them only Relations of the other Stock, die without Heirs.*

V.

5. All theſe ſorts of Goods go to the King with their burdens. Theſe four ways by which Eſtates are acquired to the King, to wit, Forfeiture, Succeſſion to Aliens, to Baſtards, and to thoſe who die without Heirs, have all of them this in common, that as they tranſmit all the Goods to the King, ſo he is in the place of Univerſal Succeſſor, and the ſaid Goods remain ſubject to all the debts, and to the other charges[e].

[e] Si, ut proponis, bona ejus qui tutelam tuam adminiſtrabat ſententiam paſſi, ad fiſcum ſunt devoluta, procuratorem noſtrum adire cura. Qui, ſi quid jure poſci animadverterit, non negabit. *l. 4. C. de bon. proſcr. ſeu damn.*

When Eſtates devolve to the Crown by any of the ways explained in this Article, they belong either to thoſe who have a Mortgage on the King's Demeſnes, or to thoſe who farm them, or in caſe there be neither Mortgagees, nor Farmers, who can claim any right to the ſaid Eſtates, the King uſually makes Grants of them, which according to the Ordinances are always made upon this condition, that the Grantees ſhall acquit all the charges. See the Ordinance of Charles VII. *of the thirtieth of* January, 1455. Vid. lib. 1. & 2. C. de petit. bon. ſubl.

VI.

6. The univerſal Donee is in place of Heir. We may reckon among the number of thoſe who are in the place of Heirs, altho' they have not that quality, univerſal Donees, that is, thoſe to whom any perſon makes over by Deed of Gift in his life-time all the Goods which he poſſeſſes at preſent, or ſhall afterwards acquire. For theſe Donees having all the Goods, they are bound for all the Charges by the effect of their Title. But the name of Heir is not applicable to them, becauſe the Goods which the Donor poſſeſſed at the time of the Donation, did from that moment belong to them irrevocably, and the Donor could not alienate them. And altho' he might diſpoſe of his other Goods which he acquired afterwards, by Alienations which he was at liberty to make in his life-time, yet he could not leave them by Will to other perſons. Thus, it is as Donees that they ſucceed to the Goods, and not as Heirs[f].

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[f] *See the eighth Article of the firſt Section of Donations, and the thirty fifth Law,* §. 4. Cod. de don. *which is there cited, and which approves of univerſal Donations of all the Goods.* Sed & ſi quis univerſitatis faciat donationem, ſive beſſis, ſive dimidiæ partis ſuæ ſubſtantiæ, ſive tertiæ, ſive quartæ, ſive quantæcunque, vel etiam totius, &c. *This Law has raiſed a doubt, whether by the* Roman *Law one can make a Donation of the Goods which he ſhall afterwards acquire, becauſe there can be no delivery of them, as there may be of Goods which one has in his preſent Poſſeſſion; and this might be given likewiſe as another reaſon for it, that by the* Roman *Law one cannot diveſt himſelf of the liberty of making a Will, by an irrevocable inſtitution of an Heir, not even in favour of Marriage.*

Pactum quod dotali inſtrumento comprehenſum eſt, ut ſi pater vita fungeretur, ex æqua portione ea quæ nubebat cum fratre, hæres ſui patris eſſet, neque ullam obligationem contrahere, neque libertatem teſtamenti faciendi mulieris patri potuit auferre. l. 15. C. de pactis. *But according to the Uſage in* France, *one may name an univerſal Heir by an Inſtitution in a Contract which cannot be revoked, as has been already mentioned in the Preface,* N°. X. *And one may likewiſe give all his Goods which he enjoys at preſent, or ſhall acquire for the future, by a Donation that is to have its effect in his life-time, and is irrevocable, provided the Donor reſerve to himſelf an Uſufruct, or ſomething whereupon to ſubſiſt. For it would be contrary to Equity and Humanity, that he ſhould be ſtript of all. Thus the univerſal Donee may, after the death of the Donor, take poſſeſſion of all the Goods in the ſame manner as the Heir. But becauſe he who has made a Donation of all his Goods preſent and to come, may alienate the Goods which he has acquired ſince the Donation, and contract new debts; it is but juſt, that after the death of the Donor, the Donee ſhould be at liberty to content himſelf with the Goods which the Donor had at the time of the Donation, and to bear the Charges thereof which were due at that time, and to renounce the Goods acquired by the Donor after the Donation, and by that means to free himſelf from the debts and charges contracted afterwards. For which reaſon it is, that in this caſe an univerſal Donation of all ones Goods preſent and to come, is diſtinguiſhed into two Donations: one, of all the Goods which the Donor poſſeſſes at the time of the Donation; and the other, of thoſe Goods which the Donor may acquire afterwards. Which diſtinction is commonly founded on this, that in Stipulations which contain ſeveral Sums, or ſeveral Things, there are as many Stipulations as there are Sums or Things;* [a] *for it is certain, that he who has ſtipulated from a Debtor things of ſeveral kinds, may demand only ſuch of them as he pleaſes. But this Maxim does not prove, that all ſorts of Covenants may be divided; and if this diviſion ſhould be prejudicial to the intereſt of one of the Parties, it would be neceſſary, according to another Rule, either to execute the whole Covenant, or to break it intirely. Becauſe when there is an Obligation on both ſides, the mutual Engagements ought to ſubſiſt* [b]. *Thus we may add as more particular reaſons why the Donation of Goods which the Donor is in preſent poſſeſſion of ought to ſubſiſt, firſt, becauſe the ſaid Donation is pure and ſimple by the Contract, and that the Donation of Goods to be acquired implies a condition that the Donor ſhall afterwards acquire Goods; which he cannot be ſaid to do, if he acquires no more than what is neceſſary to pay the Debts; for, properly ſpeaking, that is only to be called Goods which remains after the debts are paid. And in the ſecond place, it would not be juſt that the Donor ſhould have it in his power to annul the Donation by contracting Debts. Which has been a motive for ratifying the Donation of the Goods which were in the poſſeſſion of the Donor when he gave them away; in which there is no injury done to the Creditors, who have contracted only after the Donation, which they ought to have known of. But if the Donee has taken poſſeſſion of the Goods after the death of the Donor without making an inventory of them, he cannot afterwards divide the Donation: and his caſe is the ſame as if he were Heir purely and ſimply.* See as to the diviſion of an Act, the Remark on the nineteenth Article of the fifth Section of Teſtaments.

[a] Scire debemus in ſtipulationibus, tot eſſe ſtipulationes quot ſummæ ſunt, totque eſſe ſtipulationes quot ſpecies ſunt. *l.* 29. *ff. de verb. oblig.*

[b] *See the ſeventh Article of the ſecond Section of Covenants, and the tenth and eleventh Articles of the firſt Section of Reſciſſions.* Non debet ex parte obligationem comprobare, ex parte tanquam de iniqua quæri. *l.* 39. *in f. ff. de oper. lib.* Aut in totum agnoſcere, aut à toto recedere. *l.* 16. *in fin. ff. de admin. & per. tutor.*

VII.

7. The Purchaser of the Inheritance is in place of Heir.

We may likewiſe conſider him as Heir, to whom an Inheritance has been ſold, altho' he is not in effect Heir, not having ſucceeded to the deceaſed, and having the Goods only by the Title of Sale. But as he has the Rights belonging to the Heir, and being in Poſſeſſion of all the Goods, is bound for all the charges, he is therefore in the place of Heir [g].

[g] Sicuti lucrum omne ad emptorem hæreditatis reſpicit, ita damnum quoque debet ad eundem reſpicere. *l.* 2. §. 9. *ff. de hæred. vel act. vend.* See the eighth Article of the firſt Section of the third Title.

VIII.

8. The Curator to a vacant Succeſſion repreſents the Heir.

When a Succeſſion is abandoned, and the Creditors get a Curator to be named, or that a Curator is named to Succeſſions to which there is no apparent Heir, in order to take care of the effects; the ſaid Curators proſecute the Hereditary Actions, and acquit the Charges: and thoſe who have any claim or demand on the Eſtate, bring their Actions againſt them. Thus, they repreſent in this ſenſe the perſons either of the Heirs, if there be any, or of thoſe to whom the Goods may belong [h].

[h] Eiſque curatoribus actiones, & in eos utiles competunt. *l.* 2. §. 1. *ff. de cur. bon. dando.* See the fifteenth Article of the firſt Section of Curators.

Vacant Succeſſions, to which there is no apparent Heir, are put under the Adminiſtration of a Curator, until an Heir ſhall appear, or that the Goods are acquired either to the King, or to the Lord of the Mannor. And Curators are likewiſe named to Eſtates that are abandoned to the Creditors, till the Goods be ſold for payment of the Debts.

◆

TITLE II.

Of HEIRS, *or* EXECUTORS, *with the benefit of an* INVENTARY.

WE have ſeen in the fourth Article of the fifth Section of the firſt Title, that the Heir or Executor, who doubts whether the Succeſſion be advantageous, may take a time to deliberate whether he ſhall accept or refuſe it; and in the fifth Article of the ſame Section, that in caſe of any ſuch doubt the Heir or Executor may without deliberating accept the Succeſſion with the benefit of an Inventary. Which has this effect, that if the Charges appear afterwards to exceed the value of the Goods, he will be accountable only for ſo much as the Goods amount to; whereas if he did not make uſe of the ſaid benefit, he would be ſimply and purely Heir or Executor, and liable to all the Charges of the Inheritance, altho' the Effects ſhould not be ſufficient to acquit them.

Of theſe two ways which the Law has eſtabliſhed for the Security of Heirs or Executors, the firſt that was in uſe at *Rome* was the Right of Deliberating. This Right was invented, as it is ſaid in a Law, both for the intereſt of the dying perſons, that they might have Heirs to ſucceed them, being thereto allured by the liberty which they had to inform themſelves of the ſtate of the Goods and Affairs of the Succeſſion before they ſhould engage in it; and likewiſe for the advantage of the Heirs themſelves, that they might not be obliged to engage themſelves too haſtily in that quality[a].

The method of uſing this Right of Deliberating, was after this manner: The Heir who was called to a Succeſſion, either by a Teſtament, or as having right to ſucceed to one dying Inteſtate, applied to the Magiſtrate for a time to deliberate, and a delay was granted him at leaſt of a hundred days[b]. During that time, the Papers belonging to the deceaſed were communicated to the Heir, and he examined all the debts owing by the deceaſed by the Titles or Deeds of the Creditors, in order to take his meaſures for accepting or refuſing the Succeſſion[c]. And even thoſe who named their Heirs might, by the antient Law, regulate by their Teſtaments a certain time which they gave them to deliberate, after the expiration of which the Heir who did not accept the Succeſſion within that time, was excluded from it[d]; but this was afterwards aboliſhed[e].

This faculty of deliberating was of no other uſe, but to give the Heir time to examine whether it would be for his advantage to accept the Succeſſion, or whether it would be better for him to renounce it: and ſeeing he was obliged after that time to reſolve either to accept the Inheritance purely and ſimply, and to engage himſelf for all the charges, or to renounce it, without being at liberty to chuſe any middle way, there followed from thence ſeveral inconveniences both to the Heirs, and alſo to the Legataries and Creditors. For the Heirs might eaſily be deceived by the appearance of the Goods, the charges whereof might be difficult, or even impoſſible to be known, they being often ſecret and hidden; and they being once engaged in burdenſom Succeſſions, they could not be afterwards at liberty to renounce them. And they might likewiſe be deceived in another manner, by renouncing Succeſſions which might happen to be of greater value, and attended with fewer charges than did appear, which was to the prejudice of the Creditors and Legataries.

Theſe inconveniences laſted for ſeveral Ages, and until the time of *Juſtinian*, without any other remedy beſides that of an Exception which the Emperor *Gordian* had made in favour of Soldiers who happened to be engaged in burdenſom Succeſſions, to whom the ſaid Emperor granted this Privilege, that their own Goods ſhould not be ſubject to the charges of the Succeſſion [f], which was difficult to be put in practice without an Inventary, by which it might appear wherein the Goods of the Succeſſion did conſiſt. And at laſt *Juſtinian* eſtabliſhed in favour of all Heirs, whether they ſucceeded by Teſtament, or to Inteſtates, of whatſoever quality or condition without any diſtinction, a liberty to accept with the benefit of an Inventary the Succeſſion that falls to them, that is to ſay, on condition that they ſhall not be liable to the Charges farther than the value of the Goods, of which an Inventary ought to be made by a publick Officer. Which has this effect, that the Creditors, Legataries, and other perſons concerned, may have knowledge of all the Goods of the Inheritance which are appropriated to them, and that the Heir does not engage his own Eſtate, but obliges himſelf only to account for what is contained in the ſaid Inventary: And by this means full and intire Juſtice is done, both to the Heirs, to the Legatees, and to the Creditors [g].

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[a] Qui interrogatur an hæres, vel quota ex parte ſit —— ad deliberandum tempus impetrare debet. Quia ſi perperam confeſſus fuerit, incommodo afficitur. Et quia hoc defunctorum intereſt, ut habeant ſucceſſores; intereſt & viventium, ne præcipitentur, quamdiu juſtè deliberant. *l. 5. & l. 6. ff. de interrog. in jur. fac.*

[b] Ait prætor, ſi tempus ad deliberandum petet, dabo. *l. 1. §. 1. ff. de jur. delib.*

Pauciores centum dierum non ſunt dandi. *l. 2. eod.*

[c] Ariſto exiſtimat, prætorem aditum, facultatem facere debere hæredi, rationes defuncti ab eo petere, penes quem depoſitæ ſunt, deliberanti de adeunda hæreditate. *l. 28. ff. de acq. vel omitt. hæred.*

Ariſto ſcribit, non ſolùm creditoribus, ſed & hæredi inſtituto prætorem ſubvenire debere: hiſq; copiam inſtrumentorum inſpiciendorum facere, ut perinde inſtruere ſe poſſint, expediet, necne agnoſcere hæreditatem. *l. 5. ff. de jur. delib.*

[d] Titius hæres eſto: cernitoq; in diebus centum proximis quibus ſcies, poteriſq; Niſi ita creveris, exhæres eſto. *V. Ulp. Tit. 22. §. 27. & ſeq.*

[e] *L. 17. C. de jur. delib.*

As the firſt uſe of the benefit of an Inventary is to give the Heir or Executor the liberty of deliberating, whether he ſhall accept the Succeſſion or not, and of doing it with the greater ſafety, becauſe of the knowledge of the Goods and Charges of the Inheritance, which he may have from the Inventary; ſo this benefit of an Inventary has not aboliſhed the uſe of Deliberating; and *Juſtinian* has reſerved it in the ſame Law by which he has eſtabliſhed this other benefit. Which has this effect, that thoſe who doubt whether it be not more advantagious for them not to accept the Inheritance at all, even with the benefit of an Inventary, rather than to engage themſelves therein, may determine themſelves and take their final reſolution after having deliberated thereon; and that they may likewiſe without deliberating accept the Succeſſion with this benefit, which ſecures their own Eſtates, ſince they do not engage themſelves for more than the value of the Goods. Thus, we may diſtinguiſh in this matter the right to deliberate, and that of uſing the benefit of an Inventary, which ſhall be explained in the two firſt Sections of this Title; and in the third we ſhall explain the effects of the ſaid Benefit.

[*In* England, *all Executors and Adminiſtrators are allowed the benefit of an Inventary of courſe, and they are ſuppoſed to accept the Succeſſion always under that benefit. So that if they do exhibit an Inventary upon* Oath, *they are no farther accountable than for what is contained in the ſaid Inventary; unleſs the Creditors, or Legatees, can prove that there are more Goods belonging to the Succeſſion, than what are ſet down in the Inventary; in which caſe the Executors or Adminiſtrators will be obliged to charge themſelves therewith. But if they refuſe to bring in an Inventary, when they are lawfully required ſo to do, they are chargeable with all the Debts and Legacies, altho' there ſhould not be Effects ſufficient to pay them. For in this caſe, the Law preſumeth that there is enough to pay every body, and that the Executor or Adminiſtrator doth fraudulently ſubſtract the ſame.* Swinburn of Wills, Part 3^d^, §. 17.]

SECT. I.

Of the Right to Deliberate.

The CONTENTS.

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7. *Many Heirs ſucceſſively have each of them a Right to deliberate.*
8. *The Heir who dies while he is deliberating, tranſmits his Right to his Succeſſors.*

I.

1. The Heir may deliberate.

THE Heir, or Executor, who being ignorant of the Charges of the Inheritance is afraid to engage himſelf therein, may take the time allowed by Law for deliberating, before he declares whether he will accept the Succeſſion, or not [a].

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[f] *L. ult. in princip. C. de jur. delib.*

[g] *See the ſecond Section of this Title.*

[a] Illud ſciendum eſt nonnunquam ſemel, nonnunquam ſæpius diem ad deliberandum datum eſſe: dum prætori ſuadetur tempus quod primùm aditus præſtituerat, non ſuffeciſſe. *l. 3. ff. de jure delib.* Ne quis nos putaverit antiquitatis penitus eſſe contemptores, indulgemus quidem (hæredibus) petere deliberationem, vel à nobis, vel à noſtris judicibus. Non tamen amplius ab imperiali quidem culmine uno anno à noſtris verò judicibus, novem menſibus. *l. ult. §. 13. in f. C. eod.*

By the Ordinance of 1667, in the Title of Delays for deliberating, the Heir has three Months from the time that the Succeſſion is open, to make the Inventary, and forty days thereafter to deliberate.

II.

2. *He informs himſelf by the Inventary.*

To put the Heir, or Executor, in a condition to deliberate, it is neceſſary that he ſhould have the means of informing himſelf of the Goods and Charges of the Succeſſion; and that he and all other perſons concerned may have this information, the Judge directs an Inventary to be made of all the Deeds and Writings belonging to the Inheritance, which are communicated to them[b].

III.

3. *Curators named to the Succeſſion, while the Heir is deliberating.*

If during the time that the Heir is deliberating, there ſhould fall out ſome Affair in which it ſhould be neceſſary to commence a Suit for the preſervation of ſome right belonging to the Inheritance, or to defend it againſt ſome claim or pretenſion, and that the matter could not admit of delay; it would be neceſſary to name a Curator to the Inheritance, in order to proſecute its Rights, and to defend it, until the Heir by accepting the Succeſſion, may be in a capacity to act himſelf[c].

IV.

4. *Sale of things which are periſhable.*

If in the ſame caſe when the Heir delays to accept the Succeſſion, or to renounce it, there be Goods belonging to the Inheritance, which by being kept are in hazard of periſhing, or being damaged, or diminiſhing in their value, ſuch as Fruit, Grain, Liquors, or things, which it would be more advantageous to ſell than to keep, ſuch as Horſes or other Beaſts that are not neceſſary, and which would occaſion an Expence; the Heir, or Curator of the Succeſſion might ſell and diſpoſe of thoſe kinds of things, in order to preſerve the Money that is got for them in the Inheritance, obſerving in the ſaid Sales the forms preſcribed in ſuch caſes[d].

V.

5. *Acquitting the charges that are preſſing.*

If there were any debts due from the Succeſſion, which it might be neceſſary to pay off ſpeedily, the Monies ariſing from the Sales that are to be made, according to the Rule explained in the foregoing Article, ſhould be imployed for that purpoſe, or things which are the leaſt neceſſary might be ſold, or Debts that are owing to the Eſtate might be called in, in order to clear off the ſaid Demands, or to ſatisfy the other Expences that are equally neceſſary, ſuch as the Funeral Charges, the Tillage of the Lands, neceſſary Repairs, and others of the like nature, according as the Judge ſhould direct[e].

VI.

6. *Alimony to the Children during the time that they deliberate.*

If the Heirs are Infants who deliberate concerning the Inheritance of their Father, Mother, or other Aſcendant, and they have no other means of Subſiſtence during the time that they have for deliberating, they may in the mean while obtain from the Judge a moderate Proviſion out of the Goods of the Succeſſion for their Maintenance[f]. For there is leſs inconvenience in taking a Proviſion of this nature out of the Eſtate, altho' the Children ſhould renounce the Succeſſion, than there would be in depriving them of it during the delay which the Law allows them. And if it ſhould happen to be in the caſe of a Succeſſion of a Father, on which the Children ſhould have ſome demand in right of their Mother, who is already deceaſed, this Proviſion being deducted out of their demands would ſtill admit of leſs difficulty.

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[b] *See the Texts quoted under the letter* c, *in the Preamble to this Title.*

As it is only by the means of the Inventary that the Heir can come at this knowledge, the Ordinance *cited on the foregoing Article has made proviſion accordingly, as has been already obſerved, by making the time allowed for deliberating to commence only after the Inventary is made.*

[c] Dum deliberant hæredes inſtituti adire, bonis à prætore curator datur. *l.* 3. *ff. de curat. fur.* See the fifteenth Article of the firſt Section of Curators.

Seeing the time allowed to the Heir for deliberating is much ſhorter by the Ordinance *quoted on the firſt Article, than it was by the* Roman *Law, and that the delay for deliberating runs only from the time that the Inventary has been made; we muſt underſtand what is ſaid in this and the following Articles, not only of what happens during the delay for deliberating after the Inventary is made, but likewiſe of the time that the Inventary is making, and before it be ſet about.*

[d] Si major ſit hæreditas, & deliberat hæres, & res ſunt in hæreditate quæ ex tractu temporis deteriores fiunt, adito prætore, poteſt is qui deliberat, ſine præjudicio, eas juſtis pretiis vendere: qui poſſit etiam ea quæ nimium ſumptuoſa ſint, veluti jumenta aut venalitia, item ea quæ mora deteriora fiant, vendere. *l.* 5. §. 1. *ff. de jure delib.*

Theſe Sales are made by Cant or Auction, and by permiſſion of the Judge; unleſs it be that the inconſiderableneſs of the things that are ſold, and the conſent of the parties intereſted, may excuſe the charges of theſe Formalities. See the following Article.

[e] Igitur ſiquidem in hæreditate ſit vinum, oleum, frumentum, numerata pecunia: inde fieri debebunt impendia: ſi minus à debitoribus hæreditatis exigenda pecunia. Quod ſi nulli ſunt debitores, aut judicem provocent, venire debent res ſupervacuæ. *l.* 6. *ff. de jur. delib.*

In cauſæ ergo cognitione hoc vertetur, an juſta cauſa ſit, ut diminuere prætor permittat. Ergo & funeris cauſa deminui permittet: item eorum quæ ſine piaculo non poſſunt præteriri: veſcendi gratia æque deminui permittet. Sed & ubi urget ex aliis quoque cauſis permittere eum oportet. Ut ædificia ſarciantur, ne agri inculti ſint, ſi qua pecunia ſub pœna debetur, ut reſtituatur; ne pignora diſtrahantur. Ex aliis quoque juſtis cauſis prætor aditus deminutionem permittet. Neque enim ſine permiſſu ejus debet deminutio fieri. *l.* 7. *in f. eod. d. l.* 7. *in princip. l.* 5. §. 1. *in f. eod.*

[f] Filius dum deliberat alimenta habere debet ex hæreditate. *l. 9. ff. de jur. delib.* Ut ex iiſdem (bonis) ſi aliquâ alia facultas eſſe non poterit, tantum litis ſumptus & alimoniæ homini ſubminiſtretur, quantùm moderato judicis arbitrio fuerit æſtimatum. *l. ult. C. de ord. cogn. V. l. 51. ff. de hæred. pet.*

Altho' theſe words of the ſecond text quoted on this Article, and the fifty firſt Law, ff. de hæred. pet. *relate to other matters, yet we may apply here that which concerns the moderating of theſe ſorts of Proviſions, the Equity whereof is founded on the neceſſity of maintaining the Children; but which ought to be as little burdenſome to the Creditors as is poſſible.*

We muſt obſerve upon this Article, that the Proviſions mentioned therein have fewer inconveniences according to the preſent Uſage in France, *than they had in the* Roman *Law, by which the time for deliberating was much longer.* See the Remark upon the firſt Article.

VII.

7. Many Heirs ſucceſſively have each of them a right to deliberate.

If ſeveral perſons were called to the ſame Succeſſion, one in default of the other, as if a Teſtator having inſtituted an Heir, and foreſeen the caſe, either that the ſaid Heir ſhould die before him, or that he would not accept the Succeſſion, had ſubſtituted another in his place: or that the Teſtamentary Heir, or the Heir to an Inteſtate, renouncing the Succeſſion, the next in degree of Kindred ſhould be willing to accept it; in all theſe caſes the Heir, who is called to the Succeſſion in default of another, would have the ſame right to deliberate, as he had in whoſe place he ſucceeds[g]. For the time granted for deliberating cannot begin to run with reſpect to each Heir, but after that he is called to the Succeſſion.

[g] Si plures gradus ſint hæredum inſtitutorum, per ſingulos obſervaturum ſe, ait prætor id quod præfiniendo tempore deliberationis edidit. Videlicet, ut à primo quoque ad ſequentem tranſlata hæreditate, quam primùm inveniat ſucceſſorem, qui poſſit defuncti creditoribus reſpondere. *l. 10. ff. de jur. delib.* See the Title of vulgar Subſtitutions.

We muſt not confound the condition of him who ſucceeds to an Heir, purely and ſimply as his Heir, with the condition of Heirs who are ſubſtituted one to the other, or who take the place of a firſt Heir, to ſucceed in his default. For whereas theſe have the right to deliberate whether they ſhall accept the ſame Inheritance in the ſame manner as the Heir had, in whoſe place they ſucceed; he who becomes pure and ſimple Heir to another who had accepted the Inheritance, has not right to deliberate, whether he ſhall accept that Inheritance or not; but it goes to him with the ſame Engagements which the perſon was under who had accepted it, and to whom he ſucceeds.

VIII.

8. The Heir who dies while he is deliberating, tranſmits his right to his Succeſſors.

If the Heir who was deliberating happens to die before he has declared his mind, he tranſmits his Right to his Heir, or Executor, who may deliberate likewiſe whether he ſhall accept, or refuſe the Succeſſion that was fallen to the deceaſed[h].

[h] Sancimus ſi quis vel ex teſtamento, vel ab inteſtato vocatus deliberationem meruerit: vel ſi hoc quidem non fecerit, non tamen ſucceſſioni renuntiaverit, ut ex hac cauſa deliberare videatur: ſed nec aliquid geſſerit, quod aditionem, vel pro hærede geſtionem inducat, prædictum arbitrium in ſucceſſionem ſuam tranſmittat. *l. 19. C. de jur. delib.* See concerning this Right of Tranſmiſſion the tenth Section of Teſtaments.

SECT. II.

How one becomes Heir or Executor with the benefit of an Inventary.

The CONTENTS.

1. *One may become Heir, with the benefit of an Inventary, without deliberating.*
2. *The Inventary ought to be made according to form.*
3. *It ought to take in all the Goods.*
4. *The omiſſions may be ſupplied.*
5. *Puniſhment of diverting the Effects.*

I.

1. One may become Heir with the benefit of an Inventary, without deliberating.

EVery Heir, or Executor, who doubts whether the Succeſſion be advantageous, or not, and who is afraid to engage himſelf in it, may before hand demand that an Inventary be made of the Effects, and of the Deeds and Writings belonging to the Inheritance; and without taking time to deliberate, he may declare that he accepts the Succeſſion with the benefit of an Inventary. And by this means he will be liable for the Debts and Charges of the Inheritance, only in ſo far as the Goods belonging to the Deceaſed ſhall be ſufficient to acquit them, and his own Eſtate will not be chargeable therewith[a].

[a] Sin autem dubius eſt, utrumne admittenda ſit, necne defuncti hæreditas, non putet ſibi eſſe neceſſariam deliberationem: ſed adeat hæreditatem, vel ſeſe immiſceat: omni tamen modo inventarium ab ipſo conficiatur. *l. ult. §. 2. C. de jur. deliber.* Ut in tantum hæreditariis creditoribus teneantur, in quantum res ſubſtantiæ ad eos devolutæ valeant. *d. l. §. 4.* Et nihil ex ſua ſubſtantia penitus hæredes amittant, ne dum lucrum facere ſperant, in damnum incidant. *d. §. 4.*

II.

2. The Inventary ought to be made according to form. The Creditors, the Legataries, and all other perſons who have any claim on the Inheritance, having an intereſt in this Inventary, the Heir or Executor cannot make it by himſelf, but it ought to be made by a publick Officer, and according to the form which the Law and Uſage have eſtabliſhed in this matter[b].

[b] Hoc inventarium—— modis omnibus impleatur ſub præſentia tabulariorum, cæterorumque qui ad hujuſmodi confectionem neceſſarii ſunt. *l. ult. §. 2. C. de jur. delib.*

According to the Uſage received in France, *the Inventary ought to be made by Authority of Juſtice, after having ſealed up the places where the Writings, and other effects belonging to the Inheritance are kept.*

III.

3. It ought to take in all the Goods. This Inventary ought to contain all the Goods of the Succeſſion that were ſealed up by Order of the Judge, or are diſcovered by perſons who have any knowledge thereof. And the Heir or Executor ought likewiſe to declare what he knows of them, and to ſwear that he does not detain or conceal any effects belonging to the Inheritance[c].

[c] Subſcriptionem ſupponere hæredem neceſſe eſt, ſignificantem & quantitatem rerum. *Et quod nulla malignitate circa eas ab eo facta, vel facienda, res apud eum remaneant.* l. ult. §. 2. C. de jur. delib.

By the uſage in France, *not only is the Heir obliged to give in a declaration upon* Oath, *but likewiſe the Servants of the deceaſed, are obliged to declare upon* Oath *what they know, touching the effects of the deceaſed.*

IV.

4. The omiſſions may be ſupplied. If the Creditors, or Legataries, and other perſons concerned ſhould diſcover that things have been omitted in the Inventary, or ſhould any ways miſtruſt it, they will be admitted to prove the omiſſions and frauds which they ſhall alledge[d].

[d] Licentia danda creditoribus, ſeu legatariis, vel fideicommiſſariis, ſi majorem putaverint eſſe ſubſtantiam à defuncto derelictam quàm hæres in inventario ſcripſit, quibus voluerint legitimis modis quod ſuperfluum eſt approbare. *l. ult.* §. 10. *C. de jur. delib.* Ut undique veritate exquiſita, neque lucrum, neque damnum aliquod hæres ex hujuſmodi ſentiat hæreditate. *d.* §.

V.

5. Puniſhment of diverting the Effects. If the Heir or Executor had ſecretly conveyed away any of the effects belonging to the Succeſſion, or failed to diſcover what he knew thereof; this unfair dealing would be puniſhed in ſuch a manner as the quality of the fact might deſerve according to the circumſtances[e].

[e] Illo videlicet obſervando ut ſi ex hæreditate aliquid hæredes ſurripuerint, vel celaverint, vel amovendum curaverint, poſtquam fuerint convicti, in duplum hoc reſtituere, vel hæreditatis quantitati computare, compellantur. *l. ult.* §. 10. *in f. C. de jur. delib.*

This penalty of the double is not in uſe in France; *but the Heir who ſhould be found guilty of ſuch unfair practices, would be proceeded againſt according to the circumſtances. And if they ſhould appear to be ſuch as to render the Heir unworthy of the benefit of an Inventary, he might be debarred of it.*

SECT. III.

Of the effects of the Benefit of an Inventary.

The CONTENTS.

1. *The Heir with the benefit of an Inventary is bound only for the value of the Goods.*
2. *The Legacies are reduced according to the Goods.*
3. *The Heir who is a Creditor preſerves his debt.*
4. *And recovers his Expences.*
5. *He ought to ſell the Moveables.*
6. *He is only bound to render an account.*
7. *He is not obliged in paying the Creditors, to obſerve their order.*
8. *He may pay off the Legataries, if the Creditors do not appear.*
9. *The Lands which are given in payment, remain ſubject to the Mortgages.*

I.

HE who having got an Inventary made according to form, declares himſelf Heir with the benefit of an Inventary, will not be liable for the Charges of the Succeſſion but in ſo far as the value of the Goods belonging to the deceaſed amounts to, and his own Eſtate will not be any ways chargeable therewith[a], as has been ſaid in the firſt Article of the ſecond Section. *1. The Heir with the benefit of an Inventary is bound only for the value of the Goods.*

[a] In tantum hæreditariis creditoribus teneantur, in quantum res ſubſtantiæ ad eos devolutæ valeant. *l. ult.* §. 4. *C. de jur. delib.* Et nihil ex ſua ſubſtantia penitus hæredes amittant, ne dum lucrum facere ſperant, in damnum incidant. *d.* §. 4.

II.

If the Heir or Executor who has the benefit of an Inventary, was burdened with Legacies exceeding the ſum which one is allowed to diſpoſe of by Will[b], he might get them to be reduced in proportion to the Goods which remain clear, after the Debts and other Charges are deducted[c]. *2. The Legacies are reduced according to the Goods.*

[b] *See the third Title of the fourth Book.*

[c] Hæreditatem ſine periculo habeant, & legis falcidiæ adverſus legatarios utantur beneficio. *l. ult.* §. 4. C. *de jur. delib.* Bona intelliguntur cujuſque quæ deducto ære alieno ſuperſunt. *l.* 39. §. 1. *ff. de verb. ſignif.*

III.

3. *The Heir who is a Creditor preſerves his Debt.* If this Heir, who has the benefit of an Inventary, was himſelf a Creditor to the deceaſed, his quality of Creditor ſhall not be confounded with the quality of Heir, which makes him Debtor to himſelf; but he ſhall preſerve his right whole and intire, in the ſame manner as the other Creditors, and that with the Mortgages and Privileges which he had for the ſecurity of his Debt.[d]

[d] Si verò & ipſe aliquas contra defunctum habeat actiones non hæ confundantur, ſed ſimilem cum aliis creditoribus habeat fortunam: temporum tamen prærogativa inter creditores ſervanda. *l. ult.* §. 9. *in f.* C. *de jur. delib.*

IV.

4. *And recovers his Expences.* All the Expences which the Heir who has the benefit of an Inventary has been at, whether it be for the Funeral of the deceaſed, for making the Inventary, or for Repairs, and all other neceſſary charges, ſhall be allowed him out of the Goods of the Inheritance which he ſhall have received[e].

[e] In computatione autem patrimonii damus ei licentiam excipere, & retinere quidquid in funus expendit, vel in teſtamenti inſinuationem, vel in inventarii confectionem, vel in alias neceſſarias cauſas hæreditatis approbaverit ſeſe perſolviſſe. *l. ult.* §. 9. C. *de jur. delib.*

V.

5. *He ought to ſell the Moveables.* The Heir who has the benefit of an Inventary, not being bound to diſcharge the Debts but with the Goods of the Inheritance, he ought to ſell the Moveables, as the readieſt means for paying off the Debts[f].

[f] *See the Text quoted on the fourth Article of the firſt Section.*

This Sale ought to be made after the Publications which are neceſſary for bringing in many Buyers, and for preventing the frauds which are uſual in private Sales. And it is ſo order'd by ſome Cuſtoms in France.

VI.

6. *He is only bound to render an Accompt.* When the Heir ſhall pretend that the Goods of the Succeſſion are exhauſted in paying the Debts, Legacies and other Charges, he ſhall be under no farther obligation to thoſe who have any Claim on the Goods of the Succeſſion, than to give an Accompt of them, in which he is to charge himſelf with the Goods according to the Inventary, and to put down in his diſcharge, all the Debts and other Charges which he has acquitted[g].

[g] In tantum hæreditariis creditoribus teneantur, in quantum res ſubſtantiæ ad eos devolutæ valeant. *l. ult.* §. 4. C. *de jur. delib.*

It is only by an Accompt, that the Heir who has the benefit of an Inventary can ſhew that he has imployed the Goods for paying the Debts, and clearing the other Charges.

VII.

7. *He is not obliged in paying the Creditors, to obſerve their Order.* Altho' the Goods of the Succeſſion be not ſufficient to acquit all the Charges, yet the Heir, or Executor, who has the benefit of an Inventary, may pay off the Creditors who come firſt to demand their debts, if there be no Attachment of the Goods, or other hindrance on the part of the other Creditors. For he is not bound to know who are the Creditors, nor in what Order they are ranked. And thoſe who come after all the Goods of the Succeſſion are diſpoſed of to other Creditors, ought to blame themſelves for their delay[h].

[h] Eis ſatisfaciat qui primi veniant creditores. Et ſi nihil reliquum eſt poſteriores venientes repellantur. *l. ult.* §. 4. C. *de jur. delib.*

[*By the Law, in* England, *an Executor or Adminiſtrator, is obliged at his peril, in the payment of the Debts of the deceaſed, to obſerve the legal Order and Rank which the reſpective Creditors have for preference of their Debts before others. The Order which the Law has eſtabliſhed among Creditors is after this manner. The Debts due to the Crown are to have the firſt place of precedence. Next to the Debts of the Crown, are Judgments, or Debts recovered againſt the Teſtator in a Court of Record, to have priority or precedency in payment, as being of a higher nature, or more dignity, than any other. And next unto Debts by Judgment, are thoſe by Recognizance, or by Statute Staple, or Statute Merchant, to be regarded by the Executor or Adminiſtrator. Which Statutes and Recognizances, altho' they make Debts upon record, yet they are accounted to be of a lower nature and leſs dignity than Judgments, becauſe they are begotten but by voluntary conſent of parties; whereas in every Judgment there hath been a courſe and work of Juſtice againſt the Will of the Defendant, as is preſumed, and this in a Court of Juſtice, and the Records of ſuch Judgments are entred in publick Rolls. The Debts which are to be diſcharged in the next place, are thoſe which are due by Specialty or Obligation. And in the laſt place come the Debts without Specialty or Writing. The Executor or Adminiſtrator obſerving this Order eſtabliſhed by Law among the Creditors for the preference of their ſeveral Debts, may pay what Creditors he pleaſes firſt. Swinburn* of Wills, Part 6. §. 16. *Wentworth*'s Office of an Executor, chap. 12.]

VIII.

8. *He may pay off the Legataries, if the Creditors do not appear.* If the Creditors do not appear, the Heir or Executor may pay off the Legacies. But if there ſhould not remain Effects enough to ſatisfy the Creditors, they may oblige the Legataries to give back what they have received. For the Legacies are due only after the Debts are paid[i]. And in ſuch a caſe, greater regard ought to be had to the intereſt

of the Creditors, which is not to loſe what is juſtly due to them, than to the intereſt of the Legataries, which conſiſts only in reaping a Benefit which is to be taken only out of the Goods of the Succeſſion that ſhall remain clear after payment of all the debts[l].

IX.

9. *The Lands which are given in payment remain ſubject to the Mortgages.* If any Creditors had taken in payment Lands or Tenements which were part of the Succeſſion, and that other prior Creditors ſhould happen to appear afterwards; they might exerciſe their Right of Mortgage, if they had any, on the ſaid Lands or Tenements which had been given to the other Creditors: and the Heir who had the benefit of an Inventary would not be bound either in Warranty to thoſe who had taken the ſaid Lands or Tenements in payment, nor for what the other Creditors may come ſhort of in the payment of their debts, farther than to the value of the Goods of the Succeſſion which may remain in their hands[m].

⁂

TITLE III.

In what manner a SUCCESSION is acquired, and how it is renounced.

THE Reader ſees plainly, that theſe words of this Title, *in what manner a Succeſſion is acquired*, do not regard the manner in which one is called to the quality of Heir or Executor: for it has already been ſufficiently explained, that one is made Heir, either by the diſpoſition of the Teſtator, or by the Proviſion of the Law; but they have reſpect only to the manner in which he to whom a Succeſſion is fallen, whether it be by Teſtament, or as Next of Kin to an *Inteſtate*, and who has as yet done no act whereby he accepts that quality, may declare himſelf Heir, if he will make uſe of his Right, and acquire the Goods of the Succeſſion. And theſe other words which follow, *how it is renounced*, are to be underſtood of the ways by which he who is called to be Heir or Executor may ſignify his refuſal of it. For he may either accept of that quality, or renounce it. And ſince he may explain himſelf by ſeveral ways, and that he may likewiſe do ſome acts which would make him Heir, or Executor, altho' he ſhould have no ſuch intention; the different ways in which an Heir, or Executor may carry himſelf with reſpect to the Succeſſion that is fallen to him, whether it be in accepting or renouncing it, ſhall be the ſubject matter of this Title. And in the firſt Section we ſhall explain the acts which engage one in the quality of Heir, or Executor, and which imply the entry to, or acceptance of the Succeſſion. In the ſecond we ſhall ſhew what are the acts which may have ſome relation to the quality of Heir, or Executor, without engaging one in it. The third ſhall be concerning the effects and conſequences of the acceptance of the Inheritance. And in the fourth we ſhall explain what belongs to the Renunciation of the Inheritance.

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[l] Sed etſi legatarii interea venerint, eis ſatisfaciat ex hæreditate defuncti, vel ex ipſis rebus, vel ex earum forſitan venditione. *l. ult. §. 4. in f. C. de jur. delib.*

Sin verò creditores, qui poſt emenſum patrimonium nec dum completi ſunt, ſuperveniant, neque ipſum hæredem inquietare concedantur, neque eos qui ab eo comparaverint, res quarum pretia in legata, vel fideicommiſſa, vel alios creditores proceſſerunt. Licentia creditoribus non deneganda adverſus legatarios venire, vel hypothecis, vel indebiti condictione uti, & hæc quæ acceperint recuperare. Cùm ſatis abſurdum ſit creditoribus quidem jus ſuum perſequentibus legitimum auxilium denegari, legatariis verò qui pro lucro certant, ſuas partes leges accommodare. *d. l. ult. §. 5.*

[l] In re obſcura melius eſt favere repetitioni, quàm adventitio lucro. *l. 41. §. 1. ff. de reg. jur.*

It is hardly poſſible, according to the Uſage in France, *that it ſhould happen that an Heir ſhould pay off Legacies before the Debts. For the benefit of an Inventary is made publick, both by its being entred in the Acts of Court, and by the publick Notice that is given before the Sale of the Moveables, as has been obſerved on the fifth Article. But it may ſo happen that ſome Creditor may have been hindred from bringing in his claim, either by reaſon of his abſence, or for ſome other cauſe, which ought not to be of prejudice to the Heir, who paid the Legacies honeſtly and fairly without any intent to defraud the Creditors.*

[m] Sin verò hæredes res hæreditarias creditoribus hæreditariis, pro debito dederint in ſolutum, vel per dationem pecuniarum ſatis eis fecerint, liceat aliis creditoribus qui ex anterioribus veniunt hypothecis, adverſus eos venire, & à poſterioribus creditoribus ſecundùm leges eas abſtrahere: vel per hypothecariam actionem, vel per condictionem ex lege, niſi voluerint debitum eis offerre. Contra ipſum tamen hæredem (ſecundùm quòd ſæpius dictum eſt) qui quantitatem rerum hæreditariarum expendit, nulla actio extendatur. *l. ult. §. 6. & 7. C. de jur. delib.*

SECT. I.

Of the Acts which engage one in the quality of Heir or Executor.

The CONTENTS.

1. *In what the engagement to the Succeſſion conſiſts.*
2. *One may accept the Succeſſion either by expreſs acts, or otherwiſe.*
3. *What are the Acts of an Heir.*
4. *The Heir who in that quality receives payment of a debt, acts as Heir.*
5. *And if he pays a debt of the Succeſſion.*
6. *If he takes any of the Goods, or reaps the Fruits.*
7. *Altho' he errs in the fact.*
8. *He who diſpoſes of the Inheritance, makes himſelf Heir.*
9. *As alſo he who receives a Sum of Money to renounce it.*
10. *And alſo the Executor who renounces by colluſion with the Heir of Blood.*
11. *And likewiſe he who has imbezzled any of the effects.*
12. *If he imbezzles after having renounced, he is guilty of Theft.*
13. *The Next of Kin being inſtituted by Teſtament, cannot ſtick to the Legal Succeſſion, in prejudice of the Legatees.*
14. *A Minor is relieved againſt any act he has done as Heir.*
15. *If the Minor who is relieved has for his Co-heir one that is of Age, the ſaid Co-heir remains nevertheleſs Heir.*
16. *We muſt add to the foregoing Rules, thoſe of the following Section.*

I.

1. *In what the engagement to the Succeſſion conſiſts.* THE Engagement in the quality of Heir, or Executor, ought to have the ſame effect, as if the Heir or Executor had treated with the deceaſed to whom he ſucceeds, as has been ſaid in its proper place; and it is the ſame thing in effect as if it had been agreed between them, that if the Heir, or Executor would accept that quality, he ſhould have all the Goods of the Succeſſion, and ſhould likewiſe be bound to acquit all the charges[a]. Thus, in order to judge by the acts of the Heir, whether they engage him in this quality or not; we ought to conſider in them the relation which they may have to this intention of the deceaſed, that the Heir by taking the Goods ſhould ſubject himſelf to all the Charges. And according as his Conduct ſhall ſhew that he is willing to fulfil the ſaid intention of the deceaſed, it will prove his engagement, as ſhall be explained by the Rules which follow.

II.

2. *One may accept the Succeſſion either by expreſs acts, or otherwiſe.* According to this firſt Rule, we muſt diſtinguiſh two ſorts of acts which may form the engagement of the Heir to acquit the Charges of the Succeſſion; thoſe which ſignify expreſly his intention to take the Goods, and to engage himſelf for all the Charges, as if he declares that he accepts the Succeſſion[b]: and thoſe which have the ſame effect altho' he do not explain himſelf; as if he takes poſſeſſion of the Goods of the Inheritance, or if he does ſome other act which ſhews that his deſign is to have the Goods[c].

III.

3. *What are the acts of an Heir.* All the acts which an Heir may do in that quality, that is, acting as Heir, oblige him as ſuch, whether it be that he does that which he cannot do but as Heir, or that the act which he does denotes his willingneſs to be Heir. The meaning and uſe of this Rule will better appear from the Articles which follow[d].

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[a] *See the eighth Article of the firſt Section of the firſt Title.*

This kind of Treaty between the deceaſed and his Heir or Executor, is made on the part of the deceaſed in his Teſtament, when there is one, and on the Executor's part in the moment that he accepts the Succeſſion. For the Teſtator explains in his Teſtament his intention to leave his Goods to his Executor, on condition that he ſhall ſatisfy all the Charges; and the Executor, by accepting the Succeſſion, does the ſame thing as if he ſubſcribed to this condition in the Will. And when there is no Teſtament, the Engagement is nevertheleſs the ſame. For the Law which gives the Succeſſion, impoſes on the Heir that is to ſucceed to it, the ſame condition of acquitting the Charges. So that in this caſe, the Heir receiving the Succeſſion from the Law, obliges himſelf in the ſame manner.

We may apply to this Engagement of the Heir, or Executor, to the Charges which are impoſed upon him by the deceaſed, the Uſage of the ancient Roman *Law, by which Teſtaments were made by an imaginary Sale, which the deceaſed made to his Heir.* See the remark on the thirty firſt Article of the ſecond Section of Heirs and Executors in general.

[b] An admiſerit hæreditatem, vel bonorum poſſeſſionem. *l. 4. C. unde legitim. & unde cognat.*

[c] Si avia tua patrem tuum ex duabus unciis ſcripſit hæredem, ex ſola animi deſtinatione pater tuus hæres fieri poterat. *l. 6. C. de jure delib. See the following Articles.*

[d] *See the following Articles.*

IV.

4. The Heir who in that quality receives payment of a debt, acts as Heir.

The Heir who receives that which he has no right to receive but in that quality, does an act which properly belongs to the Heir[e]. As if he receives payment from one that is Debtor to the Inheritance; for by receiving it, he declares his intention to make uſe of his Right of Heir.

[e] Tunc pro hærede geri dicendum eſſe ait, quoties accipit quod citra nomen & jus hæredis accipere non poterat. *l.* 20. §. 4. *in f. ff. de acquir. vel omitt. hæred.*

V.

5. And if he pays a debt of the Succeſſion.

If the Heir makes payment of a debt to one of the Creditors of the Succeſſion, he thereby declares that he accepts the Succeſſion; and engages himſelf to acquit the charges[f], ſince he acknowledges himſelf to owe what he pays, and which he does not owe but as Heir.

[f] Cùm debitum paternum te exolviſſe alleges pro portione hæreditaria, agnoviſſe te hæreditatem defuncti non ambigitur. *l.* 2. *C. de jure delib.* Agnovit judicium defuncti, eo quòd debitum paternum pro hæreditaria parte perſolvit. *l.* 8. *C. de inoff. teſt.*

VI.

6. If he takes any of the Goods, or reaps the Fruits.

If he who is called to an Inheritance takes any of the Goods belonging to it after that it is open, as if he reaps the fruits of any Ground, if he cultivates it, if he farms it out, if he takes any of the Moveables of the Succeſſion, if he ſells them, or diſpoſes otherwiſe of them, and in general, if he takes that which he had no right to take but as Heir, or if he diſpoſes of any of the Goods of the Succeſſion as Maſter and Owner, he makes himſelf thereby Heir[g].

[g] Pro hærede autem gerere quis videtur, ſi rebus hæreditariis tanquam hæres utatur, vel vendendo res hæreditarias, vel prædia colendo, locandove, & quoquo modo voluntatem ſuam declaret vel re, vel verbo de adeunda hæreditate. §. 7. *inſt. de hæred. qual. & diff.* Pro hærede enim gerere eſt pro domino gerere. Veteres enim hæredes pro dominis appellabant. *d.* §. See the Text quoted on the fourth Article.

VII.

7. Altho' he errs in the fact.

The Heir, who has taken poſſeſſion of ſome particular thing which was not part of the Succeſſion, but which he by miſtake thought did belong to it, does even in that an act of Heir. For he declares his intention to accept of that quality, and by that means obliges himſelf to it[h].

[h] Gerit pro hærede qui animo agnoſcit ſucceſſionem. Licèt nihil attingat hæreditarium. Unde & ſi domum pignori datam, ſicut hæreditariam retinuit, cujus poſſeſſio qualis qualis fuit in hæreditate, pro hærede gerere videtur. Idemque eſt & ſi alienam rem ut hæreditariam poſſediſſet. *l.* 88. *ff. de acquir. vel amit. hæred.*

VIII.

8. He who diſpoſes of the Inheritance, makes himſelf Heir.

The Heir who even before he intermeddles any way with the Inheritance, ſells it, or gives it to another, or diſpoſes of it otherwiſe, makes himſelf Heir, and remains bound for all the Charges in the ſame manner as if he had accepted the Succeſſion. For to ſell or diſpoſe of it is to make uſe of it as Maſter[i].

[i] Quamvis hæres inſtitutus hæreditatem vendiderit, tamen legata & fideicommiſſa ab eo peti poſſunt. Et quod eo nomine datum fuerit, venditor ab emptore vel fidejuſſoribus ejus petere poterit. *l.* 2. *C. de legat.* See the eighteenth Article of the firſt Section of Heirs and Executors in general.

Altho' the Text quoted on this Article, ſpeaks only of him who has ſold the Inheritance, yet the diſpoſing of it in any other manner has the ſame effect.

IX.

9. As alſo he who receives a Sum of Money to renounce it.

If he who was called to a Succeſſion receives a Sum of Money, or any other thing, to renounce it, and to let it go to the perſon who has right to ſucceed in his place; he does even by that Renunciation an act of Heir. For by receiving a price for the Succeſſion, he ſells it[l].

[l] Licèt pro hærede gerere non videatur qui pretio accepto prætermiſit hæreditatem, tamen dandam in eum actionem, exemplo ejus qui omiſſa cauſa teſtamenti ab inteſtato poſſidet hæreditatem. Divus Hadrianus reſcripſit. Proinde legatariis, & fideicommiſſariis tenebitur. *l* 2. *ff. ſi quis omiſſ. cauſ. teſtam.* Si pecunia accepta hæres omiſit aditionem, legata & fideicommiſſa præſtare cogitur. *l.* 1. *C. ſi omiſſ. ſit. cauſ. teſt.* See the foregoing Article, and the eighteenth Article of the firſt Section of Heirs and Executors in general.

X.

10. And alſo the Executor who renounces by colluſion with the Heir of Blood.

If the Teſtamentary Heir colluding with the Heir of Blood, had renounced the Succeſſion in order to leave the Eſtate to him, and that even without any valuable conſideration, both of them deſigning by this fraud to render the Teſtament altogether ineffectual; he would neverthelesſ be bound to pay the Legacies and other Charges. For this colluſion would be in a manner a diſpoſal of the Inheritance, and his knavery would deſerve this juſt puniſhment[m].

[m] Si quis per fraudem omiſerit hæreditatem; ut ad legitimum perveniat, legatorum petitione tenebitur. *l.* 1. §. *ult. ff. ſi quis omiſſ. cauſ. teſt. ab int. vel al. m. p. h.*

The Heir of Blood is likewiſe bound for the Legacies in this caſe. As to which the Reader may conſult the eighteenth and nineteenth Articles of the third Section of Teſtaments, and the remarks which are there made on them.

XI.

11. *And likewiſe he who has imbezzled any of the Effects.* If a Son, or other Heir to the deceaſed, who ſhould pretend to abſtain from the Inheritance, had imbezzled any of the Effects belonging to it, he would have by that means engaged himſelf to the Charges: For his condition ought not to be any better for having ſubſtracted the Effects knaviſhly, than if he had taken as Heir that which he has imbezzled in this manner[n].

XII.

12. *If he imbezzles after having renounced, he is guilty of Theft.* It would not be the ſame thing in the Heir or Executor, who after he has renounced the Inheritance, ſhould imbezzle or purloin any of the Effects belonging to it. For he would not by this act render himſelf Heir, unleſs the circumſtances were ſuch as that it ought to have this effect; but he would thereby commit a Theft, for which he would be puniſhed[o].

XIII.

13. *The next of Kin being inſtituted by Teſtament, cannot ſtick to the Legal Succeſſion in prejudice of the Legatees.* If the Teſtamentary Heir were the ſame perſon who had right to ſucceed to the Teſtator, if he had died inteſtate, and he thinking to avoid the payment of the Legacies and other Charges impoſed by the Teſtament, ſhould renounce the Teſtamentary Succeſſion, and cleave to his right of ſucceeding to the deceaſed as dying Inteſtate, he would not by that be deprived of the Succeſſion[p]; but he would nevertheleſs be bound to execute the Teſtament. For the Teſtator might have named another perſon for his Heir or Executor, and he cannot have the Goods of the deceaſed, unleſs he executes his Will[q].

XIV.

14. *A Minor is relieved againſt any act he has done as Heir.* The Heir who is a Minor cannot do any act of Heir which may engage him irrevocably to that quality. And if the Succeſſion with which he has intermeddled proves to be burdenſome, he is relieved from it[r].

XV.

15. *If the Minor who is relieved has for his Co-heir one that is of age, the ſaid Co-heir remains nevertheleſs Heir.* If the Minor who renounces the Succeſſion which he had already accepted, had a Co-heir of full age, who had likewiſe accepted the Inheritance for his portion; the ſaid Co-heir will nevertheleſs remain Heir, after the Minor has renounced. But he will be liable to the charges only for his own portion, and will not be bound for thoſe which fell to the ſhare of the Minor; the Creditors preſerving their Rights in order to proſecute them purſuant to the Rules which have been explained in the ninth Section of the firſt Title[ſ].

XVI.

16. *We muſt add to the foregoing Rules thoſe of the following Section.* One may be able to judge by the Rules explained in this Section, and by the examples of the caſes which have been here quoted, what are the acts which may engage one in the quality of Heir, or Executor. And it will be eaſy to apply to the particular facts which may happen, and to the circumſtances, the uſe of theſe Rules, together with thoſe which ſhall be explained in the following Section[t].

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[n] Si quis ſuus ſe dicit retinere hæreditatem nolle, aliquid autem ex hæreditate amoverit, abſtinendi beneficium non habebit. *l. 71. §. 4. ff. de acquir. vel omitt. hæred.*

[o] Hæc verba edicti ad eum pertinent qui ante quid amovit, deinde ſe abſtinet. Cæterum ſi ante ſe abſtinuit, deinde tunc amovit, hoc videamus, an edicto locus ſit. Magiſq; eſt ut putem iſtic Sabini ſententiam admittendam. Scilicet, ut furti potius actione creditoribus teneatur. Etenim qui ſemel ſe abſtinuit, quemadmodum ex poſt delicto obligatur. *l. 71. §. ult. ff. de acquir. vel omitt. hæred.*

[p] Hæres inſtitutus idemq; legitimus, ſi quaſi inſtitutus repudiaverit, quaſi legitimus, non amittit hæreditatem. *l. 17. §. 1. ff. de acquir. vel omitt. hæred.*

[q] Prætor voluntates defunctorum tuetur, & eorum calliditati occurrit qui omiſſa cauſa teſtamenti, ab inteſtato hæreditatem, partemve ejus poſſident, ad hoc ut eo circumveniant, quibus quid ex judicio defuncti deberi potuit, ſi non ab inteſtato poſſideretur hæreditas: & in eos actionem pollicetur. *l. 1. ff. ſi quis omiſſ. cauſ. teſt.* Quocumque enim modo hæreditatem lucri facturus quis ſit, legata præſtabit. *d. l. §. 9. in f. l. 3. C. ſi omiſſ. ſit cauſ. teſt.*

We muſt obſerve on this Rule, that in the Provinces of France *which are governed by their Cuſtoms, if the Teſtator charges his Heir at Law with more than he has power to give away by the Cuſtom, the ſaid Heir may ſtick to his Right which belongs to him by the Cuſtom, and get the diſpoſitions of the Teſtament to be reduced in ſo far as they encroach on his Right. For the Teſtator could not diſpoſe to his prejudice.*

[r] Minoribus vigintiquinque annis, ſi damnoſam hæreditatem parentis appetierint, ex generali edicto, quod eſt de minoribus vigintiquinque annis ſuccurrit (Proconſul) cùm etſi extranei damnoſam hæreditatem adierint, ex ea parte edicti in integrum eos reſtituit. *l. 57. §. 1. ff. de acq. vel om. hæred.*

See the tenth and following Articles of the firſt Section of Reſciſſions and Reſtitutions of things to their former ſtate. The Creditors can ſuffer no manner of inconvenience from a Minor's renouncing an Inheritance which he had accepted. For ſeeing there is always an Inventary made of the Goods when the Heir that ſucceeds is a Minor; the ſaid Inventary preſerves the Rights of the Creditors, and the Minor is as it were an Heir with the benefit of an Inventary.

[ſ] Si minor annis poſteaquam ex parte hæres extitit, in integrum reſtitutus eſt, D. Severus conſtituit, ut ejus partis onus cohæres ſuſcipere non cogatur. Sed bonorum poſſeſſio creditoribus detur. *l. 61. ff. de acquir. vel. omitt. hæred.* See the Remark on the foregoing Article.

[e] This Article is a conſequence of the foregoing Articles, and of the following Section.

SECT. II.

Of the Acts which have ſome relation to the quality of Heir, or Executor, but which do not engage one in it.

The CONTENTS.

1. *To act as Heir, it is neceſſary that he who acts ſhould know that he is ſuch.*
2. *And that the act proceed from no other cauſe.*
3. *The Heir at Law who knows not that there is a Teſtament, does not approve it by declaring himſelf Heir.*
4. *We muſt diſtinguiſh the motives of the acts.*
   Firſt Example.
5. *Second Example.*
6. *Another Example.*
7. *When one is forced to act as Heir, it does not engage him.*
8. *Precaution to be taken by the Heir who is afraid leſt he ſhould engage himſelf by ſome act.*

I.

1. To act as Heir, it is neceſſary that he who acts ſhould know that he is ſuch.

THE acts which an Heir or Executor may chance to do, whilſt he is ignorant of the death of the perſon to whom he ſucceeds, and when he acts upon other conſiderations, put him under no manner of engagement. For to act as Heir, it is neceſſary that the perſon who acts ſhould know that he is ſuch, and that the Succeſſion is open, that is to ſay, that the perſon to whom he has a right to ſucceed is dead. Thus he who being preſumptive Heir to a perſon that is abſent, whether he be inſtituted by Teſtament, or has a right to ſucceed in caſe the ſaid perſon dies Inteſtate, took care of his affairs during his abſence, and continues to take the ſame care after his death, before he knows any thing of his death, does not engage himſelf to the Inheritance. And he would be as little engaged, if he were ignorant that he was Heir, altho' he knew of the death of the ſaid perſon[a].

[a] Qui hæreditatem adire, vel bonorum poſſeſſionem petere volet, certus eſſe debet defunctum eſſe teſtatorem. *l. 19. ff. de acquir. vel omitt. hæred.* Neminem pro hærede gerere poſſe, vivo eo cujus in bonis gerendum ſit, Labeo ait. *l. 27. eod.*

II.

2. And that the act proceed from no other cauſe.

It may ſo happen that an Heir, or Executor, who knows of the death of the perſon to whom he is to ſucceed, may do ſome acts which in their own nature would be reckoned acts of the Heir, but which by the circumſtances are to be diſtinguiſhed from them. Thus, for inſtance, if a Son who was living in a Houſe which his Father had given him the uſe of during pleaſure, continues to dwell in it for ſome time after his Father's death, without declaring his mind, whether he will be Heir to his Father, or not; this poſſeſſion which he has of the Houſe, will not be a ſufficient reaſon for concluding that it is as Maſter and Owner of the Houſe that he has continued to live in it ſince his Father's death; and it will be no hindrance to him why he may not renounce the Inheritance, if nothing elſe has engaged him in it. For altho' his precarious Title was at an end by his Father's death, yet this bare detention of a Houſe, which is part of the Inheritance, having no relation to the quality of Heir, would oblige him only to pay the Rent of the Houſe to him who ſhall ſucceed as Heir, or to the Creditors of the Inheritance[b].

[b] Si paterna hæreditate te abſtinuiſſe conſtiterit, & non ut hæredem in domo, ſed ut inquilinum, vel cuſtodem, vel ex alia juſta ratione habitâſſe, liquidò fuerit probatum, ex perſona patris conveniri te procurator meus prohibebit. *l. 1. C. de repud. vel abſt. hæred.*

Non hoc an tenuerit quis res hæreditarias, necne, ſine voluntate acquirendæ ſibi hæreditatis, quærendum eſt: ſed an admiſerit hæreditatem, vel bonorum poſſeſſionem. *l. 4. C. und. legit. & unde cognati.*

We have in this Rule put the caſe of another Houſe different from that wherein the Father of the ſaid perſon lived, that we might ſpeak only of the fact of the bare dwelling in a Houſe belonging to the Inheritance, and to avoid the jumbling together other acts of an Heir, which this Son would be obliged to prevent, with reſpect to the Moveables and Papers which ſhould happen to be in the Houſe where the Father lived, if after his death the Son ſhould continue to dwell in it. For by reaſon of the ſaid Moveables and Papers, the Son would be obliged to get them ſpeedily ſealed up, in order to have an Inventary taken of them, unleſs he had a mind to enter Heir ſimply and purely, without the benefit of an Inventary. See in relation to what is ſaid of a precarious Poſſeſſion the ſecond and thirteenth Articles of the firſt Section of the Loan of Things to be reſtored in Specie.

III.

3. The Heir at Law who knows not that there is a Teſtament, does not approve it by decla-

It is not always enough to make an Heir liable to the charges of the Inheritance, that he does ſome act as Heir, even altho' he knows that he is Heir, and alſo that the perſon to whom he is to inherit is dead, if he is ignorant by what Title he is to ſucceed. Thus, for *ing him-ſelf Heir.* example, if one who had right to ſucceed to a perſon dying Inteſtate, is by the ſaid perſon inſtituted his Heir by a Teſtament, and he knowing nothing of the ſaid Teſtament, enters to the Succeſſion as next of Kin, and that the Legataries ſhould come afterwards and ſet up a Teſtament, which would engage him in ſuch charges, that he would chuſe rather to renounce the Inheritance than to keep it, he might abſtain from it: and he would ceaſe to be Heir in the ſame manner as one who is inſtituted by a Teſtament, and who believing it to be a good Will, and not being next of Kin, had entered to the Succeſſion, of which he ſhould happen to be afterwards deprived on account of the nullities which ſhould be diſcovered in the ſaid Teſtament[c].

[c] Ut quis pro hærede gerendo obſtringat ſe hæreditati, ſcire debet qua ex cauſa hæreditas ad eum pertineat, veluti agnatus proximus juſto teſtamento ſcriptus hæres, antequam tabulæ proferantur, cùm exiſtimaret inteſtato patremfamilias mortuum, quamvis omnia pro domino fecerit, hæres tamen non erit. Et idem juris erit, ſi non juſto teſtamento hæres ſcriptus, prolatis tabulis, cum putaret juſtum eſſe quamvis omnia pro domino adminiſtraverit, hæreditatem tamen non acquiret. *l. 22. ff. de acquir. vel omitt. hæred.*

Altho' the Diſpoſitions of Teſtaments which load the Heir too much may be reduced, as ſhall be ſhewn in the third Title of the fourth Book, and in the fourth Title of the fifth Book; yet ſeeing there may be diſpoſitions which are not ſubject to this Reduction, as ſhall be explained in the ſame places, and that other conſiderations, and even that of being engaged in Law-Suits about the ſaid Reductions, may oblige the Teſtamentary Heir not to accept the conditions of the Teſtament, there may be caſes where the Rule explained in this Article may have its uſe.

IV.

4. We muſt diſtinguiſh the motives of the acts. Firſt Example. Among the acts which an Heir or Executor may do, it is neceſſary to diſtinguiſh between thoſe which can have no other cauſe beſides an intention which implies the acceptance of the Inheritance, and thoſe which may proceed from other cauſes, and from which it does not neceſſarily follow, that he who does them is Heir. Thus, what one does out of a motive of duty, as if the Son takes care to bury his Father, this office which he does to his deceaſed Parent is not reputed to be acting as Heir. Thus the Heir, who while he is deliberating whether he ſhall accept, or not, lays up the Effects of the Succeſſion in ſafety, does not declare by that action that he is Heir. But in theſe and the like caſes, it is by the quality of the acts, and the circumſtances, that we diſtinguiſh what is to be looked upon as an acting as Heir, and what ought not to have that effect[d].

[d] Pro hærede gerere videtur is, qui aliquid facit quaſi hæres, & generaliter Julianus ſcribit, eum demum pro hærede gerere, qui aliquid quaſi hæres gerit. Pro hærede autem gerere, non eſſe facti, quàm animi. Nam hoc animo eſſe debet, ut velit eſſe hæres. Cæterum ſi quid pietatis cauſà fecit, ſi quid quaſi non hæres egit, ſed quaſi alio jure dominus, apparet non videri pro hærede geſſiſſe. *l. 20. ff. de acquir. vel omitt. hæred.* Ut putà patrem ſepelivit, vel juſta ei fecit: ſi animo hæredis, pro hærede geſſit. Enimverò ſi pietatis cauſà hoc fecit, non videtur pro hærede geſſiſſe. *d. l. 20. §. 1.* Aut ſi non ut hæres, ſed ut cuſtodiat: aut putavit ſua: aut dum deliberat quid fecit conſulens ut ſalvæ ſint res hæreditariæ. Si fortè ei non placuerit pro hærede gerere, apparet non videri pro hærede geſſiſſe. *d. §. 1. V. l. 4. ff. de relig. & ſump. fun.*

V.

5. Second Example. The Heir who without any deſign of accepting this quality, but barely to prevent the loſs or ruine of a thing belonging to the Inheritance, takes ſome care of it, or having ſome juſt reaſon to believe it to be his own, takes poſſeſſion of it, does not thereby engage himſelf to be Heir, provided that the circumſtances ſhew his intention and his integrity[e].

[e] Si quid quaſi non hæres egit, ſed quaſi alieno jure dominus, apparet non videri pro hærede geſſiſſe. *l. 20. ff. de acquir. vel omitt. hæred.* Aut ſi non ut hæres, ſed ut cuſtodiat, aut putavit ſua. *d. l. §. 1.*

VI.

6. Another Example. If the Heir was in Partnerſhip with the deceaſed, to whom he was to ſucceed, or if they had ſomething in common together, and that this Partner who was inſtituted Heir exerciſing his Right, after the death of the other, to the thing which belonged to them in common, does it in ſuch a manner as to reſtrain himſelf to his own proper Right without confounding it with the Right which belonged to the deceaſed, and which by the quality of Heir had accrued to him; thoſe acts being confined to his own proper Right, will not be a ſufficient ground to declare him Heir, no more than the care which he may have taken of the thing belonging to him in common with the deceaſed[f].

[f] Duo fratres fuerant, bona communia habuerant: eorum alter inteſtato mortuus ſuum hæredem non reliquerat: frater qui ſupererat nolebat ei hæres eſſe: conſulebat, num ob eam rem quòd communibus, cùm ſciret eum mortuum eſſe, uſus eſſet, hæreditati ſe alligâſſet. Reſpondit, niſi eo conſilio uſus eſſet, quòd vellet ſe hæredem eſſe, non aſtringi. Itaque cavere debet, ne qua in re plus ſua parte dominationem interponeret. *l. 78. ff. de acquir. vel omitt. hæred.*

VII.

7. When one is forced to If it has happened that an Heir has been forced by any perſon to do ſome act,

act as Heir, it does not engage him.

act, which, if he had been at his own free liberty when he did it, would have made him Heir; the ſaid force being well proved, would render the act of no effect, and he would nevertheleſs be admitted to renounce the Succeſſion[g].

[g] Si metus cauſa adeat aliquis hæreditatem, fiet ut quia invitus hæres exiſtat, detur abſtinendi facultas. *l.* 85. *ff. de acquir. vel omitt. hæred.*

VIII.

8. Precautions to be taken by the Heir, who is afraid leſt he ſhould engage himſelf by ſome act.

The Heir, or Executor, who ſhould find himſelf under a neceſſity of doing ſome acts which he feared might be made uſe of to tie him down to the acceptance of that quality may beforehand declare his intention by ſome Inſtrument in Writing, wherein he may proteſt that what he does or ſhall do, ſhall be without taking upon him the quality of Heir, but barely either for preſerving the Goods of the Succeſſion, or for the other cauſes which may oblige him to act, and which he may ſpecify in his Proteſt. And in this caſe, if what he has done appears to be ſincere, the acts done purſuant to this Proteſt will do him no manner of prejudice. It is by the means of this precaution, that the Heirs who are not willing to engage themſelves to accept the Succeſſion, ought in ſuch like caſes to provide for their ſecurity[h].

[h] Et ideo ſolent teſtari liberi qui neceſſarii exiſtunt, non animo hæredis ſe gerere quæ gerunt, ſed aut pietatis, aut cuſtodiæ cauſa, aut pro ſuo. *l.* 20. §. 1. *ff. de acquir. vel omitt. hæred.* Plerique filii cùm parentes ſuos funerant, vel alii qui hæredes fieri poſſunt, licet ex hoc ipſo neque pro hærede geritio, neque aditio præſumitur: tamen, ne vel miſcuiſſe ſe neceſſarii, vel cæteri pro hærede geſſiſſe videantur, ſolent teſtari pietatis gratia facere ſe ſepulturam. *l.* 14. §. 8. *ff. de relig. & ſumpt. fun.*

SECT. III.

Of the effects and conſequences of the Acceptance of the Inheritance.

The CONTENTS.

1. *Two effects of the Acceptance, the Right to the Goods, and the Poſſeſſion.*
2. *The Poſſeſſion is not neceſſary to one's becoming Heir.*
3. *The Acceptance of the Succeſſion is carried back to the time of the death which laid the Succeſſion open.*
4. *Effect of the Acceptance, to oblige to pay all the Charges.*
5. *Another effect, the right of Tranſmitting the Inheritance.*
6. *In what ſenſe the Acceptance regards the Goods which do not remain in the Inheritance.*

I.

1. Two effects of the Acceptance, the Right to the Goods and the Poſſeſſion.

IT is neceſſary to diſtinguiſh two effects of the Acceptance of the Inheritance. One is, that which makes the Heir or Executor Maſter of all the Goods, and of all the Rights belonging to the Succeſſion, altho' he be not as yet in poſſeſſion of them: and the other effect, which is a conſequence of the former, is, that he may take poſſeſſion of them. The Heir becomes Maſter of the Goods by a bare act, by which he declares, or ſignifies, that he is Heir, altho' as yet he poſſeſſes no part of the Inheritance[a]. And he does not acquire the poſſeſſion of the Goods, till he begins to poſſeſs them according to the Rules which have been explained in the Title of Poſſeſſion.

[a] Ex ſola animi deſtinatione. *l.* 6. *C. de jur. delib.* See the ſecond Article of the firſt Section.

Bonorum poſſeſſio admiſſa, commoda & incommoda hæreditaria, itemque dominium rerum quæ in his bonis ſunt, tribuit. Nam hæc omnia bonis ſunt conjuncta. *l.* 1. *ff. de bonor. poſſ.* See the following Article.

II.

2. The Poſſeſſion is not neceſſary to one's becoming Heir.

As ſoon as the Heir, or Executor has done any act which engages him in that quality, whether he poſſeſſes the Goods of the Inheritance, or a part of them, or even altho' he has none of them in his poſſeſſion, yet he may exerciſe the Rights belonging to the Heir or Executor, and he is likewiſe bound for all the Charges[b].

[b] Gerit pro hærede qui animo agnoſcit ſucceſſionem, licet nihil attingat hæreditarium. *l.* 88. *ff. de acquir. vel omitt. hæred.*

III.

3. The Acceptance of the Succeſſion is carried back to the time of the death which laid the Succeſſion open.

Seeing the Heir, or Executor, who accepts the Succeſſion only ſome time after the death of the perſon to whom he ſucceeds, is reputed Heir, or Executor, from the moment of the ſaid death, as has been ſaid in another place[c]; all the Goods which augment, and all the Charges which diminiſh the Inheritance after the ſaid death, will fall to him. And whatever has been laid out for the preſervation of the Goods, or acquitting of the Charges, whether it was by a Curator, if there was any, or by other perſons, will be on his account[d], count[d], unleſs he has good reaſons for not approving the ſaid diſburſements.

[c] *See the fifteenth Article of the firſt Section of the firſt Title.*

[d] Omnis hæreditas, quamvis poſteà adeatur, tamen cum tempore mortis continuatur. *l.* 138. *de reg. jur.* Illud quæſitum eſt, an hæredi futuro ſervus hæreditarius ſtipulari poſſit? Proculus negavit, quia is eo tempore extraneus eſt. Caſſius reſpondit, poſſe: quia qui poſtea hæres extiterit videretur ex mortis tempore defuncto ſucceſſiſſe. *l.* 28. §. *ult. ff. de ſtip. ſerv.*

IV.

4. Effect of the Acceptance, to oblige to pay all the charges.

The Heir who is of age, and who has once taken upon him that quality without the benefit of an Inventary, enters irrevocably into all the Engagements which are the conſequences thereof[e].

[e] *See the ninth, tenth, eleventh, and twelfth Articles of the firſt Section of the firſt Title; and the ſixth Section, and the other following Sections of the ſame Title.*

V.

5. Another effect, the Right of tranſmitting the Inheritance.

There is another effect of the Acceptance of the Succeſſion, which is the Right that it gives to the Heir, or Executor, if he happens to die after this acceptance, to tranſmit or convey the Inheritance to his Heir, or Executor. This is that Right which is called the Right of Tranſmiſſion of the Inheritance, which we ſhall treat of in its proper place[f]. And it is enough here barely to mention it.

[f] *See the tenth Section of the Title of Teſtaments.*

VI.

6. In what ſenſe the Acceptance regards the Goods which do not remain in the Inheritance.

Altho' the Acceptance of the Succeſſion is limited to the Goods which remain therein after the death of the perſon to whom the Heir or Executor ſucceeds, and that it does not extend to thoſe Goods to which the Right that the deceaſed had did determine by his death, as has been obſerved in another place[g]; yet the Heir or Executor does nevertheleſs take poſſeſſion of thoſe ſorts of Goods, whether it be to preſerve them for the perſons to whom they are to be reſtored, as if they were Goods ſubſtituted, or even to continue to reap the Fruits of them, according to the conditions of the Subſtitution. And he enters likewiſe into the Engagements which the deceaſed was under in relation to the ſaid Goods. Thus, for example, if the deceaſed had damnified them, the Heir or Executor would be bound for the damages which the Owners had ſuffered, and for the charges of the ſaid Goods which the deceaſed had failed to acquit during the time that he enjoyed them.

[g] *See the fifth Article of the firſt Section of Heirs and Executors in general.*

SECT. IV.

Of Renouncing the Inheritance.

The CONTENTS.

1. *Every Heir may renounce the Succeſſion.*
2. *How the Succeſſion is renounced.*
3. *In order to renounce, it is neceſſary one ſhould know his Right, and that the Succeſſion be open.*
4. *The Heir who has renounced, cannot afterwards retract.*
5. *One cannot renounce the Inheritance in part.*

I.

1. Every Heir may renounce the Succeſſion.

EVery Heir or Executor, is at liberty to accept the Succeſſion, or to abſtain from it, and to renounce it; provided he has not done any act which may have engaged him in that quality[a].

[a] Is qui hæres inſtitutus eſt, vel is cui legitima hæreditas delata eſt, repudiatione hæreditatem amittit. *l.* 13. *ff. de acq. vel omitt. hæred.*

II.

2. How the Succeſſion is renounced.

The Heir, or Executor, who has a mind to renounce the Succeſſion, may do it by acts which ſignify his intention ſo to do. Thus he might cauſe notice to be given to the Creditors, and to the Legataries, that he will not accept the Succeſſion, and that he renounces it. He might likewiſe make ſuch a declaration to the perſon who has the Right to ſucceed in his place. And this Renunciation ought to be made either judicially, or otherwiſe by ſome act intimated to the party, to whom notice ought to be given, and executed honeſtly and fairly[b].

[b] Recuſari hæreditas non tantùm verbis, ſed etiam re poteſt: & alio quovis indicio voluntatis. *l.* 95. *ff. de acq. vel omitt. hæred.*

Seeing the Renunciation of the Succeſſion may have conſequences which make it neceſſary, that there ſhould remain Proofs of it, whether it be for the diſcharge of the Heir or Executor who renounces, or for the behoof of the perſon who has right to ſucceed in his default, or for the Intereſt of the Creditors; the Renunciation cannot be well done but by ſome Publick Inſtrument in Writing, which may be known to all parties concerned.

III.

3. In order to renounce, it is neceſ-

As in order to act as Heir or Executor, it is neceſſary that the Heir or Executor ſhould know the death of the perſon *ſary that one ſhould know his Right, and that the Succeſſion be open.*

perſon to whom he is to ſucceed, and that he ſhould know likewiſe that he is called to the Inheritance[c]; ſo it is alſo neceſſary in order to renounce the Succeſſion, that the Heir or Executor be not ignorant of the ſaid death, nor of his own Right to ſucceed. For in order to renounce a Right, it is neceſſary that the perſon who renounces ſhould have it in his power to acquire it[d], and know of it[e].

[c] *See the firſt Article of the ſecond Section.*

[d] Is poteſt repudiare, qui & acquirere poteſt. *l.* 18. *ff. de acquir. vel omitt. poſſ.* Nolle adire hæreditatem non videtur qui non poteſt adire. *l.* 4. *eod.*

[e] In repudianda hæreditate, vel legato certus eſſe debet de ſuo jure is qui repudiat. *l.* 23. *ff. de acq. vel omitt. hæred.*

This Rule has no relation to the Renunciations of Daughters, of which mention has been made in the Preamble of the ſecond Section of Heirs and Executors in general. For thoſe Renunciations concern only Succeſſions to come, and are founded on motives which render them lawful and honeſt, and conſequently reaſonable; whereas it would be uncivil and unreaſonable that an Heir ſhould renounce a Succeſſion, unleſs it were under the circumſtances mentioned in the Article.

IV.

4. The Heir who has renounced, cannot afterwards retract.

Altho' the Renunciation of the Succeſſion ſeems to have no other effect, but to free him who might be Heir or Executor from that quality, without obliging him to any thing; yet it has this effect, that he who has once renounced a Succeſſion cannot afterwards claim it, if the perſon who had right to ſucceed in his default has taken his place. Thus the Heir who has renounced, has engaged himſelf to the other who ſucceeds in his place, to let him enjoy peaceably the Inheritance, whereof he has relinquiſhed to him all the Effects, and the Charges[f].

[f] Si major quinque & viginti annis hæreditatem fratris tui repudiaſti, nulla tibi facultas ejus adeundæ relinquitur. *l.* 1. *C. de dolo.*

If the Heir who has renounced, ſhould afterwards repent of it, whilſt all things are yet entire, no other perſon having appeared to claim the Inheritance, nothing would hinder him from reſuming his Right.

[*As to this matter of Renunciation, there is a difference to be made according to the Uſage in* England, *between a Renunciation made by an Executor of a Will, when there are more Executors than one, and a Renunciation made by an Executor, when he is ſole Executor. In the firſt caſe of many Executors, if one renounces, and the others take upon them the Execution of the Will, he who has renounced may at any time during the life of his Co-executors retract his Renunciation, and adminiſter the Goods of the deceaſed jointly with his Co-executors. But after their death, it is too late for him to retract. And I take the reaſon of this to be, that the Law looks upon all the Executors to be only one and the ſame perſon repreſenting the Teſtator, and that therefore while any of the Co-executors are alive, the Executor who has once renounced, is afterwards admitted to act in conjunction with them, as being one and the ſame perſon with them by a Fiction of the Law. But in the caſe of one ſingle Executor, if he renounces, and Adminiſtration with the Will annexed is granted to another perſon, then things not being any longer intire, he cannot afterwards retract his Renunciation, and take upon him the Executorſhip.* Swinburn *of Wills, Part* 6. §. 3. Brook's *Abridgment, Tit. Executor, Numb.* 38. 117.]

V.

5. One cannot renounce the Inheritance in part.

As the Heir or Executor cannot divide his acceptance of the Inheritance, to take one part of it, and leave the reſt, as has been ſaid in the fifth Article of the third Section; ſo neither can he divide his Renunciation, by relinquiſhing one part of the Inheritance, and keeping the remainder. But he ought either to renounce the whole Succeſſion, or to keep it intire[g].

[g] Vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jure delib.*

TITLE IV.

Of PARTITIONS *among* CO-HEIRS.

IT is an Engagement which all perſons are under who have any thing in common among them, to come to a Partition when any one of them deſires it. For they may indeed all of them have the joint enjoyment of the Thing which belongs to them in common, if this undivided enjoyment thereof be agreeable to them, and ſuit with their conveniency; but if any one of them is deſirous to have his portion to himſelf, it would be contrary to juſtice and to good manners, to force him to have it always undivided, ſince that would be a perpetual occaſion of ſtrife and contention among them, as has been obſerved in another Title[a].

[a] *See the eleventh Article of the ſecond Section of thoſe who happen to have,* &c.

As we have explained in the ſame place the mutual Engagements of thoſe who have any thing in common together without a Covenant, ſo we have there ſet down the Rules which have relation to their engagement of dividing the common Thing, and the ſaid Rules may be applied to Partitions among Coheirs. But ſince we have not there explained this kind of Partition in particular, nor even in general the nature of

Partition, which is of greater extent among Co-heirs, than among all other perſons; we ſhall explain in this Title all that belongs to this matter, both what has not been explained in that other Title, and what is neceſſary to be explained here.

If any Reader ſhall find fault, that we have not inſerted under this Title that Rule of the *Roman* Law which relates to Partitions which Parents may make of their Goods amongſt their Children, he may ſee what is ſaid on this ſubject in the Preamble of the firſt Section of the Title of Teſtaments.

It is proper to acquaint the Reader here, that altho' it might be expected that we ſhould explain under this Title the matter of Collation of Goods which the Co-heirs are bound to bring into the Maſs of the Inheritance, in order to be comprized in the Partition; yet we ſhall not treat of it here. For this matter takes in a great many particulars which ought to be diſtinguiſhed from the matter of Partitions, and it ſhall be explained in a ſeparate Title by it ſelf, which ſhall be the fourth of the ſecond Book.

SECT. I.

Of the nature of Partition, and in what manner it is made.

The CONTENTS.

1. *Definition of Partition.*
2. *Partition is as an Exchange.*
3. *Or as a Sale.*
4. *All the Goods of the Inheritance are divided.*
5. *And likewiſe all the Charges.*
6. *Warranty for Evictions, and for the Charges.*
7. *Equality of the condition of the Coparceners.*
8. *If the Equality cannot be exact, in what manner it is to be ſupplied.*
9. *What the deceaſed owed to the Heir, is reckoned part of the Charges.*
10. *The Goods which cannot be divided, are to be ſold by Auction.*
11. *The Auction may be made publickly.*
12. *If the thing is adjudged to one of the Heirs, as being the higheſt bidder, the others cannot claim any ſhare in it, by offering their ſhare of the Price.*
13. *Where the Deeds belonging to the Succeſſion are to be lodged.*
14. *Who is the Plaintiff in a Demand of Partition.*
15. *A new Partition for an Heir who appears afterwards.*
16. *Wrong done in a Partition.*
17. *Three ways of making a Partition.*

I.

1. Definition of Partition. THE Partition of the Goods of the Inheritance among Co-heirs, is nothing elſe but the exerciſe of the Right which they have all of them reciprocally, to take out of the Goods which belong to them in common, each of them one portion ſeparated from the portions of the others, which is to be to him in lieu of the undivided ſhare which he had in the whole[a]. And it is the ſame thing in all other Partitions of a Thing which two or more perſons have in common. For thoſe who have any thing in common among them, cannot be compelled to poſſeſs it always jointly and in common. Thus, every one of the Co-heirs may oblige the reſt to come to a Partition of the Inheritance[b].

II.

2. Partition is as an Exchange. It follows from this nature of Partition, that it is as it were an Exchange which the parties who divide make among themſelves; the one giving his right in the thing which he relinquiſhes, for the other's right in that which he takes to himſelf. Thus, for inſtance, when in a Partition among two Coheirs, the one takes a certain Eſtate in Land for his ſhare, the other a Houſe, he who takes the Land retains the right which he himſelf had to the one half of it, and acquires the right which his Coheirs had to the other half; and he who takes the Houſe, retains in the ſame manner the right which he himſelf had to the one half of it, and acquires the other half which belonged to the other[c].

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[a] Cohæredibus volentibus à communione diſcedere, neceſſarium videbatur aliquam actionem conſtitui qua inter eos res hæreditariæ diſtribuerentur. *l.* 1. *ff. fam. erciſc.*

Bona quæcunque tibi ſunt communia cum fratre tuo ex hæreditaria ſucceſſione patris, vel matris, cum eodem familiæ erciſcundæ judicio experiens, ut dividantur, impetrabis. *l.* 8. *C. eod.*

[b] Arbitrium familiæ erciſcundæ vel unus petere poteſt. Nam provocare apud judicem, vel unum hæredem poſſe palam eſt. Igitur & præſentibus cæteris, & invitis, vel unum arbitrium poſcere. *l.* 43. *ff. fam. erciſc.* See the eleventh Article of the ſecond Section of thoſe who happen to have any thing, *&c.*

[c] Permutatio rerum diſcernens communionem; *l.* 77. §. 18. *ff. de legat.* 2. Quaſi certa lege per-

mutationem fecerint. *l. 20. §. 3. in f. ff. fam. erciſc.*

III.

3. *Or as a Sale.* The Partition being conſidered under another view, may be compared to the Contract of Sale. For altho' one of the Co-parceners does not buy any thing from the other; yet they eſtimate among themſelves that which they are to divide, and every one of them takes a ſhare of the Goods in proportion to the ſhare which he had in the Price which they ſet upon all the Goods of the Inheritance[d].

[d] Diviſionem prædiorum vicem emptionis obtinere placuit. *l. 1. C. comm. utriuſq; judic. tam famil. q. c. d.*

Seeing the Valuations which Co-heirs make among themſelves of the Goods which they divide, are of no other uſe, but to facilitate the giving to every one of them ſo much of the Goods as they ought to have for their portion, this compariſon of Partition to the Contract of Sale, is limited to the Idea which is given of it in this Article; and as it has not the other marks of this Contract, ſo it ought not to have the conſequences thereof. Thus the Co-heirs who divide the Goods of the Inheritance, are not bound to pay the Fines of Alienation, and the other dues which might be demanded in a Contract of Sale, not even as to the Monies which one of the Co-heirs may be obliged to pay in to his Co-heir to make their ſhares equal, which is called the Balance of the Partition. Which happens when it is not poſſible to divide all the Goods of the Succeſſion in ſuch a manner as to make all the portions equal, as when there are ſome Goods that cannot be divided, and which exceed the value of one ſhare; or when it is altogether impoſſible to divide the Goods into equal portions without obliging the one to pay in ſome Money to the other, for rendring the ſhares equal. For in theſe caſes there is this difference between the Money given for balancing the Shares, and the Price in a Sale, that in the Contract of Sale the Buyer had no right in the Thing that is ſold, and he purchaſes it intirely by a Commerce, wherein he engages himſelf voluntarily. But in a Partition, he who pays in the Money had a Right in the whole Thing which he takes, and a Right which came to him by a Title independent of his Will. Thus he does not buy any thing, but being engaged to take for his Portion ſome of the Goods which are of greater value than what his ſhare amounts to, he is obliged to make the condition of his Co-heir equal to his own. So that this return of Money being only an Acceſſary that is eſſential to the Partition, it does not change the nature of it, but becomes a part thereof, and does not give to the Partition the characters of a Contract of Sale, which are quite different.

IV.

4. *All the Goods of the Inheritance are divided.* The Partition ought to take in all the Goods without exception, Moveables and Immoveables, Rents, Debts owing to the Eſtate, and in general all ſorts of Effects whatſoever that are in the Succeſſion, and which ought to go to the Heirs[e]. We muſt likewiſe take in among the Goods that are to be divided, thoſe which the Heirs, or any one of them are bound to bring into the Maſs of the Inheritance, purſuant to the Rules which ſhall be explained in the Title of Collation of Goods. But if after the Partition has been made, there ſhould appear Goods which had not been comprized therein, it would be reformed, or a new Partition would be made either of the whole Eſtate, or only of thoſe Goods which were omitted[f].

[e] Per familiæ erciſcundæ actionem dividitur hæreditas. *l. 2. ff. famil. erciſc.* Judex familiæ erciſcundæ nihil debet indiviſum relinquere. *l. 25. §. 20. eod.*

[f] Quòd ſi quædam res indiviſæ relictæ ſunt, communi dividundo de his agi poteſt. *l. 20. §. 4. ff. fam. erciſc.*

V.

As the Heirs divide all the Goods of the Inheritance which they know of, ſo they ought likewiſe to divide the Debts owing by the deceaſed, and the other Charges. For there are no more Goods than what remains, after all the Charges are deducted[g]. 5. *And likewiſe all the Charges.*

[g] Bonorum poſſeſſio admiſſa commoda & incommoda hæreditaria, itemq; dominium rerum quæ in his bonis ſunt, tribuit. Nam hæc omnia bonis ſunt conjuncta. *l. 1. ff de bonor. poſſeſſ.*

Bona intelliguntur cujuſque, quæ deducto ære alieno ſuperſunt. *l. 39. §. 1. ff. de verb. ſignif.*

VI.

If after the Partition there appear any new Charges, whether they be Debts or others, or if any of the Lands divided be evicted, the Heirs ſhall warrant one another againſt ſuch Evictions, and ſhall do one another juſtice reciprocally, either by a new Partition, or otherwiſe, purſuant to the Rules which ſhall be explained in the third Section[h]. 6. *Warranty for Evictions, and for the Charges.*

[h] Judex familiæ erciſcundæ nihil debet indiviſum relinquere. Item curare debet ut de evictione caveatur his quibus adjudicat. *l. 25. §. 20. & 21. ff. fam. erciſc.* See the third Section.

VII.

The Goods and the Charges are divided among the Co-heirs according to the Portions which they have in the Inheritance, ſo as that what every one has for his Portion be eſtimated on the ſame foot with what the others have for theirs; and that they bear likewiſe their reſpective proportions of the Charges, making their condition always as equal as is poſſible, both as to the advantages, and diſadvantages in the Goods, and in the Charges[i]. 7. *Equality of the condition of the Co-parceners.*

[i] Inter cohæredes communicentur commoda & incommoda. *l. 19. in f. ff. fam. erciſcund.*

VIII.

8. If the equality cannot be exact, in what manner it is to be ſupplied.

If the Goods and Charges which are to be divided are of ſuch a nature that it is not poſſible to give to all Goods of the ſame quality, and to divide the Charges equally, and in ſuch a manner as that the condition of every one may be equal to that of the others: this equality is made up by joining to the Goods of the greateſt value, the heavieſt Charges, or by indemnifying ſome other way, thoſe who ſhould ſuffer any diſadvantage, either by returns of Money from one ſhare to another, or by other accommodations which may render equal as much as is poſſible the condition of the Co-heirs. Thus, for example, if in order to have the uſe of a Houſe, or other Tenement, which falls to the Lot of one, it ſhould be neceſſary to ſubject to ſome Service another Houſe or Tenement which is in the Lot of another, this Service ought to be eſtabliſhed, and the inconvenience thereof ought to be otherwiſe made amends for, either by the valuation of the Lands and Tenements, or in ſome other manner. And in fine, the Co-parceners ought mutually to bear with ſome inconvenience, for the eaſe and conveniency of one another, and always to prefer that which is moſt advantageous for them all in general, to what might be for the intereſt of any one of them in particular[l].

[l] Familiæ erciſcundæ judicium ex duobus conſtat, id eſt, rebus atque præſtationibus. *l.* 22. §. 4. *ff. fam. erciſcund.* Sed etiam cùm (*judex familiæ eriſcundæ fundum*) adjudicat, poterit imponere aliquam ſervitutem, ut alium alii ſervum faciat, ex iis quos adjudicat. *l.* 22. §. 3, *eod.*

Ut in omnibus æquabilitas ſervetur. *l.* 4. *in f. comm. divid.*

Judicem in prædiis dividundis quod omnibus utiliſſimum eſt, vel quod malint litigatores, ſequi convenit. *l.* 21. *ff. comm. divid.*

IX.

9. What the deceaſed owed to the Heir, is reckoned part of the Charges.

We muſt reckon among the Charges of the Inheritance, that which the deceaſed may have owed to one of the Heirs. For here the quality of Debtor is not confounded with that of Creditor, any farther than for the ſhare which this Heir ought to bear of his own Debt, and he will remain Creditor to the other Heirs for all the over-plus[m].

[m] Si filius familias juſſu patris obligatus ſit, debebit hoc debitum præcipere. Sed etſi in rem patris vertit, idem placet. *l.* 20. §. 1. *ff. fam. erciſcund.*

X.

10. The Goods which cannot be divided, are to be ſold by Auction.

When there are in the Inheritance ſuch kind of Goods which are not capable of being divided, ſuch as an Office, or a Houſe which cannot be divided, or other Effects which none of the Heirs either can, or is willing to take, whether it be becauſe of the price, or for other reaſons, which may make it neceſſary to ſell the Goods, in order to divide the price of them, they are ſold by Auction, as has been ſaid in another place[n]: or if any one of the Heirs is willing to take the Goods that are to be ſold, at the price which they ſhall agree on among themſelves, he ſhall have a leſs ſhare of the other Goods, or ſhall refund to the others that which they ought to have out of the Goods which he keeps to himſelf[o].

[n] *See the twelfth Article of the ſecond Section of thoſe who happen,* &c.

[o] *See the ſame Article.*

Si familiæ erciſcundæ vel communi dividundo judicium agatur, & diviſio tam difficilis ſit, ut penè impoſſibilis eſſe videatur: poteſt judex in unius perſonam totam condemnationem conferre & adjudicare omnes res. *l.* 55. *ff. fam. erciſc.*

XI.

11. The Auction may be made publickly.

Seeing this Sale by Auction is to be for the common good of the Co-heirs, every one of them may demand that it be publick, may bid himſelf for the Thing expoſed to Sale, and inſiſt that all perſons be received to bid, in order to raiſe the price of that which none of the Co-parceners either could or would take in his Lot[p].

[p] Ad licitationem nonnunquam etiam extraneo emptore admiſſo: maximè ſi ſe non ſufficere ad juſta pretia alter ex ſociis ſua pecunia vincere vilius licitantem profiteatur. *l.* 3. *C. com. divid.*

See the place quoted on the foregoing Article.

XII.

12. If the thing is adjudged to one of the Heirs, as being the higheſt bidder, the others cannot claim any ſhare in it, by offering their ſhare of the Price.

If it is one of the Heirs to whom the Thing that is ſold by Auction is adjudged, he ſhall remain ſole and unchangeable Proprietor of it, and none of the other Heirs ſhall have right to claim any ſhare in it by paying in his part of the Price, even altho' it were a thing that were capable of being divided. For it is a voluntary and irrevocable Alienation, and he to whom the thing is adjudged, may ſay that he did out-bid others in the Price only that he might have the whole to himſelf and the others cannot divide his Title[q].

[q] *This is a conſequence of the Sale by Auction, which was only done in order to alienate the Thing which either could not be divided, or which the Heirs were not willing to divide, that they might ſhare the price of it among them.* V. l. 7. §. 13. ff. comm. divid.

XIII.

13. Where the Deeds belonging to the Succeſſion are to be lodged.

As the Partition of the Goods and Rights of the Succeſſion gives to every one of the Heirs in particular that which falls to his ſhare, ſo likewiſe each of them ought to have only the Deeds and Writings which relate to the Goods and Rights which he has in his Lot. And if there are any Writings which are of common uſe to ſeveral of the Heirs, the principal Heir keeps poſſeſſion of the Originals which he is to exhibit whenever there is occaſion, and in the mean while he gives Copies of them to the others; or if they do not agree to diſpoſe of them in this manner, the Writings are depoſited in the hands of a Publick Notary, or they will be otherwiſe diſpoſed of as the Judge ſhall direct[r]. And as for the diſpoſitions of the deceaſed, whether they be a Teſtament, Codicil, or others, they remain in the hands of the Notary before whom they were ſped, that he may give authentick Copies of them to the Heirs; or if they happen to be among the Papers of the Teſtator, or in the cuſtody of other perſons, they are either diſpoſed of according as the Heirs do agree among themſelves, or if they cannot agree, the Judge will give directions therein[s].

[r] Si quæ ſunt cautiones hæreditariæ, eas Judex curare debet ut apud eum maneant, qui majore ex parte hæres ſit: cæteri deſcriptum & recognitum faciant: cautione interpoſita, ut cùm res exegerit, ipſæ exhibeantur. Si omnes iiſdem ex partibus hæredes ſint, nec inter eos conveniet, apud quem potius eſſe debeant, ſortiri eos oportet: aut ex conſenſu, vel ſuffragio eligendum amicum apud quem deponantur, vel in æde ſacra deponi debent. *l. 7. ff. fam. erciſc.*

[s] Sed & tabulas teſtamenti debebit aut apud eum qui ex majore parte hæres eſt, jubere manere, aut in æde deponi. *l. 4. §. ult. ff. fam. erciſc.* See the ſixteenth Article of the ſecond Section of thoſe who happen to have, *&c.* *This Article is conceived in ſuch terms as to make it conformable to the uſage in* France.

XIV.

14. Who is the Plaintiff in a demand of Partition.

If in order to have a Partition, the Co-heirs go to Law with one another, ſeeing they all demand that which falls to their ſhare, and that their Engagements are reciprocal, they are therefore all of them in the place of Plaintiffs, in the ſame manner as in the other kinds of Partitions of things that are common. But altho' they are all in effect Plaintiffs in that reſpect, yet he is only conſidered as Plaintiff, who firſt began the Suit. For in Judicial Proceedings, this quality is not regulated by the nature of the Rights which thoſe that go to Law together have one againſt the other, but by the firſt demand that brings the matter into Judgment[t]. Thus, even in cauſes where only one perſon is obliged towards the other, as a Debtor to his Creditor, who has naturally on his ſide the right to demand that which is due to him; it may happen that this Debtor becomes the Plaintiff, as if he ſummons his Creditor to deliver him up a Bond which he pretends to be null or diſcharged, or to apply towards payment of the ſaid Debt a Sum which he has already paid. For theſe are in effect demands which he makes to his Creditor.

[t] In tribus iſtis duplicibus judiciis, familiæ erciſcundæ, communi dividundo, finium regundorum, quæritur, quis actor intelligatur, quia par cauſa omnium videtur. Sed magis placuit eum videri actorem qui ad judicium provocaſſet. *l. 2. §. 1. ff. comm. divid.*

XV.

15. A new Partition for an Heir who appears afterwards.

If it ſhould happen that after the Partition was made, there ſhould appear a new Co-Heir or Co-Executor, whoſe long abſence had given occaſion to believe that he was dead, or whoſe Right was unknown, as if a ſecond Teſtament which was not known of had called him with the others to the Succeſſion; this firſt Partition would be annulled; and it would be neceſſary to make a new Partition with him of all the Goods that are ſtill in being, and of the value of thoſe which have either been conſumed or alienated, that he may have his portion of the whole Inheritance[u].

[u] Cohæredibus diviſionem inter ſe facientibus, juri abſentis & ignorantis minimè derogari, ac pro indiviſo portionem eam quæ initio ipſius fuit, in omnibus communibus rebus eum retinere, certiſſimum eſt. Unde portionem tuam cum reditibus arbitrio familiæ erciſcundæ percipere potes ex facta inter cohæredes diviſione nullum præjudicium timens. *l. 17. C. fam. erciſ.*

XVI.

16. Wrong done in a Partition.

When there is any conſiderable wrong done in a Partition, even altho' the Coparceners ſhould all of them be of age, yet this damage may be repaired purſuant to the Rule explained in another place[x].

[x] *See the fourteenth Article of the ſecond Section of thoſe who happen,* &c. *and the remark that is there made upon it.*

See likewiſe the ninth Article of the ſixth Section of Covenants, and the fourth Article of the third Section of the Vices of Covenants, and the third Article of the third Section of Reſciſſions.

XVII.

17. Three ways of making a Partition.

Partitions may be made three ways, either by the Heirs themſelves, if they know the value of the things and can agree among themſelves; or by Arbitrators or ſkilful perſons whom they chuſe by mutual conſent: or judicially, if they cannot agree among themſelves; in which caſe the Partition is made by ſkilful perſons who are named by the Judge, if the Heirs themſelves do not every one of them name ſome perſons on their part[y].

SECT. II.

Of Things which enter or do not enter into the Partition; and of the Expences laid out by the Heirs or Executors, which they may recover.

WE ſhall not put down here among the Goods which enter into the Partition, thoſe which are liable to be brought into the Maſs of the Inheritance by way of Collation or Hotch-pot, altho' they are to be divided as well as the others; becauſe the matter relating to the Collation of Goods is explained in another place, as has been mentioned at the end of the Preamble of this Title.

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I.

1. *Three ſorts of Goods which a perſon deceaſed may have had.*

WE muſt diſtinguiſh among the Goods which dying perſons leave behind them, three different ſorts which they may have had. The firſt is of thoſe Goods wherein the right which the deceaſed had to them ceaſed by his death, ſuch as thoſe of which he had only the Uſufruct, or which were ſubject to a Subſtitution, and others of which mention has been made in the fifth Article of the firſt Section of the firſt Title. The ſecond is of thoſe Goods which the deceaſed may have given away in Legacies, or otherwiſe, to other perſons than his Heirs or Executors. And the third is of thoſe Goods which remain to his Heirs or Executors. And it is this third ſort of Goods, which come into Partition or Diſtribution, whether the deceaſed died Teſtate, or Inteſtate[a].

II.

2. *In what caſe Goods bequeathed or ſubſtituted may enter into the Partition.*

Altho' the things bequeathed by a Teſtator, and the Goods which he may have had that were ſubject to a Subſtitution, or to a Fiduciary Bequeſt, are not comprized among the Goods of the Succeſſion, which are to be divided among the Heirs; yet nevertheleſs, if the Legacy was conditional, ſo that the Legatary was not to have the thing bequeathed, but upon a condition, or in a caſe which it was altogether uncertain whether it would happen or not, or that the Fiduciary Bequeſt was only to take place in a time which was not as yet come; in all theſe caſes the Heirs might in the mean while divide thoſe kinds of things, they taking among themſelves the neceſſary precautions for the events which might oblige them to reſtore the Goods, and giving to the Legataries, and to the perſons who may have right to the ſubſtituted Goods, the ſecurity which ſhall be ſpoken of in its proper place[b].

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[y] Arbitro accepto fratres communem hæreditatem conſenſu dividentes pietatis officio funguntur. *l. ult. ff. fam. erciſc.*

A Partition may be made by mutual conſent, whether it be that the Heirs do it themſelves, or by Arbitrators, or ſkilful perſons. And if they do not agree among themſelves, the Partition is made by a decretal Order of the Judge, in which caſe every one of the Parties names ſkilful Perſons on their ſide, or if the Parties refuſe to name, the Judge names them. And this is a nomination which the Judge makes by virtue of his Office; which does not hinder the Parties from giving in their reaſons of Recuſation againſt the perſons named by the Judge, in order to have other ſkilful perſons named who are not ſuſpected. See the twenty firſt Title of the Ordinance of the Month of *April*, 1667.

[a] Per familiæ erciſcundæ actionem dividitur hæreditas, ſive ex teſtamento, ſive ab inteſtato. *l. 1. ff. fam. erciſc.*

[b] Res quæ ſub conditione legata eſt, interim hæredum eſt. Et ideo venit in familiæ erciſcundæ judicium, & adjudicari poteſt, cum ſua ſcilicet cauſa, ut exiſtente conditione, eximatur ab eo cui adjudicata eſt, aut deficiente conditione, ad eos revertatur à quibus relicta eſt. *l. 12. §. 2. ff. fam. erciſc.*

Si ſcriptus ex parte hæres rogatus ſit *Præcipere pecuniam & eis quibus teſtamento legatum erat, diſtribuere:* id quod ſub conditione legatum eſt tunc præcipere debebit, cùm conditio extiterit: interim aut ei, aut his quibus legatum eſt, ſatiſdari oportet. *l. 96. §. pen. ff. de leg. 1.* See the ſeventh Article of the tenth Section of Legacies, and the nineteenth Article of the firſt Section of Subſtitutions both direct and fiduciary.

III.

3. The particular Legacies which are given to any of the Heirs or Executors, do not enter into the Partition.

We may reckon among the things which do not enter into the Partition, that which a Teſtator gives as a particular Legacy to ſome one of his Heirs or Executors, over and above his equal ſhare with the others. For that Heir or Executor is to take the ſaid thing before the Partition[c].

[c] Si uni ex hæredibus fuerit legatum, hoc deberi ei officio judiciis familiæ erciſcundæ manifeſtum eſt. *l. 17. §. 2. ff. de legat. 1.*

IV.

4. The Goods which are to be reſtored, are not divided.

We muſt likewiſe exclude from the Partition all thoſe Goods of the Succeſſion that have been acquired by ways which oblige the Poſſeſſors to reſtore them: ſuch as things that have been got by ſtealth, or robbery[d].

[d] Sed & ſi quid ex peculatu, vel ex ſacrilegio acquiſitum erit, vel vi, aut latrocinio, aut aggreſſura, hoc non dividetur. *l. 4. §. 2. ff. fam. erciſc.* See the laſt Article of the ſecond Section of thoſe who happen, *&c.*

V.

5. Nor the things which can only ſerve for ſome ill uſe.

We ought likewiſe to place in the ſame rank thoſe kinds of things which can be applied only to ſome ill uſe, ſuch as Books of Magick, and other things of the like nature, which ought to be ſuppreſſed[e].

[e] Mala medicamenta, & venena veniunt quidem in judicium, ſed judex omnino interponere ſe in his non debet. Boni enim & innocentis viri officio eum fungi oportet. Tantundem debebit facere & in libris improbatæ lectionis, magicis fortè vel his ſimilibus. Hæc enim omnia protinus corrumpenda ſunt. *l. 4. §. 1. ff. fam. erciſc.* See the ſeventeenth Article of the ſecond Section of thoſe who happen to have, *&c.*

VI.

6. The Revenues which every Heir has received come into the Partition.

Beſides the Goods which are extant in the Inheritance at the time of the Partition, or which ought to be brought into it by way of Collation, or Hotchpot, the Maſs of the Inheritance ought to be augmented with the Fruits and Revenues of the common Goods which every one of the Heirs may have enjoyed by himſelf; for he ought to be accountable for them, purſuant to the Rule explained in the third Article of the twelfth Section of Heirs and Executors in general, and the ſaid Fruits are a part of the Goods of the Succeſſion which come into the Partition[f].

[f] Fructus omnes augent hæreditatem, ſive ante aditam, ſive poſt aditam hæreditatem acceſſerint. *l. 20. §. 3. ff. de hæred. pet.* Fructibus augetur hæreditas, cum ab eo poſſidetur à quo peti poteſt. *l. 2. in f. C. de pet. hæred.* See the third Article of the twelfth Section of Heirs and Executors in general, and the Texts which are there quoted.

It is in the ſenſe explained in this Article, that we ought to underſtand what is ſaid in theſe Texts, that the Fruits augment the Inheritance. But if the Goods of a Succeſſion were to be eſtimated, in order to adjuſt for example the Falcidian *Portion, or the Legitime, we ought not in that caſe to comprize in the ſaid Eſtimate the Fruits and other Revenues which the Heirs who were in Poſſeſſion of the Inheritance may have enjoyed. For the ſaid Fruits would not increaſe the Maſs of the Goods of the deceaſed; but they would be only an Acceſſary which would belong to every one of the Heirs, according to their ſhares in the Inheritance.* See the ſeventh Article of the firſt Section of the *Falcidian* Portion, and the eleventh Article of the third Section of the Legitime.

VII.

7. The Expences laid out about the Fruits, are to be deducted out of them.

The expences which the Heirs or Executors have been at either in cultivating the Lands, or in gathering and preſerving the Fruits, are to be deducted out of the Fruits which they are bound to account for to one another. So that there enters into the Partition, only ſo much as remains of the clear value of the Fruits, after the Expences are deducted[g].

[g] Fructus intelliguntur, deductis impenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt. *l. 36. §. ult. ff. fam. erciſc.*

VIII.

8. Altho' there be no Fruits, yet the Heir recovers the charges he has been at

Altho' the Expences laid out by one of the Heirs or Executors in order to reap the Fruits, ſuch as thoſe for cultivating the Lands, and others of the like nature, happen to be ineffectual, either when there is no Crop at all, or when the *in cultivating the Lands.* the Crop is leſs than the Expences; yet the Heir or Executor who had laid them out, will nevertheleſs recover them, for they were neceſſary for the common intereſt[h].

[h] Quòd ſi ſumptus quidem fecit, nihil autem fructuum perceperit, æquiſſimum erit, rationem horum quoque in bonæ fidei poſſeſſoribus haberi. *l. 37. ff. de hæred. pet.* See the following Article.

IX.

9. *The Heirs recover the neceſſary and uſeful Expences, altho' the event makes them unprofitable.* It would be the ſame thing if an Heir, or Executor, had been at any expence to preſerve any of the Goods belonging to the Inheritance, even altho' the thing on which the expence was laid out ſhould happen to periſh, as if a Houſe which he had cauſed to be propped up in order to prevent its fall, was afterwards conſumed by fire. For there is this difference between the condition of this Heir or Executor, as of every honeſt and fair Poſſeſſor, and that of an unjuſt Poſſeſſor, that whereas the unjuſt Poſſeſſor cannot recover the neceſſary or profitable Expences which he has laid out on the thing which he poſſeſſed unjuſtly, unleſs the thing it ſelf is ſtill in being, and is improved by the ſaid Expences, and that on the contrary he loſes his Expences if the thing is periſhed, or is no ways the better for what has been laid out upon it; the Heir or Executor, and every other honeſt and fair Poſſeſſor, recovers theſe ſorts of Expences, altho' the thing be totally deſtroyed[i].

[i] Planè in cæteris neceſſariis & utilibus impenſis poſſe ſeparari, ut bonæ fidei quidem poſſeſſores has quoque imputent: prædo autem de ſe quæri debeat, qui ſciens in rem alienam impendit. Sed benignius eſt, in hujus quoque perſona haberi rationem impenſarum. Non enim debet petitor ex aliena jactura lucrum facere; & id ipſum officio judicis continebitur, nam nec exceptio doli mali deſideratur. Planè poteſt in eos differentia eſſe, ut bonæ fidei quidem poſſeſſor omnimodo impenſas deducat, licet res non exiſtet, in quam fecit, ſicut tutor vel curator conſequuntur. Prædo autem non aliter quàm ſi res melior ſit. *l. 38. ff. de hæred. pet.* Quia nullus caſus intervenire poteſt qui hoc genus deductionis impediat. *l. 51. ff. fam. erciſc.*

X.

10. *Three kinds of Expences.* Among the Expences which an Heir or Executor may have laid out on the Goods belonging to the Inheritance, we muſt diſtinguiſh three ſorts of them. Thoſe which are neceſſary, thoſe which, altho' not neceſſary, are nevertheleſs uſeful; and thoſe which have been laid out only for pleaſure, without any neceſſity, and without any profit[l]. And according to theſe differences, the Heir, or Executor, recovers or does not recover his Expences, by the Rules which follow.

[l] Impenſarum quædam ſunt neceſſariæ, quædam utiles, quædam verò voluptariæ. *l. 1. ff. de impenſ. in res dot. fact.*

Altho' this Law has relation to another matter, yet it may be applied here, as likewiſe thoſe which are quoted on the following Articles. See touching the ſeveral ſorts of Expences, the eleventh Article and the other following Articles of the third Section of Dowries, and the ſixteenth and following Articles of the tenth Section of the Contract of Sale.

XI.

The neceſſary Expences are thoſe which one is obliged to lay out in preſerving the Goods, and for preventing their periſhing, or being damaged; ſuch as are the ordinary Repairs in Buildings, thoſe which are made to prevent their fall, that which is laid out in planting new Trees in the room of others that are dead, or blown down, and other ſuch like Expences, the want of which would cauſe ſome damage to the Inheritance. Which is the reaſon why the Heirs who have been at any expences of this kind ought to recover them[m]. 11. *Neceſſary Expences.*

[m] Neceſſariæ hæ dicuntur quæ habent in ſe neceſſitatem impendendi. *l. 1. §. 1. ff. de impenſ. in res dot. fact.*

Si ædificium ruens quod habere mulieri utile erat, refecerit, aut ſi oliveta rejecta reſtauraverit. *d. l. 1. §. 3.*

Impenſæ neceſſariæ ſunt, quæ ſi factæ non ſint, res aut peritura, aut deterior futura ſit. *l. 79. ff. de verb. ſignif. V. l. 39. ff. de hæred. petit.*

XII.

The uſeful Expences are thoſe which, altho' they are laid out without neceſſity, yet augment the Eſtate; ſuch as the planting of an Orchard, or ſome additional Building to an Houſe, in order to raiſe the Rent of it. And theſe ſorts of Expences ought to be repaid to the Heirs or Executors who have laid them out[n]. 12. *Uſeful Expences.*

[n] Utiles autem impenſæ ſunt quas maritus utiliter fecit, remq; meliorem uxoris fecerit, hoc eſt, dotem. Veluti, ſi novelletum in fundum factum ſit, aut ſi in domo piſtrinum, aut tabernam adjecerit. *l. 5. §. ult. & l. 6. ff. de impenſ. in res dot. fact.*

Utiles non quidem minuunt ipſo jure dotem, veruntamen habent exactionem. *l. 7. in f. eod.*

Utiles impenſas eſſe Fulcinius ait, quæ meliorem dotem faciant, non deteriorem eſſe non ſinant: ex quibus reditus mulieri acquiratur: ſicut arbuſti paſtinatione ultra quàm neceſſe fuerat. *l. 79. §. 1. ff. de verb. ſignif.* In his impenſis & piſtrinum, & horreum inſulæ dotali adjectum plerumque dicimus. *d. §. in fin.*

XIII.

The Expences which being neither neceſſary nor uſeful, are laid out only for pleaſure, ſuch as a ſuperfluous Building, 13. *Expences laid out for pleaſure.*

ing, Waterworks, Painting, Carving, and others of the like nature, which an Heir had laid out, knowing that he had Co-heirs, are not recoverable, and he who has laid them out, ought to blame himſelf for it[o]. But this juſtice may be done him, to leave, if it is poſſible, in his lot the Land or Tenement on which the ſaid Expences have been laid out, without eſtimating it at a higher rate upon that account, or even to reimburſe the ſaid Heir of ſo much as the Land or Tenement on which the ſaid Repairs have been made, is really the better for them; for in that caſe theſe Expences would be uſeful. But if the ſaid Heir had laid out theſe kinds of Expences, being ignorant that he had any Co-heirs, and looking upon himſelf to be the ſole Owner; it would be but juſt and equitable that he ſhould ſuffer no manner of prejudice from his honeſt and fair dealing, and that ſome regard ſhould be had thereto in the Partition, according as the circumſtances might require[p].

XIV.

14. Expences for pleaſure which are uſeful. We muſt not reckon in the number of Expences made for bare pleaſure, thoſe which are laid out in embelliſhing a Land or Tenement, or other thing which is the more ſaleable by reaſon of the ſaid Ornaments[q].

XV.

15. Damages against the Heir who delays the Partition. If one of the Heirs ſhould refuſe to divide the Goods of the Succeſſion, and to bring into it things which were liable to periſh, ſuch as Cattel that are in his poſſeſſion, and it ſhould happen during his delay that theſe ſorts of things which might have been ſold did really periſh, he would be liable for them, becauſe this loſs might be imputed to him. Which is to be underſtood only of the caſes where there being no diſpute among the Heirs, as to the right of any of them to the Succeſſion, he who puts off the Partition could have no reaſonable excuſe for his delay. But if an Heir who is in poſſeſſion of the Inheritance fairly and honeſtly, believing himſelf to be ſole Heir, ſhould conteſt the right of one who pretending likewiſe to be Heir, ſhould demand of him the Goods of the Succeſſion; theſe ſorts of Loſſes which ſhould happen during their controverſy, ought not to be imputed to him. For it would be as an unforeſeen accident. And even altho' he had foreſeen it, yet the fear of this event would not oblige him to abandon the right which he pretended to have ſingly to the Goods of the Inheritance[r].

SECT. III.

Of Warranties between Co-heirs, and of the other conſequences of the Partition.

IT is not neceſſary to repeat here what is meant by Warranty, nor the general Rules relating to this matter, which has been explained in the Title of the Contract of Sale[a]; and in this Section we ſhall treat only of the Rules which are peculiar to the Warranty between Co-heirs.

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[o] Voluptariæ autem impenſæ ſunt quas maritus ad voluptatem fecit, & quæ ſpecies exornant. *l. 7. ff. de impenſ. in res dot. fact.*

Voluptariæ ſunt quæ ſpeciem duntaxat ornant, non etiam fructum augent. Ut ſunt viridaria, & aquæ ſalientes, incruſtationes, loricationes, picturæ. *l. 79. §. 2. ff. de verb. ſignif.*

Ex duobus fratribus uno quidem ſuæ ætatis, alio verò minore annis, cùm haberent communia prædia ruſtica, major frater in ſaltu communi habenti habitationes paternas, ampla ædificia ædificaverat, cumque eundem ſaltum cum fratre divideret, ſumptus ſibi, quaſi re meliore ab eo facta, deſiderabat, fratre minore jam legitimæ ætatis conſtituto. Herennius Modeſtinus reſpondit, ob ſumptus nulla re urgente, ſed voluptatis cauſa factos, eum de quo quæritur, actionem non habere. *l. 27. ff. de negot. geſt.*

Altho' this Brother mentioned in the Text could not perhaps claim in the rigour of the Law, to be reimburſed of theſe kinds of Expences; yet Equity would ſeem to require, that ſome amends ſhould be made him ſome other way, as is explained in the Article.

[p] Videamus tamen ne & ad picturarum quoque & marmorum, & cæterarum voluptariarum rerum impenſas æquè proficiat nobis doli exceptio, ſi modo bonæ fidei poſſeſſores ſimus. *l. 39. §. 1. de hæred. petit.*

[q] Quod ſi hæ res in quibus impenſæ factæ ſunt promercales fuerint, tales impenſæ non voluptariæ, ſed utiles ſunt. *l. 10. ff. de exp. in res dot. fact.*

[r] Illud quoque quod in oratione Divi Hadriani eſt, ut *poſt acceptum judicium id actori præſtetur, quod habiturus eſſet ſi eo tempore quo petit reſtituta eſſet hæreditas: interdum durum eſt.* Quid enim ſi poſt litem conteſtatam mancipia aut jumenta, aut pecora deperierint? damnari debebit ſecundùm verba orationis: quia potuit petitor, reſtituta hæreditate, diſtraxiſſe ea, & hoc juſtum eſſe in ſpecialibus petitionibus Proculo placet. Caſſius contra ſenſit. In prædonis perſona Proculus rectè exiſtimat; in bonæ fidei poſſeſſoribus, Caſſius. Nec enim debet poſſeſſor aut mortalitatem præſtare, aut propter metum hujus periculi temerè indefenſum jus ſuum relinquere. *l. 40. ff. de hæred.*

[a] *See the third Article of the ſecond Section of the Contract of Sale, and the tenth Section of the ſame Title.*

The

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9. *The Heir who diſpoſes of any thing privately, bears alone the loſſes which attend it.*

I.

1 Warranty is reciprocal among the Co-heirs.

AS Co-heirs have their Portions of the Inheritance by the ſame Title and the ſame Right which is common to them; ſo their condition ought to be the ſame, and they ought all of them to have the ſame ſecurity for what is given them to their ſhares. Thus the Partition of the Inheritance implies the condition that the Portions of the Co-heirs ſhall remain bound reciprocally for the Warranty of one another[a], by the Rules which follow.

II.

2. Two different effects of this Warranty.

We muſt diſtinguiſh two different effects of the Warranty between Co-heirs, according to two different kinds of Goods that may be in the Succeſſion. One is of thoſe things which are really in being, Moveables or Immoveables, and which may be ſeen and touched, ſuch as a Horſe, a Suit of Hangings, Jewels, and other Moveables: a Houſe, a Vineyard, a Field, and other Immoveables. The other is of Rights, ſuch as a Bond, a Rent, a Sentence or Judgment, a Tranſaction, or other Title which may create a Debt, or ſome other Right[b]. In the Partition of Things which are really in being, and may be ſeen and felt, the Warranty is not that thoſe things do really exiſt, and are in being, for that every one ſees. But ſince it is poſſible that they may be no part of the Inheritance, if it ſhould happen that any one ſhould claim a Right of Property in them, the Heirs ought to warrant one another that the ſaid Goods are really and truly a part of the Succeſſion[c]. And in the Partition of the Debts due to the Succeſſion, and of the other Rights, ſince one may be ignorant whether there be any ſuch Debts or Rights at all belonging to the Eſtate, or not, whether a Rent be ſtill due, or whether it has been redeemed, if an Obligation is annulled by payment, or by ſome other cauſe; the Warranty for Debts and Rights implies, that they not only are a part of the Inheritance, but that they actually are ſuch as they appear, that they are really and truly due, and that they do belong to the Heir to whoſe lot they fall[d]; unleſs it be that this Warranty has been otherwiſe regulated among the Heirs, as ſhall be ſaid in the fourth Article.

III.

3 Warranty for the debts due from the Succeſſion, and the other Charges.

Beſides this warranty which the Heirs owe to one another with reſpect to what enters into the Partition, that what every one has in his Lot is a part of the Inheritance, and that it belongs to no other perſon; they ought likewiſe to warrant one another againſt all Suits at the inſtance of the Creditors to the Succeſſion, or of others who ſhall pretend to have Mortgages or other Securities, on that which has fallen to the Lot of one of the Heirs[e].

IV.

4. The Heirs may regulate differently the Warranties.

The Warranties explained in the two preceding Articles, are natural and juſt. And altho' no mention had been made of them in the Partition, yet they would be tacitly implied, and the Heirs would be reciprocally obliged to them. But if they agree either to add to theſe Warranties, or to take any thing from them, their agreement will be to them inſtead of a Law. Thus for the Debts owing to the Succeſſion, they may agree that they ſhall warrant one another not only that they are due, but likewiſe that the Debtors are ſolvent, and will pay the Debts, or that the Heirs will make them good to one another, either after a bare refuſal of payment from the Debtor, or after the uſing of ſuch diligence for recovery of them, as they ſhall agree on. And they may on the contrary divide the ſaid Debts without any Warranty on the one part or the other, not even as to thoſe which may happen to have been acquitted, or of which perhaps there remains nothing due for ſome other reaſon. Which may be equitable upon ſeveral conſiderations, as, among others, if they were Heirs to a Merchant who ſold by Retail, and who had left behind him a great many ſmall Debts, the warranting of which would only give occaſion to a great many Law-Suits[f].

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[a] Curare debet judex familiæ erciſcundæ, ut de evictione caveatur his quibus adjudicat. *l. 25. §. 21. ff. fam. erciſc.*

[b] Quædam res corporales ſunt, quædam incorporales. Corporales hæ ſunt quæ tangi poſſunt, veluti fundus, homo, veſtis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem ſunt quæ tangi non poſſunt, qualia ſunt ea quæ in jure conſiſtunt, ſicut hæreditas, uſuſfructus, uſus, & obligationes quoquo modo contractæ. *inſt. de reb. corp. & incorp.*

[c] De evictione caveatur. *l. 25. §. 21. ff. fam. erciſc.* See the ſecond and third Articles of the firſt Section.

[d] Si nomen ſit diſtractum. Celſus libro nono digeſtorum ſcribit locupletem eſſe debitorem non debere præſtare, debitorem autem eſſe præſtare niſi aliud convenit. *l. 4. ff. de hared. vel act. vend.* Duntaxat ut ſit, non ut exigi etiam aliquid poſſit. *l. 74. §. ult. ff. de eviction.*

Altho' theſe Texts reſpect other matters, yet they may be applied here.

[e] *See the following Article.*

[f] Si familiæ erciſcundæ judicio, quo bona paterna inter te & fratrem tuum æquo jure diviſa ſunt, nihil ſuper evictione rerum ſingulis adjudicatarum ſpecialiter inter eos convenit: id eſt, ut unuſquiſque eventum rei ſuſcipiat: rectè poſſeſſionis evictæ detrimentum fratrem & cohæredem tuum pro parte agnoſcere præſes provinciæ per actionem præſcriptis verbis, compellet. *l.* 14. *C. fam. erciſc.* See the twenty fourth and following Articles of the tenth Section of the Contract of Sale.

V.

5. The Heirs warrant one another for their reſpective portions of the Charges.

If in the Partition of a Succeſſion, which is burdened with Debts, or other Charges, the Heirs have engaged to one another, to acquit each of them ſome part of the ſaid Debts and Charges, they ſhall reciprocally warrant one another againſt them, and every one ſhall acquit the Charges which he has taken upon himſelf. And if they have made no agreement touching this matter, they muſt acquit the Charges in proportion to the ſhares which they have in the Inheritance, and every one of them ſhall warrant the others for his Portion of the Charges[g].

[g] Neque æquam, neque uſitatam rem deſideras, ut æs alienum patris tui non pro portionibus hæreditariis exolvas tu & frater cohæres tuus. *l.* 1. *C. ſi cert. petatur.*

VI.

6. And for thoſe which appear only after the Partition.

If after the Partition there ſhould appear any new Debts, or new Charges, which were not known of before; as if ſome of the Lands ſhould appear to be burdened with a Ground-Rent, or with other Charges, beſides the uſual duties of Quit-Rents, and others of the like nature, or that ſome part of the Goods ſhould appear to be ſubject to a Subſtitution, theſe new Charges, whatever kind they were of, would regard all the Heirs, and they would reciprocally warrant one another againſt them[h].

[h] Pro hæreditariis partibus hæredes onera hæreditaria agnoſcere, etiam in fiſci rationibus, placuit. *l.* 2. *C. de hæred. pet.*

VII.

7. The caſualties after the Partition regard thoſe to whom they happen.

The loſſes which may happen by caſualties after the Partition, regard him to whoſe Lot the thing has fallen which periſhes, or is damaged. As if it was Grain, Liquors, Beaſts, or other things ſubject to theſe kinds of Loſſes, or a Land or Tenement ſituated on the bank of a River, which has been carried away by a Flood, or a Houſe burnt down by Fire. For in all theſe caſes, and even thoſe that are the leaſt foreſeen, the Thing not being any more in common, he whom the Partition has made Maſter of it ſuffers the loſs thereof[i].

[i] Quæ fortuitis caſibus accidunt, cum prævideri non potuerint (in quibus etiam aggreſſura latronum eſt) nullo bonæ fidei judicio præſtantur. *l.* 6. *C. de pignor. act.*

VIII.

8. The Heir is bound for a loſs which has happened in conſequence of a deed which he may be blamed for.

If by a conſequence which may be imputed to the deed of one of the Heirs, there happens ſome loſs or damage to any of the Goods of the Inheritance, he ſhall be liable for it. Thus, for Example, if an Heir having committed ſome Crime or Offence, and his Goods being ſeized, ſome of the Goods belonging to the Inheritance had been ſeized among them; and that this Seizure had been attended with the loſs of ſome profit or income which might have been drawn from the ſaid Goods, or that the ſaid Goods had been damaged by the Seizure, or that it had occaſioned other damages, he whoſe Crime or Offence had had this conſequence, would bear ſingly the loſs which his own deed had occaſioned, and he would warrant his Co-heirs againſt it[l]. And it would be the ſame thing, altho' this Heir had committed no Offence, if the damage proceeded from his act. As if a Creditor to the Inheritance whom he was obliged to pay off, had cauſed other Goods of the Succeſſion to be ſeized than thoſe which had fallen to his Lot. For in this caſe, he would be accountable for the damages that his Co-heirs might ſuffer thereby.

IX.

9. The Heir who diſpoſes of any thing privately, bears alone the loſſes which attend it.

If any one of the Heirs diſpoſes by himſelf of any of the Goods belonging to the Inheritance, with deſign to make an advantage thereby to himſelf without the privity of his Co-heirs; as if he ſells a Thing, lets it out to hire, or farms it out, he ſhall not only be bound to pay in to his Co-heirs the profit which he ſhall have made by it; but if his act is attended with any loſs, as if the perſon to whom this Heir has ſold or let the Thing, proves inſolvent, he alone ſhall bear the loſs which happens, inſtead of the profit which he deſigned to have made by it for himſelf. And he ſhall be anſwerable to his Co-heirs both for the Rents of the Lands and Tenements which he has let or farmed out, and for the value of the Goods which he has ſold[m].

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[l] Si is cum quo fundum communem habes ad delictum non reſpondit, & ob id motu judicis villa diruta eſt, aut arbuſta ſucciſa ſunt, præſtabitur tibi detrimentum judicio communi dividundo. Quidquid enim culpa ſocii admiſſum eſt, eo judicio continetur. *l. 20. ff. comm. divid.*

We have given in this Article another Example than that mentioned in the Law which is here quoted, to make the Rule conformable to the Uſage in France, *by which Contumacy is not puniſhed with that rigour, which ſometimes may be unjuſt. But this matter does not belong to this place.*

[m] Sive autem locando fundum communem, ſive colendo, de fundo communi quid ſocius conſecutus ſit, communi dividundo judicio tenebitur. Et ſi quidem communi nomine id fecit, neque lucrum, neque damnum ſentire eum oportet. Si verò non communi nomine, ſed ut lucretur ſolus, magis eſſe oportet ut & damnum ad ipſum reſpiciat. *l. 6. §. 2. ff. comm. divid. v. l. 5. C. de ædif. priv.*

What is ſaid in this Text of a Partner, may be applied to a Co-heir.

THE CIVIL LAW IN ITS NATURAL ORDER.

PART II.
Of SUCCESSIONS.

BOOK II.
Of Legal Succeſſions, or Succeſſion to INTESTATES.

HAVING explained in the firſt Book, all that belongs in common both to Legal Succeſſions, or Succeſſion to Inteſtates, and to Teſtamentary Succeſſions; we muſt now proceed to the matters which are peculiar to theſe two kinds of Succeſſions, and explain the detail of each of them in their Order. As to which, it is neceſſary to obſerve, that in the Books of the *Roman* Law the Teſtamentary Succeſſions have the firſt place[a]; but we have thought it more natural to begin with the Succeſſion of Inteſtates; and that chiefly for two reaſons. The firſt is, becauſe, as has been remarked in another place[b], the Succeſſions to Inteſtates are more natural than the Teſtamentary Succeſſions, and of a much more univerſal and more neceſſary uſe; ſeeing we might do very well without the Teſtamentary Succeſſions, but the Legal Succeſſions, or Succeſſions to Inteſtates are abſolutely neceſſary. And the Cuſtoms of *France* own none elſe for Heirs but thoſe of the

Blood and Family of the deceaſed. So that it may be ſaid, that the Teſtamentary Succeſſions are, as it were Exceptions to the Natural Law of Legal Succeſſions, and that the liberty of diſpoſing of one's Eſtate by Teſtament in favour of other perſons than the Heirs of Blood, and eſpecially the power of making other Heirs, is as it were a diſpenſation from the common and univerſal Rule, which calls the Heirs of Blood to the Succeſſions. Thus, as it is neceſſary to know the common Order it ſelf, before we enquire into the changes which have been made in it; ſo the matters relating to the Succeſſion of Inteſtates ought to take place. And before we treat, for inſtance, of the liberty which a Teſtator has to diſpoſe of his Goods by Teſtament to the prejudice of his Children, it is neceſſary to know that the Children ought naturally to ſucceed to their Father.

The ſecond conſideration which has induced us to begin with the Legal Succeſſions is, that the matters belonging to theſe Succeſſions are much ſhorter, and much eaſier, than the matters concerning Teſtaments, which contain a vaſt number of particulars, full of different ſorts of difficulties; and that it is the method in all Arts and Sciences, to begin, as much as is poſſible, with that which is eaſieſt, and which leads to the knowledge of what is moſt difficult. Thus we had reaſon to believe, that it would be on one ſide more natural to give to the Legal Succeſſions the firſt rank, in which they are placed by the Order of the Society of Mankind, which regulates the uſe of Succeſſions: and that on the other ſide it would be more methodical in explaining theſe two matters which ought to be diſtinguiſhed, to obſerve the order and method of Sciences, which requires, that that which is moſt ſimple, moſt eaſy, and moſt natural, ſhould precede that which is more intricate, more difficult, and leſs natural. And altho' it is true, that when the queſtion is to judge in any particular caſe, who it is that is to ſucceed, it is neceſſary to begin, by enquiring whether there is any Teſtament that may have its effect, becauſe if there is any ſuch, the Teſtamentary Heir excludes the Next of Kin[c]; yet it does not follow from this bare conſideration, which relates only to the queſtion who ſhall ſucceed, that in general the Right of Succeſſion by Teſtament is a matter whereof the Rules ought to precede thoſe which belong to the Succeſſion of *Inteſtates*. For the Order of the Queſtions that occur in any Cauſe, and the Order of the Rules by which they are to be decided, have nothing belonging to them in common.

It is not neceſſary to point out here the particular Order of the ſeveral matters which compoſe this ſecond Book of Legal Succeſſions, or Succeſſion to Inteſtates; ſince that appears ſufficiently by the Titles of the ſaid Matters. Neither ſhall we take up any time here to explain the Principles of Natural Equity, which tranſmit the Succeſſions to the Heirs of Blood. The Reader may ſee on this ſubject what has been ſaid concerning it in another place[d].

There are three Orders of Perſons who ſucceed to Inteſtates. That of Children and other Deſcendants; That of Fathers and Mothers and other Aſcendants; And that of Brothers and Siſters and other Collateral Relations. And theſe three Orders ſhall be the ſubject matter of the three firſt Titles of this Book.

We may add as a fourth Order of Heirs to Inteſtates, that which in default of Relations calls the Huſband to the Succeſſion of his Wife, and the Wife to the Succeſſion of her Huſband[e]. But this kind of Succeſſion being reduced to one ſingle Rule, it is not neceſſary to diſtinguiſh it under a ſeparate Title; and we ſhall add it in a Section at the end of the third Title.

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[a] Poſteaquàm Prætor locutus eſt de bonorum poſſeſſione ejus qui teſtatus eſt, tranſitum fecit ad inteſtatos, eum ordinem ſecutus, quem & lex duodecim tabularum ſecuta eſt. Fuit enim ordinarium ante de judiciis teſtantium, dein ſic de ſucceſſione ab inteſtato loqui. *l.* 1. *ff. ſi tab. teſt. null. ext.*

[b] *See the Preface to this Second Part,* N°. VIII.

[c] Perſpicis quòd teſtamentariæ ſucceſſionis ſpe durante inteſtato bona defuncti non rectè vindicantur. *l.* 8. *C. comm. de ſucceſſ.*

[d] *See the Preface to this Second Part,* N°. IV.

[e] *See the Preface to the Second Part,* N°. XI.

TITLE I.

In what manner CHILDREN *and other* DESCENDANTS *ſucceed.*

SECT. I.

Who are the Children and Deſcendants.

The CONTENTS.

1. *Who are the Children.*
2. *Who are the Deſcendants.*
3. *All Deſcendants are included under the name of Children.*
4. *Baſtards are not comprized under the name of Children.*
5. *Children born in the ſeventh or eleventh Month.*
6. *Of Poſthumous Children.*
7. *Of Still-born Children.*
8. *Of Monſters.*
9. *The Child born during the Marriage is preſumed to be the Child of the Huſband.*

I.

1. Who are the Children.

BY Children is meant properly thoſe who are in the firſt degree, that is to ſay, the Son or the Daughter who are born immediately of the perſon to whom they are to ſucceed. And the name of Children is likewiſe given in a ſecond ſenſe to all the Deſcendants which are ſpoken of in the following Article. And when we would diſtinguiſh theſe from the Children of the firſt degree, we give them the name of Grand-children[a].

[a] Liberorum appellatione nepotes, & pronepotes, cæteriq; qui ex his deſcendunt, continentur. *l.* 220. *ff. de verb. ſignif. V. §. ult. inſt. qui teſt. tut. dar. poſſ.*

II.

2. Who are the Deſcendants.

The Deſcendants are thoſe who are born of the Son or Daughter; whether they be in the ſecond degree of Grandſon, Grand-daughter, or in the third degree, or other more remote degree. For whatever degree they are in at ever ſo great a diſtance, they are called Deſcendants, or Grand-children: and they have likewiſe the general name of Children of thoſe of whom they are deſcended[b].

[b] Naturum appellatio & ad nepotes extenditur. *l.* 104. *ff. de verb. ſignif.*

III.

3. All Deſcendants are included under the name of Children.

Under the name of Children and Deſcendants are comprehended Sons and Daughters, Grand-ſons and Grand-daughters, without diſtinction either of Sex or Degree, and whether they be deſcended of Sons or of Daughters, and whether they be under the Power and Authority of their Father, or not[c].

[c] Liberorum appellatione continentur non tantùm qui ſunt in poteſtate, ſed omnes qui ſui juris ſunt. Sive virilis, ſive fœminini ſexus ſunt: exve fœminini ſexu deſcendentes. *l.* 56. *ff. de verb. ſignif.*

IV.

4. Baſtards are not comprized under the name of Children.

By the name of Children is underſtood only thoſe who are lawfully begotten; and this name is not given to Baſtards, but when it is accompanied with ſome addition, ſuch as that of natural Children, or ſome other which may diſtinguiſh their condition from that of legitimate Children. And when the queſtion is concerning the Succeſſion of an Inteſtate, as Baſtards have no ſhare in it, ſo they are not comprized under the name of Children[d].

[d] *See the eighth Article of the ſecond Section of Heirs and Executors in general.*

V.

5. Children born in the ſeventh or eleventh Month.

We muſt reckon in the number of Children that are not legitimate, thoſe who are born within ſo ſhort a time after the Marriage of their Mother, that the Huſband has juſt reaſon to ſay that he is not their Father: and likewiſe thoſe who are born ſo long a time after the death of the Huſband, that it is reaſonable to judge that they have been conceived only after his death[f].

[e] De eo qui centeſimo octogeſimo ſecundo die natus eſt, Hippocrates ſcripſit, & Divus Pius pontificibus reſcripſit, juſto tempore videri natum. *l.* 3. §. *ult. ff. de ſuis & legit. hæred.* Septimo menſe naſci perfectum partum jam receptum eſt, propter auctoritatem doctiſſimi viri Hippocratis. Et ideo credendum eſt eum qui ex juſtis nuptiis ſeptimo menſe natus eſt, juſtum filium eſſe. *l.* 12. *ff. de ſtatu hom.*

[f] Poſt decem menſes mortis natus, non admittitur ad legitimam hæreditatem, *l.* 3. §. *penult. ff. de ſuis & legit. hæred.* De muliere quæ parit undecimo menſe, *V. Nov.* 39. *C.* 2.

☞ We have not ſet down in this Article the preciſe time mentioned in the Texts here quoted, becauſe the ſhorteſt time which is marked for a forward birth, and the longeſt time for a backward birth, may be joined with ſuch circumſtances as to make us doubt of the certainty of the Rule concerning the time neceſſary for a lawful birth. Neither does there appear any Natural Principles by which it may be demonſtrated, that a Child, in order to its being born at the due time, muſt needs have been conceived a hundred fourſcore and two days before its birth, and that a Child born within a ſhorter time after the Marriage cannot be legitimate. Neither do we know of any Natural Principles which demonſtrate, that a birth cannot be delayed beyond the tenth month. For as to the forward birth, altho' we had the experience of Children certainly conceived at a certain day, born afterwards on the hundredth fourſcore and ſecond day, and which had lived a long time, and other proofs of Children born one or two days ſooner, which were not able to live; yet we could not infer from thence, that the ſpace of a hundred fourſcore and two days is ſo preciſely neceſſary, that it is abſolutely impoſſible for a Child to live, if it wants one day of the ſaid time. And if it ſhould happen, that a Child which had been certainly conceived about five months only before its birth, ſhould nevertheleſs live ſeveral years, which very credible perſons affirm that they have ſeen, this event would not be looked upon as an effect impoſſible to Nature, but as being natural, although very ſingular. And as to the birth in the eleventh month after the Huſband's death, it is known, that there are Examples both antient and modern, of Children who have been adjudged to be legitimate, altho' born a long time after ten months from the death of their Father. So that it does not ſeem poſſible to regulate the juſt time of a Woman's going with Child, in order to determine that a Child is illegitimate, if it is born a few days ſooner, or a few days later. And it is not reaſonable that a queſtion of this importance ſhould depend on a Rule which undertakes to fix the time of the operations of Nature, and eſpecially of thoſe which the combination of different cauſes does diverſify, and where it does not ſeem poſſible to point out the preciſe bounds of what Nature is able, or not able to do. But it ſeems reaſonable that in the particular caſes where the queſtion is, whether a Child be legitimate or not; the doubt ariſing from this, that the Child's birth is either too forward, or too backward, we ſhould join to the common Rules which reſult from the Texts quoted on this Article, as to what concerns the time of a Woman's going with Child, the conſideration of the particular circumſtances, in order to decide wiſely and prudently a queſtion of ſo great conſequence, in which the honour of a Mother, the ſtate of a Child, and the quiet of the Families, which have an intereſt both in the one and the other, are all equally concerned.

See the fifth Article of the ſecond Section of Heirs and Executors in general, and the Remark which is there made on it.

[*It may not be improper to obſerve here, that according to the Law and Cuſtom of* England, *he who marries a ſingle Woman who is with Child, whether it be by himſelf, or any other perſon, makes her iſſue legitimate, altho' it be born immediately after Marriage: For in this caſe the Marriage demonſtrates whoſe the Child is. But it is to be diſtinguiſhed in the caſe of him that marries a Widow with Child, whether ſhe be apparently with Child at the time of her ſecond Marriage, or whether it be doubtful. For in the firſt caſe, it ſhall be reputed the Iſſue of the former Huſband; and in the other caſe, of the latter Huſband. Fleta* lib. 1. c. 14. *Coke* 1 Inſtit. fol. 244. a. *Cowel*'s Inſtitutes of the Laws of *England*, Book 1. Tit. 9.]

VI.

6. Of Poſthumous Children. The Children who are not as yet born when their Fathers die, whom we call Poſthumous Children, and likewiſe thoſe who are taken out of their Mother's Womb, ſhe being dead before ſhe was brought to bed, are reckoned in the number of Children who ſucceed. And although they are not as yet born, when the Succeſſions which they are to inherit fall to them, by the death of their Father, Mother, or others their Relations; yet they belong to them upon condition that they ſhall be born alive, and they are conſidered as Heirs already before their birth[g].

[g] Sicuti liberorum eorum qui jam in rebus humanis ſunt curam prætor habuit, ita etiam eos qui nondum nati ſint, propter ſpem naſcendi, non neglexit. Nam & hac parte edicti eos tuitus eſt, dum ventrem mittit in poſſeſſionem. *l. 1. ff. de ventre in poſſ. mitt.*

Altho' theſe Poſthumous Children are not as yet born when the Succeſſion falls to them, yet it belongs to them, and it is kept for them till their birth. See the ſeventh Article of the following Section, and the fourteenth Article of the firſt Section of Curators.

VII.

7. Of Still-born Children. Still-born Children are not counted in the number of Children who ſucceed. And although they were alive in their Mother's Womb at the time that the Succeſſions which concerned them fell, yet they have no ſhare in them. For they are conſidered in the ſame manner as if they never had been born[h].

[k] See the fourth Article of the ſecond Section of Heirs and Executors in general, and the fourth and fifth Articles of the firſt Section of Perſons.

VIII.

8. Of Monſters. We ought likewiſe much leſs to place in the number of Children, thoſe Lumps of Fleſh, or Monſters, which are born without humane ſhape[l].

[l] See the fourth Article of the ſecond Section of Heirs and Executors in general, and the fourteenth Article of the firſt Section of Perſons.

IX.

9. The Child born during the Marriage, is preſumed to be the Child of the Husband. The Child which is born of a married Woman, is preſumed to be the Husband's: and it is held for legitimate, unleſs the contrary is proved[m].

[m] Pater is eſt quem nuptiæ demonſtrant. l. 5. ff. de in jus vocand.

[*By the Common Law of England, if the Husband be within the four Seas, that is, within the Juriſdiction of the King of England, if the Wife hath Iſſue, no proof is to be admitted to prove the Child a Baſtard. For in that caſe* Filiatio non poteſt probari, *unleſs the Husband hath an apparent impoſſibility of Procreation; as if the Husband be but eight years old, or under the age of Procreation.* Coke 1 Inſtit. fol. 244.]

SECT. II.

The Order of the Succeſſion of Children and Deſcendants.

IT is not neceſſary to give an account here of the ſeveral diſpoſitions of the *Roman* Law touching the Succeſſion of Children, in the number of whom they reckoned thoſe who had this name given them by Adoption, nor of the differences which they made between the Children that were emancipated, and thoſe who remained under the Father's Power and Authority; between the Grandchildren by Sons, and thoſe by Daughters; between the Relation by the Male Sex, which they called *Agnation*, and the Relation by the Female Sex, which they called *Cognation*. Theſe differences, as to what concerns Succeſſions, had given occaſion for ſeveral Rules; ſo that by the ancient Law, the Children who were emancipated were excluded by their Brothers who remained in the Family under their Father's Power; the Children of Daughters were excluded from the Inheritance of their Grandfather by the Mother's ſide, by the Sons and their Children, and even by the Collateral Relations, who were of the number of the *Agnates*. But in progreſs of time theſe differences were very much moderated[a]: and at laſt the Emperor *Juſtinian* quite aboliſhed theſe diſtinctions, and called indifferently to the Succeſſions the Children who were emancipated, as well as thoſe who remained under their Father's Power, and without making any difference of Sex, or Parentage by *Agnation*, or *Cognation*[b].

[a] *V. l. 1. §. 2. & 4. ff. de ſuis & legit. l. 9. c. eod. l. 12. eod. l. 14. C. de legit. hered. Tit. inſt. de hered. quæ ab int. §. 14. & ſeq. & Tit. de Senat. Tertul. & de Senat. Orphit.*

[b] *Nov. 118. c. 1. c. 4.*

The CONTENTS.

1. *All the Children ſucceed by equal portions.*
2. *The Children of the Children ſucceed by Repreſentation with the Children of the firſt degree.*
3. *As alſo among themſelves, altho' there be no Children of the firſt degree.*
4. *How the Children of different Marriages ſucceed.*
5. *The Children of different Marriages take the Rights of their Fathers and Mothers.*
6. *Portion of the Child which is not as yet born.*
7. *Curator to the Child that is in the Mother's womb.*
8. *Proviſion for the Widow big with Child.*
9. *Proviſion for the Child whoſe ſtate is called in queſtion.*
10. *The Deſcendants exclude the Aſcendants from Succeſſions.*
11. *Of the caſe where the Father and Son die at the ſame time.*
12. *Of the caſe where the Mother and the Child on the breaſt die together.*
13. *Children have the Right of Tranſmiſſion.*
14. *Proviſion for the Children who deliberate whether they ſhall accept the Inheritance.*
15. *Fathers have the Uſufruct of Succeſſions which fall to their Children.*
16. *Rights which paſs to thoſe of the Family, who do not ſucceed to the Eſtate.*

I.

1. *All the Children ſucceed by equal portions.* IF the perſon who dies, whether it be Man or Woman, leaves Children behind him, they ſhall ſucceed to him by equal Portions, without diſtinction of Sex, and without any difference between thoſe who are emancipated, and thoſe who have remained under their Father's Power; and if there is only one Child, Son or Daughter, he ſhall have the whole[a].

[a] Rectè Prætor à liberis initium fecit ab inteſtato ſucceſſionibus, ut ſicuti contra tabulas ipſis defert, ita & ab inteſtato ipſos vocet. *l.* 1. §. 5. *ff. ſi tab. teſt. nul. ext. unde lib.*

Si quis igitur deſcendentium fuerit ei qui inteſtatus moritur, cujuſlibet naturæ, aut gradus, ſive ex maſculorum genere, ſive ex fœminarum deſcendens, & ſive ſuæ poteſtatis, ſive ſub poteſtate ſit, omnibus aſcendentibus, & ex latere cognatis præponatur. *Nov.* 118. *c.* 1.

The caſes in which there is a Right of Primogeniture are to be excepted out of this Article; and we muſt likewiſe except out of it the married Daughters, who have renounced their Right of Inheritance in favour of the Male Iſſue, or who without renouncing are excluded by ſome Cuſtoms. See the Preamble of the ſecond Section of Heirs and Executors in general. *This excluſion of the Daughters ceaſes when there are no Males, nor any deſcended of Males.*

II.

2. The Children of the Children ſucceed by Repreſentation with the Children of the firſt degree.

If beſides the Children of the firſt degree, there ſhould happen to be Children of other Sons or Daughters deceaſed, thoſe Children of the ſecond degree, or their Deſcendants, whether Sons or Daughters, in whatever degree they chance to be, would be called to the Succeſſion, together with the Children of the firſt degree, to take the ſhare in the Inheritance, which the perſon of whom they are deſcended would have had if he were alive; for they repreſent the ſaid perſon, that is, take his place, and enter into his Right. Which is the reaſon that the Succeſſion is divided among the Children of the firſt degree, and the Deſcendants of other Children deceaſed, not by the head, or in equal portions, according to the number of the perſons who ſucceed, but by the Stocks; the Deſcendants of each Son or Daughter having no more among them all, than the portion which their Father or Mother would take if they were alive[b].

[b] Si quem horum deſcendentium filios relinquentem mori contigerit, illius filios, aut filias, aut alios deſcendentes in proprii parentis locum ſuccedere: ſive ſub poteſtate defuncti, ſive ſuæ poteſtatis inveniantur. Tantam de hæreditate morientis accipientes partem, quanticumque ſint, quantam eorum parens, ſi viveret, habuiſſet. Quam ſucceſſionem in ſtirpes vocavit antiquitas. In hoc enim ordine gradum quæri nolumus. Sed cum filiis & filiabus ex præmortuo filio aut filia, nepotes vocari ſancimus: nulla introducenda differentia, ſive maſculi, ſive fœminæ ſint; & ſeu ex maſculorum, ſeu fœminarum prole deſcendant: ſive ſuæ poteſtatis, ſive ſub poteſtate ſint conſtituti. *Nov.* 118. *c.* 1.

This Right of Repreſentaiton takes place in the direct Line of Deſcendants without limitation. But it has not place in the Line of Aſcendants. See the fifth and ſixth Articles of the firſt Section of the following Title. *And as to the Repreſentation among Collaterals,* ſee the third, fourth, ſixth, ſeventh and eighth Articles of the ſecond Section of the third Title.

It may be obſerved in relation to this Right of Repreſentation which Deſcendants have, that as it is agreeable to Natural Equity, ſo it is received in the Provinces of France *which are governed by their Cuſtoms, as well as thoſe which are governed by the written Law. However, there are ſome ſtrange Cuſtoms, where the Deſcendants have not the Right of Repreſentation. So that the Children exclude from the Succeſſion of their Father, the Children of their own Brothers, the deceaſed's Grandchildren.*

III.

3. As alſo among themſelves, altho' there be no Children of the firſt degree.

If all the Children of the firſt degree being deceaſed, there ſhould remain only Grand-children by Sons or Daughters, theſe Grand-children would ſucceed by repreſentation of their Father or Mother. And altho' they ſhould be all in a like degree, yet all the Children of each Son or each Daughter, let them be of never ſo great a number, would have no more among them all, than the portion which their Father or Mother would have had[c].

[c] Nepotes ex diverſis filiis varii numeri avo ſuccedentes ab inteſtato, non pro virilibus portionibus, ſed ex ſtirpibus ſuccedunt. *l.* 2. *C. de ſuis & legit. Nov.* 118. *c.* 1.

IV.

4. How the Children of different Marriages ſucceed.

If there are Children or Deſcendants of different Marriages, whether it be by the Father or Mother's ſide, all the Children of the ſame Father, and all thoſe of the ſame Mother, ſucceed to them by equal ſhares, without diſtinction of the firſt or ſecond Marriage[d].

[d] Matris inteſtatæ defunctæ hæreditatem ad omnes ejus liberos pertinere, etiamſi ex diverſis matrimoniis nati fuerint. *l.* 4. *ff. ad Senat. Tertull. & Orphit.* Ex rerum vero conſequentia hoc ipſum & in patribus ſit ſecundas nuptias facientibus. *Nov.* 22. *c.* 29.

V.

5. The Children of different Marriages take the Rights of their Fathers and Mothers.

In the caſe of the foregoing Article, where Children ſucceed to their Father who has been more than once married, the Children of the firſt Marriage take out of his Eſtate before the Partition that which they ought to have in right of their Mother: and thoſe of the ſecond or other ſubſequent Marriage, if the Father has had more than two Wives, take likewiſe out of his Eſtate before the Partition, what belongs to them in right of their Mother. And if it is the Succeſſion of a Mother who has had Children of different Marriages, thoſe of each Marriage take out of it before the Partition that which they ought to have in right of their Father[e].

[e] Si mulier ex pluribus matrimoniis liberos ſuſceperit, ſingulis patrum ſponſalitiæ largitates cuſtodiendæ. *l.* 4. *C. de ſecund. nupt.*

Abſolutè unaquæque ſoboles proprii parentis accipiat ſponſalitiam largitatem. *Nov.* 22. *c.* 29.

Ex rerum verò conſequentia hoc ipſum & in patribus ſit ſecundas nuptias facientibus. *l. c.* 29. See the fourth Title of the third Book.

VI.

6. Portion of the Child which is not as yet born.

If in the caſe of the Succeſſion of a Father who leaves behind him one or more Children, his Widow ſhould happen to be big with Child, the Child in the Mother's Womb would be reckoned among the Children of the deceaſed. And if the other Children ſhould proceed to a Partition of the Eſtate, it would be neceſſary to lay aſide one ſhare for the Child that is to be born, and to name a Curator to it, who may take care of its intereſt, unleſs they ſhould think it more convenient to delay the Partition until the birth of the Child, either by reaſon of the uncertainty whether the Child will be born alive or not, or becauſe it may happen that there may be more Children than one of this birth[f].

☞ The caſe mentioned in this Text of the birth of three Children at a time is ſo very rare, that it would be unreaſonable to leave always three ſhares for the Children which may be born of a Widow who is left big with Child. And altho' it happens ſometimes that there are two Children at a birth, yet this would not be a ſufficient reaſon for laying aſide always two ſhares, when an Inheritance is to be divided during the time that a Widow is with Child; for it would give too frequent occaſion to make a new Partition. And the inconvenience is much leſs in making a new Partition, when there happen two Children at a birth, than in making it every time that there is only one. But it is more convenient and more natural for the Children concerned in the Partition, to defer it till the Widow of the deceaſed is brought to bed, that they may ſee whether there is any live Child born or not, whether there are two, or only one. And if there ſhould be only Daughters alive, in a caſe where the eldeſt Son was to have ſomething by way of diſtinction, over and above his equal ſhare with the reſt, it would be neceſſary likewiſe to defer the Partition upon this account, that they might know whether it is a Son or a Daughter that is born. It is upon theſe conſiderations, that we have not followed the Rule explained in this Text, and that we have made it conformable to Equity, and to our Uſage.

VII.

7. Curator to the Child that is in the Mother's Womb.

In the caſe of a Widow's being left big with Child, if it is neceſſary to do any thing for the ſecurity of the Rights of the Child that is to be born; whether it be in the caſe of a Partition, if it is neceſſary that one ſhould be made, or for other cauſes, ſuch as that of exerciſing the Rights, and managing the Goods which may belong to him, a Curator is named for theſe Functions, as has been ſaid in its proper place[g].

VIII.

8. Proviſion for the Widow big with Child.

If in the caſe of the foregoing Article, the Widow ſhould demand a Proviſion out of the Goods of the Inheritance, for her ſubſiſtence and maintenance during her being with Child, on the Child's account; this would be granted her in proportion to the quality of the perſons, and the Goods of the deceaſed, altho' ſhe ſhould have an Eſtate of her own. For this proviſion being for a Child that is to be born, and which is to have its ſhare in the Inheritance; both the Publick Intereſt, Humanity, and Religion do all of them require that even more care ſhould be taken of it than of the Children that are already born. And this Proviſion would be taken out of the ready Money belonging to the Inheritance, if there is any, or out of the other Effects which may be moſt eaſily, and moſt readily converted into Money[h]. But if it ſhould appear, that the Widow, in order to get this Proviſion, had feigned herſelf to be big with Child, ſhe would be obliged to reſtore to the Heirs whatever ſhe had received upon that account[i].

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[f] Antiqui libero ventri ita proſpexerunt, ut in tempus naſcendi omnia ei jura integra reſervarent, ſicut apparet in jure hæreditatum: in quibus, qui poſt eum gradum ſunt agnationis, quo eſt id, quod in utero eſt, non admittuntur, dum incertum eſt an naſci poſſit. Ubi autem eodem gradu ſunt cæteri quo & venter, tunc quæ portio in ſuſpenſo eſſe debeat, quæſierunt: ideo, quia non poterant ſcire quot naſci poſſunt. Ideo nam multa de ea re tam varia & incredibilia creduntur, ut fabulis adnumerentur. Nam traditum eſt & quatuor pariter puellas à matre familias natas eſſe. Alioquin tradidere non leves auctores, quinquies quaternos enixam Peloponeſi: multas Ægipti uno utero ſeptenos. Sed & tergeminos Senatores cinctos vidimus Horatios. Sed & Lælius ſcribit, ſe vidiſſe in palatio mulierem liberam, quæ ab Alexandria perducta eſt, ut Hadriano oſtenderetur, cum quinque liberis, ex quibus quatuor eodem tempore enixa (inquit) dicebatur, quintum poſt diem quadrageſimum. Quid eſt ergo? Prudentiſſime juris auctores medietatem quandam ſecuti ſunt, ut quod fieri non rarum admodum poteſt, intuerentur. Id eſt, quia fieri poterat ut tergemini naſcerentur, quartam partem ſuperſtiti filio aſſignaverint. Τὸ γὰρ ἅπαξ, ἢ δὶς, id eſt, quod enim ſemel aut bis exiſtit, ut ait Theophraſtus, παραβαίνουσιν οἱ νομοθέται. Id eſt, prætereunt legiſlatores. Ideòque & ſi unum paritura ſit, non ex parte dimidia, ſed ex quarta interim hæres erit. Et ſi pauciores fuerint nati, reſiduum ei pro rata accreſcere: ſi plures quàm tres decreſcere de ea parte ex qua hæres factus eſt. *l. 3. & 4. ff. ſi pars hered. pet. v. l. 28. in fin. de judic. l. 36. ff. de ſolut.*

[g] Quoties autem venter mittitur in poſſeſſionem, ſolet mulier curatorem ventri petere, ſolet & bonis. *l. 1. §. 17. ff. de vent. in poſſ. mitt. & cur. ei.* See the fourteenth Article of the firſt Section of Curators.

IX.

9. Proviſion for the Child whoſe ſtate is called in queſtion.

If in the ſame caſe there ſhould be other Children of a former Marriage, or Heirs of Blood in default of Children, who ſhould pretend that the Child which the Widow is big with, or which is already born, is not legitimate, ſo that it ſhould be neceſſary to have a judicial determination, touching the ſtate of this Child that is born, or to be born[l]; during the time that this queſtion remains undecided, the Child's Mother, or its Curator, might demand a proviſion out of the Goods of the Succeſſion for its Alimony. And if the Law-ſuit ſhould laſt a long time, the Allowance would be increaſed according to the Expence, including likewiſe therein that which is laid out on his Studies, and other neceſſary Expences according to the quality of the perſons, and the greatneſs of the eſtate. For in ſuch a controverſy, we ought to preſume during the time that it is undecided, both in favour of the Mother, that ſhe has not been unfaithful to her Huſband, and in favour of the Child, that it is legitimate; and it would be of a much worſe conſequence to have deprived the Child of its Nouriſhment and Education, if it ſhould appear to be legitimate, than to have diminiſhed the Inheritance in ſo much as had been applied to that uſe, altho' it ſhould be afterwards adjudged that the Child is not legitimate[m]. Thus, this Allowance is not refuſed, altho' the ſtate of the Child may appear doubtful, which it ought to be if it were evident that the Child had no manner of right[n].

X.

10. The Deſcendants exclude the Aſcendants from Succeſſions.

If the deceaſed has left behind him Children, or only Grandchildren, and if his Father, or Mother, or other Aſcendants have ſurvived him, his Children, or Grandchildren of both Sexes, in what degree ſoever they are, will exclude his Father and Mother; and they will likewiſe exclude from the Succeſſion all other Aſcendants, and much more all Collaterals. For it is the Natural Order, that Eſtates ſhould go from Fathers to their Children[o].

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[h] Mulier autem in poſſeſſionem miſſa, ea ſola ſine quibus foetus ſuſtineri, & ad partum uſque produci non poſſit, ſumere ex bonis debet. Et in hanc rem curator conſtituendus eſt, qui cibum, potum, veſtitum, tectum mulieri præſtet, pro facultatibus defuncti, & pro dignitate ejus atque mulieris. Deminutio autem ad hos ſumptus fieri debet, primùm ex pecunia numerata: ſi ea non fuerit, ex his rebus quæ patrimonia onerare magis impendio, quàm augere fructibus conſueverunt. *l.* 1. §. 19. & 20. *ff. de vent. in poſſ. mitt. & curat. ejus.*

Curator ventris alimenta mulieri ſtatuere debet, nec ad rem pertinet an dotem habeat unde ſuſtentare ſe poſſit: quia videntur, quæ ita præſtantur, ipſi præſtari qui in utero eſt. *l.* 5. *eod.*

Favorabilior eſt cauſa partus quàm pueri. Partui enim in hoc favetur, ut in lucem producatur: puero, ut in familiam inducatur. Partus enim iſte alendus eſt, qui non tantum parenti, cujus eſſe dicitur, verum etiam reipublicæ naſcitur. *l.* 1. §. 15. *eod.*

[i] Et ſi ſciens prudenſque ſe prægnantem non eſſe conſumpſerit, de ſuo id conſumpſiſſe, Labeo ait. *l.* 1. §. *ult. ff. de ventre in poſſ. mitt.*

[l] Si cui controverſia fiet an inter liberos ſit, & impubes ſit cauſa cognita perinde poſſeſſio datur, ac ſi nulla de ea re controverſia eſſet. *l.* 1. *ff. de Carbon. edicto.*

We have left out the remaining part of this Law, which directs that the Judgment touching the ſtate of this Child ſhould be deferred until it has attained the Age of Puberty, unleſs, as it is ſaid in the third Law, §. 5. of the ſame Title, it ſhould appear to be for the Child's advantage not to have the Judgment delay'd; as if there ſhould be danger of loſing the proofs which might be of ſervice to him. But if the other Children, or the Heirs who ſhould controvert the ſtate of this Child, ſhould refuſe to agree to ſuch a delay, and to leave the Child in poſſeſſion in the mean while, the Uſage in France *would not approve of ſuch delay. And it would be juſt for the common intereſt both of this Child, and of its Adverſaries, to have the queſtion touching the ſtate of the Child, decided with its Tutor, or Curator. And if the Cauſe ſhould be determined againſt him, the Judgment which ſhould be given, would be only as it were Proviſional, and would not hinder him from applying afterwards to have it reverſed, as well as every Minor who has not been ſufficiently defended.*

[m] An autem veſcendi cauſa deminuere poſſit is qui ex Carboniano miſſus eſt, videamus? Et ſiquidem ſatis impubes dedit, ſive decrevit præſes, ſive non, deminuet veſcendi cauſa: & hoc minus reſtituet hæreditatis petitori. Quòd ſi ſatisdare non potuit, & aliter alere ſe videtur non poſſe, deminuendi cauſa uſque ad id quod alimentis ejus neceſſarium eſt mittendus eſt. Nec mirum debet videri, hæreditatem propter alimenta minui, ejus quem fortaſſe judicabitur filium non eſſe, cùm omnium edictis venter in poſſeſſionem mittatur, & alimenta mulieri præſtentur propter eum qui poteſt non naſci. Majorque cura debeat adhiberi ne fame pereat filius, quàm ne minor hæreditas ad petitorem perveniat, ſi apparuit filium non eſſe. *l.* 5. §. 3. *ff. de Carbon. Ed.* Non ſolum alimenta pupillo præſtari debent, ſed & in ſtudia, & in cæteras neceſſarias impenſas, debet impendi, pro modo facultatum. *l.* 6. §. 5. *eod.*

[n] Cauſæ cognitio in eo vertitur, ut ſi manifeſta calumnia appareret eorum qui infantibus bonorum poſſeſſionem peterent, non daretur bonorum poſſeſſio. Summatim ergo cùm petitur ex Carboniano bonorum poſſeſſio debet prætor cognoſcere. Et ſi quidem abſolutam cauſam invenerit, evidenterque probatur filium non eſſe, negare debet ei bonorum poſſeſſionem Carbonianam. Si verò ambiguam cauſam, hoc eſt, vel modicum, pro puero facientem, ut non videatur evidenter filius non eſſe, dabit ei Carbonianam bonorum poſſeſſionem. *l.* 3. §. 4. *eod.*

Altho' this laſt text does not relate to the Proviſion for Alimony, but to the Inheritance it ſelf, yet it may be applied to the one as well as to the other.

[o] Si matre ſuperſtite filius vel filia, qui quæve moritur, filios dereliquerit, omnimodo patri ſuo matrive ipſo jure ſuccedant. Quod ſine dubio & de pronepotibus obſervandum eſſe cenſemus. *l. 11. C. de ſuis & legit. lib.*

Si quis igitur deſcendentium fuerit ei qui inteſtatus moritur, cujuſlibet naturæ, aut gradus ſive ex maſculorum genere, ſive ex fœminarum deſcendens, & ſive ſuæ poteſtatis, ſive ſub poteſtate ſit, omnibus aſcendentibus, & ex latere cognatis præponatur. *Nov.* 118. *c.* 1.

XI.

11. Of the caſe where the Father and Son die at the ſame time.

Seeing the Son does not ſucceed to his Father but when he ſurvives him, and ſince it may happen that they may both die together, ſo that it cannot be known which of them died firſt; it is neceſſary in this caſe to regulate who ſhall ſucceed to the Eſtate both of the one and the other. Thus, for inſtance, if it ſhould happen that a Father and his Son had periſhed together in a Battel, or in a Shipwrack, and that it were impoſſible to know which of them had ſurvived and ſucceeded, whether the Son had ſurvived the Father, or the Father the Son, that the Eſtate of him who died firſt might go to the Heirs of the other; it would be preſumed that the Son had ſurvived and ſucceeded to the Father. And it would be the ſame thing if it were the Mother and the Son. For this being the Natural Order, it is ſuppoſed that the event has been conformable to it; and this preſumption may be founded on this, that it is natural to think that by reaſon of the difference of age, the Son, being the moſt robuſt, has reſiſted Death the longeſt[p].

[p] Cùm bello pater cum filio periſſet, materque filii quaſi poſtea mortui bona vindicaret, agnati verò patris, quaſi filius ante periſſet, Divus Hadrianus credidit patrem priùs mortuum. *l. 9. §. 1. ff. de reb. dub.*

Cùm pubere filio mater naufragio periit: cum explorari non poſſit, uter prior extinctus ſit, humanius eſt credere filium diutius vixiſſe. *l. 22. eod.*

Si Lucius Titius cum filio pubere quem ſolum teſtamento ſcriptum hæredem habebat, perierit, intelligitur ſupervixiſſe filius patri, & ex teſtamento hæres fuiſſe: & filii hæreditas ſucceſſoribus ejus defertur, niſi contrarium approbetur. *d. l.* §. 4. *See the following Article, with the remarks upon it. See likewiſe the fifteenth Article of the fourth Section of Proofs and Preſumptions, and the remark upon it.*

XII.

12. Of the caſe where the Mother and the Child on the breaſt die together.

Altho' in the caſe of the preceding Article it is preſumed, that the Father died firſt; yet if for another caſe we ſhould ſuppoſe, that it were a ſucking Child who died with its Mother, whether it were in a Shipwrack, by Fire, or ſome other accident; it would be preſumed, becauſe of the weakneſs of the Child, that the Mother had lived longeſt. And the ſame thing would be preſumed in every Child that has not as yet attained the age of Puberty, whether it be that the caſe had happened to the Son and the Mother, or to the Son and the Father[q].

[q] Inter ſocerum & generum convenit: ut ſi filia mortua ſuperſtitem anniculum filium habuiſſet, dos ad virum pertineret: Quòd ſi vivente matre filius obiiſſet, vir dotis portionem uxore in matrimonio defuncta reſtitueret. Mulier naufragio cum anniculo filio periit. Quia veriſimile videbatur ante matrem infantem periiſſe, virum partem dotis retinere placuit. *l. 26. ff. de pact. dotal.*

Si mulier cum filio impubere naufragio periit, priorem filium necatum eſſe intelligitur. *l. 23. ff. de reb. dub.* Quòd ſi impubes cum patre filius perierit, creditur pater ſupervixiſſe, niſi & hic contrarium approbetur. *l. 9. in f. eod.*

☞ It is neceſſary to remark on this and the foregoing Article, that theſe Rules appearing to be founded on the preſumptions of what naturally happens, it would ſeem that they ought to be fixed, and always the ſame in all ſorts of caſes without diſtinction. That is to ſay, that whatever the conſequence might be either for or againſt thoſe who have any intereſt whether the Father or Son died firſt, and without any regard to the conſideration which the intereſt of one of the Parties might deſerve above that of the other; we ought always to judge in the ſame manner. Nevertheleſs we ſee in ſome Laws, that in theſe ſorts of caſes, where it is not known which of the two died firſt the preſumptions are different, according to the conſideration of the perſons concerned. Thus, for example, in the caſe mentioned in the firſt of the texts cited on the preceding Article, where the queſtion was, whether the Relations of the Father ought to inherit his Eſtate; which would have been juſt, if he had ſurvived his Son, or whether the Mother ought to inherit the Father's Eſtate, as having paſt to the Son, if he died only after his Father, the Emperor *Adrian* decided in favour of the Mother, that the Son had ſurvived his Father. Thus, on the contrary in a like caſe, where a perſon who had been ſet free from Slavery, died together with his Son by the ſame accident, ſo that it was uncertain if either of them, or which of them did ſurvive, another

Law preſumes in favour of the Patron; that is, of the Maſter who had given this perſon who had been a Slave his freedom, that the Son had not ſurvived his Father, that the Father's Inheritance might go to the Patron[a]; for he had right to ſucceed to the perſon whom he had made free from Slavery, and who died without Children. And this Law prefers him to the perſon who ought to be Heir to the Son, unleſs it were clearly proved that the Father died firſt: *Si cum filio ſuo Libertus ſimul perierit, inteſtati patrono legitima defertur hæreditas; ſi non probatur ſupervixiſſe patri filius.* Theſe are the words of this Law, which explains afterwards the motives of this deciſion, founded on the conſideration of the perſon of the Patron. *Hoc enim reverentiâ patronatus ſuggerente dicimus.*

We ſee alſo that in a like event of a Father and a Son having periſhed together in a Shipwrack, or by ſome other accident, another Law preſumes under another view, that the Son did not ſurvive the Father. It is in the caſe where a Teſtator had required his Heir to reſtore his Eſtate, or a part of it, or ſome particular thing, to another perſon after the death of this Heir, if he ſhould die without Children. It is ſaid in that Law, that if the perſon who was charged with this Fiduciary Bequeſt[b], having only one Son, this Son and his Father had died at the ſame time by ſome accident, ſo that it was impoſſible to know which of them had ſurvived; it would be preſumed that the Son had not ſurvived, and that therefore the caſe of the Fiduciary Bequeſt had happened, the perſon who was charged with it having died without Children. Which would make the Eſtate to go to the perſon for whoſe benefit the Fiduciary Bequeſt was deviſed; whereas had it been preſumed that the Son had ſurvived, it would have made the caſe of the Fiduciary Bequeſt to ceaſe; and the Son having ſucceeded to his Father, he would have tranſmitted the Eſtate to his Heir. *Si quis ſuſceperit quidem filium, verum vivus amiſerit, videbitur ſine liberis deceſſiſſe. Sed ſi naufragio, vel ruinâ, vel aggreſſu, vel quo alio modo ſimul cum patre perierit (filius) an conditio, ſi ſine liberis pater decederet, defecerit videamus, & magis non defuiſſe arbitror. Quia non eſt verum filium ejus ſupervixiſſe. Aut igitur filius ſupervixit patri, & extinxit conditionem fideicommiſſi: aut non ſupervixit, & extitit conditio. Cùm autem quis ante & quis poſteà deceſſerit non apparet, extitiſſe conditionem fideicommiſſi magis dicendum eſt.* l. 17. §. 7. ff. ad Senat. Trebell. It would ſeem as if we might reaſonably conclude from this Deciſion, that ſince it preſumes contrary to the Natural Order, and againſt the Rule explained in the eleventh Article, that the Son did not ſurvive his Father, it is founded only on the favour of the Fiduciary Bequeſt, to make it ſubſiſt againſt the Heir of the Son. And ſince it was ſufficient for the perſon who was to be benefited by the Fiduciary Bequeſt, that the Son had not ſurvived, whether he died before his Father, or only in the ſame moment with him[c]; the Law barely ſuppoſes that the Son did not ſurvive, and that therefore the condition of the Fiduciary Bequeſt was come to paſs, which accompliſhes the intention of the Teſtator, which was to prefer no body to the perſon who was to be benefited by the Fiduciary Bequeſt, but the Children of his Heir, in caſe he ſhould have any who ſhould ſucceed him.

It appears from all theſe ſeveral queſtions which ariſe from the caſe where the Father and Son die together, that the Laws decide differently touching the order of their death, according to the differences of the perſons concerned, judging in favour of the Mother, that the Father died firſt; deciding on the contrary in favour of the Patron, that the Son did not ſurvive; and in favour of the Fiduciary Bequeſt, that the condition on which it was left has happened, by the Father's dying without leaving any Children alive behind him. And in this laſt caſe, it is not the favour of the perſon for whoſe benefit the Fiduciary Bequeſt is left, that occaſions this Deciſion, but barely the quality of its being a Cauſe relating to a Fiduciary Bequeſt, which was ſingularly favourable in the *Roman* Law. But if in the ſame caſe of this Fiduciary Bequeſt, it were the Widow of the Father, and Mother of the Son who died together, who ſhould pretend that according to the Rule of the eleventh Article, and the Order of Nature, her Son had outlived his Father, and that therefore the condition of the Fiduciary Bequeſt had not happened, ſince the Father having died the

[a] *L. 9. §. 2. ff. de reb. dub.*

[b] *This is the name which is given to theſe ſorts of Diſpoſitions; Which we ſhall treat of in the fifth Book.*

[c] Aut non ſupervixit *filius*, & extitit conditio. *d. l.*

the firſt, he did not die without Children; would it be preſumed againſt the Mother in favour of him who was to have the benefit of the Fiduciary Bequeſt, that the Son had ſurvived his Father, and would it not be juſt on the contrary, to preſume in favour of the Mother, that the Son had lived longeſt; ſeeing the Mother would have for her on one ſide, the natural preſumption that the Son ought to ſurvive the Father, and on the other ſide, the favour of her quality of Mother, which, according to the ſpirit of the Laws which we have juſt now quoted, would ſeem to decide in her favour? The conſequence ſeems to be very well grounded, and in order to judge the better of it, it may be remarked, that there reſults from the Laws which we have quoted, and from others relating to this ſubject, three different manners of deciſion in caſes of this nature. The firſt, which ſuppoſes that according to the Order of Nature the Son has ſurvived the Father: the ſecond, which makes an exception to this firſt in the caſes of a Child who is under the years of Puberty: and the third, which ſuppoſes that the Father and Son died in one and the ſame moment. And it is very certain that one of theſe caſes muſt of neceſſity happen; that is to ſay, either that the Father dies firſt, or that he dies laſt, or that both the one and the other die the ſame moment. It may be ſaid of the third of theſe three kinds of Preſumption, that it ought to be aboliſhed, if it were the Rule to preſume always that the Son who is adult ſurvived the Father, and that the Father ſurvived the Son that was under the age of fourteen years. For by this Rule we ought never to preſume, that both of them died in the ſame inſtant; and all the queſtions would be decided by the age of the Son. Since therefore it is certain that the Laws preſume ſometimes that the Son, even altho' he be of the age of fourteen years, has not ſurvived; it follows from thence that thoſe Laws ſuppoſe that it may naturally happen, either that the Son dies firſt, or that both the one and the other die in the ſame inſtant; and this is likewiſe a Truth which Reaſon ſufficiently convinces us of. For it may happen ſeveral ways, that the Mother may periſh under the Ruines of a Building ſooner than the Child whom ſhe ſuckles. It may happen that a Son may be killed in a Battel before his Father; and on the ſame occaſions, and likewiſe on all others, it may ſo fall out, that they both die in the ſame inſtant, or that even he who by reaſon of his age, or ſome other infirmity, might be preſumed to die firſt, does nevertheleſs die the laſt. It is upon this natural diverſity of events that the different manners in which the Laws decide Queſtions of this nature are founded, preſuming ſometimes that the death of both has happened in the ſame inſtant, as it may fall out, and at other times that one of the two died firſt, not by the preſumptions of the equality or difference of their Ages, or of other cauſes, but by preſuming that that has happened which may be moſt advantagious to the party whoſe Cauſe is moſt favourable. For whereas if we knew certainly the truth of the event, whatever it were, it would be neceſſary to decide conformably thereto; the uncertainty of what has happened when we can have no proofs of it, makes the Law to determine with Authority that that has happened which the natural biaſs ſeems to demand, as appears by the Examples which we have juſt now explained. And this manner of deciding may have its foundation in a principle of Equity which is very natural; for ſeeing it is impoſſible on one ſide to know the truth, and neceſſary on the other ſide to come to ſome deciſion, which cannot be made but by ſuppoſing one of the caſes which may happen, there is only the Law which can ſubſtitute its Authority, in the place of the Deciſion which the Truth would make, if it were known. It is in this manner that we ought to 'reconcile thoſe Deciſions which are ſo different; whence it ſeems to follow, that in the Queſtions of this nature, we ought to join to the knowledge of the matter of fact, ſuch as it may be gathered from the circumſtances, the conſideration of the perſons concerned, that we may decide the matter by all theſe views purſuant to the principles which reſult from the reflections on all the ſaid Laws.

If in order to make application of theſe Principles, we ſuppoſe that a Father, and his only Son of about thirteen years of age, having died together, the Widow, Mother of the ſaid Son, demands the Goods of the Father, together with thoſe of the Son, pretending that the Son out-lived the Father, and conſequently ſucceeded to him: and that the Collateral Relations of the Father demand his Inheritance, and likewiſe over and above that which the Father was intitled to out of the Goods of the Son; and ground their pretention on this, that the Son not having as yet fourteen years of age, we ought to preſume that the Father out-lived him. How ought this Queſton to be decided? Would it be adjudged that the Son, becauſe of his tender age, died the firſt, and that therefore the Mother is to have no ſhare in the Goods of her Son? Or will it be preſumed, in favour of the Mother, that the Son has ſurvived the Father? And even altho' it were a Child of much younger years, would the Mother be deprived of that which ſhe ought to have, if it were certain that her Son had ſurvived, ſince it may even have happened that the Father died before the Son, by reaſon of other circumſtances beſides that of age, which is not a certain proof that the Son died firſt? Or would it be ſuppoſed rather that both the one and the other died in the ſame inſtant, in order to give to the Mother the Eſtate of her Son, whom the Father did not ſurvive, and to the Collateral Relations the Father's Eſtate, to which the Son did not ſucceed, he not having ſurvived the Father? The firſt of theſe three ways of deciding this Queſtion would appear too hard. And ſince it is poſſible that the Son may have ſurvived, it would ſeem that we ought not to decide the doubt by the contrary ſuppoſition, which deprives the Mother of all manner of ſhare in the Goods of her Son which came to him by his Father; which conſideration will be an inducement for deciding the doubt according to the ſecond manner; ſince the third would ſtill have this hardſhip in it, that the Mother would be thereby deprived of that which even the Cuſtoms which appropriate the Goods to thoſe of the Stock from whence they came, give her out of the Goods which the Son has inherited of his Father.

If we ſuppoſe for another caſe, that a Father who had ſeveral Sons dies with one of them, ſo that it cannot be known which of them died firſt, and that this Son having ſome Eſtate of his own, had made a Teſtament, and therein named one of his Friends his Univerſal Heir, and that the Brothers coming to divide among them their Father's Eſtate, this Heir of their Brother ſhould pretend that the Son had ſurvived the Father, and that therefore he ought to have not only the Goods belonging to this Son, but likewiſe the ſhare which fell to him of his Father's Eſtate. Would this queſtion be decided in favour of this Heir, by preſuming that the Son died laſt; or would it be determined in favour of the Brothers, upon the preſumption that they died both in the ſame inſtant, and that ſo the Brother's Heir has no ſhare in the Goods of the Father, and that he ought to take only the Goods which their Brother may have had ſome other way? This Heir would be founded on the preſumption that the Son had ſurvived and ſucceeded his Father: and the Brothers would have to urge on their ſide, not only the conſideration which is ſo very favourable of the Natural Equity which calls them to ſucceed to their Father's Eſtate, and which excludes this Stranger from it; but likewiſe this reaſon, that there being no manner of proof to ſhew which of the two died firſt, nor any reaſon to preſume in favour of the Stranger, againſt the intereſt of the Brothers; it ought to be preſumed that both the one and the other died in the ſame inſtant, with as much or rather more reaſon than in the caſe of the Fiduciary Bequeſt which has been ſpoken of. So that according to the Principles which we have juſt now been enquiring into, it would be enough for this Heir, that he ſhould have the proper Goods of the Son, without having any ſhare in thoſe which the Son would have inherited of his Father, if it had been certain, as it is not, that he did ſurvive him.

We might give other Examples of the like caſes, but theſe few are ſufficient for a matter which ſo rarely happens; and it is enough to have taken notice of theſe ſeveral Principles, which ſeem to be ſufficient for all the different caſes of this nature.

V. l. 32. §. 1. *ff. de religioſ. & ſumpt. fun. l.* 9. §. 1. *ff. de reb. dub. d. l.* §. *ult. l.* 16. *eod. d. l.* 16. §. 1. *l.* 17. & 18. *eod. d. l.* 18. §. 1.

It appears by theſe texts, the words whereof we have not ſet down here, that the ordinary preſumption is that the two died in the ſame inſtant, ſince it cannot be ſaid of any one of them, that he ſurvived the other. So that it is only by circumſtances, or upon particular conſiderations, that the contrary is preſumed.

See the fifteenth Article of the fourth Section of Proofs and Preſumptions, the ſeventh Article of the ſecond Section of Pupillary Subſtitution, and the eighteenth Article of the firſt Section of Subſtitutions, direct and fiduciary.

XIII.

13. Children have the Right of Tranſmiſſion.

Children and other Deſcendants are conſidered as being in ſome manner Maſters of the Eſtate of their Father or Mother, Grand-father or Grand-mother, and other Aſcendants, even before their death. And when that does happen, it is not ſo much a Succeſſion which the Children acquire, as a continuation of a Right which they had already, with this difference between this Right and the Inheritance, that whereas during the life of the Aſcendant to whom they ſucceed, they had his Eſtate as it were in Partnerſhip with him, and that his Poſſeſſion preſerved it to them; they have now all alone the ſole and entire Right to the Eſtate after his death. Thus, altho' they ſhould know nothing of his death, and even altho' they ſhould be ignorant of their own Right, as if they ſhould happen to be young Children, yet the Eſtate would be entirely theirs[r]. Which has this effect, that if the Son who has ſurvived his Father, and who has not renounced the Succeſſion, happens to die before he has entred to it, or even before he knows that it is fallen to him, he would tranſmit, that is to ſay, would make his Right to paſs to his Heirs. And this is what is called the Right of Tranſmiſſion, of which we ſhall ſpeak in its proper place[s].

[r] In ſuis hæredibus aditio non eſt neceſſaria, quia ſtatim ipſo jure hæredes exiſtunt. *l. 14. ff. de ſuis & legit. hæred.*

In ſuis hæredibus evidentius apparet continuationem dominii eo rem perducere ut nulla videatur hæreditas fuiſſe quaſi olim hi domini eſſent, qui etiam vivo patre quodammodo domini exiſtimantur. *l. 11. ff. de lib. & poſt.* Sui autem hæredes fiunt etiam ignorantes. § 3 *inſt. de hæred. quæ ab int.*

Et ſtatim à morte parentis quaſi continuatur dominium. *d.* §.

Altho' this word ſuus hæres *does not agree to all Children in the* Roman *Law, and that Children emancipated from their Father's Power loſt this quality, yet theſe Texts are nevertheleſs conformable to the Uſage in* France, *which does not make this diſtinction between Children in matters of Succeſſion, and which, even under the* Roman *Law it ſelf, was aboliſhed by* Juſtinian. V. Nov. 118. c. 1.

[s] *See the tenth Section of Teſtaments.*

XIV.

14. Proviſion for the Children who deliberate whether they ſhall accept the Inheritance.

Although Children and other Deſcendants, who ſurvive their Fathers and Mothers, and others their Aſcendants, are ſeized of their Eſtate, as has been ſaid in the preceding Article, yet they have nevertheleſs the liberty to deliberate whether they will accept the Inheritance, or whether they will abſtain from it. And if during the time that is given them for deliberating, they demand ſome Allowance for their ſubſiſtance, it is granted unto them, as has been ſaid in another place[t].

[t] *See the ſixth Article of the firſt Section of Heirs or Executors with the benefit of an Inventary.*

XV.

15. Fathers have the Uſufruct of Succeſſions which fall to their Children.

It is neceſſary to remark in relation to the Succeſſions of Aſcendants which go to their Children, and other Deſcendants, that they have not always a full and plenary Right to them. For if the Son who is under his Father's Authority ſucceeds to his Mother, or other Aſcendant by the Mother's ſide, his Father ſhall have the Uſufruct of the Goods of that Succeſſion, as ſhall be explained in the following Title[u].

[u] *See the ſecond Section of the following Title.*

XVI.

16. Rights which paſs to thoſe of the Family, who do not ſucceed to the Eſtate.

We muſt likewiſe obſerve upon the ſame ſubject of the Succeſſion of Children and other Deſcendants, and likewiſe in general touching all Succeſſions of Inteſtates, whether they be Deſcendants, Aſcendants, or Collaterals, that there may be in the Inheritance certain Rights which go to the Heirs of Blood, altho' they be deprived of the Succeſſion by a Teſtament, or even that they renounce it. Thus the Right of Patronage annexed to a Family, paſſes to thoſe to whom the Title gives it, although they do not ſucceed to the Eſtate[x]. Thus the Right of being interred in the Burying-place of the Family, paſſes equally to thoſe who are of the Family, whether they Inherit the Eſtate, or not[y].

[x] Filii hæreditate paternâ ſe abſtinentes, jus quod in libertis habent paternis, non ammittunt. *l. 9. ff. de jur. patron. l. 47. §. 4. ff. de bon. libert.*

Altho' the Right of Patronage which is ſpoken of in this Article be of a different nature from that mentioned in this Law, yet it may be applied to it, ſeeing theſe two Rights have one and the ſame name, and that the one as well as the other goes to the neareſt Relations, altho' they do not ſucceed as Heirs to the Eſtate. The Patronage ſpoken of in this Article, is the Right which the Church has granted to the Founders of ſome Benefices, and their Deſcendants, to preſent to the Ordinary who has the Right of Inſtitution, perſons who are capable. Which is a matter that does not come properly within the deſign of this Book.

[y] *V. l. 6. ff. de relig. & ſumpt. fun.*

SECT. III.

Of the Lines and Degrees of Proximity.

ALthough the ſubject matter of this Title be limited to that which concerns Children and other Deſcendants, and that it may ſeem for that reaſon that we ought to ſpeak here only of the Lines and Degrees of Deſcendants; yet the connexion there is between the Lines and Degrees of Aſcendants, Deſcendants and Collaterals, does not allow this matter to be divided; but ſeeing we are about to explain here the Lines and Degrees of Deſcendants, it is proper likewiſe to join the others.

Seeing theſe Lines and Degrees of Proximity, or Conſanguinity, are more eaſily diſtinguiſhed in a Figure, we have inſerted one at the end of this Section. But it is neceſſary beforehand to explain what is meant by Degrees of Proximity, and by the Lines which the ſaid Degrees compoſe; for it is by thoſe Lines and Degrees that we ſee what is the Proximity between two perſons; and this ſhall be the ſubject matter of this Section.

The knowledge of the Degrees of Proximity is not only neceſſary in the matter of Succeſſions, but likewiſe in other matters; as in Tutorſhips, that thoſe may be named Tutors who are related to the Minors, and thoſe excuſed who are not: in the Challenges or Recuſations of Judges who are Relations: in the admiſſion of Witneſſes, either in Civil or Criminal Cauſes, in order to receive or reject the Teſtimony of thoſe who are related to the Parties[a]: in Marriages, which are unlawful between thoſe that are within certain degrees of Relation or Affinity[b].

The Prohibitions of Marriages within the Degrees of Proximity and Affinity, which had been eſtabliſhed by the *Roman* Law, have been very much enlarged by the Canon Law, which is obſerved in *France*[c]. But this matter does not belong to this place; for here it ſufficeth to point out the Order of the Degrees of Kindred in ſo far as concerns Succeſſions. And as for the Degrees of Affinity or Alliance, as the ſame have no relation to Succeſſions, Allies by Marriage having no manner of Right to inherit, we ſhall ſay nothing of them[d]. The Degrees of Affinity are ſufficiently diſtinguiſhed by thoſe of Proximity; for in order to know the Degree of Affinity between the Huſband and the Relations of his Wife, and between the Wife and the Relations of her Huſband, there is no more required but to place the Huſbands in the ſame Degree in which their Wives are, and the Wives in the ſame Degree with their Huſbands.

Seeing all the Articles of this Section have relation to the Figure of Kindred which is placed at the end of it, and that without the ſight of the ſaid Figure it will be difficult for beginners to underſtand aright all this detail; they are to take notice that it will be convenient for them to have the Figure before them at the reading of each Article, and before they look into it to read the Advertiſement which we have ſet down at the end of this Section, for the right underſtanding the uſe of the ſaid Figure.

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I.

1. *What are the Degrees of Proximity, or Conſanguinity.*

SEeing Proximity between two perſons proceeds either from this, that they are deſcended one from the other, which makes the connexion between Aſcendants and Deſcendants, or from their being both deſcended of one and the ſame perſon, which makes that of Collaterals; we judge therefore of the Proximity between two perſons by the number of Generations which make both the one and the other of the ſaid connexions. And theſe Generations are called Degrees, by which we ſtep from one perſon to another, in order to make the computation of their Kindred[a], in the manner which ſhall be explained in the following Articles.

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[a] Juriſconſultus cognatorum gradus & affinium noſſe debet. Quia legibus hæreditates & tutelæ ad proximum quemque agnatum redire conſueverunt. *l.* 10. *ff. de gradibus & affin.* Præterea legibus judiciorum publicorum, contra affines & agnatos teſtimonium inviti dicere non coguntur. *d. l.*

[b] Nemini liceat contrahere matrimonium cum filia, nepte vel pronepte, itemq; cum matre, avia, vel proavia: & ex latere amita ac matertera, ſorore, ſororis filia, & ex ea nepte: præterea fratris tui filia, & ex ea nepte. Itemque ex affinibus, privigna, noverca, nuru, ſocru, cæteriſq; quæ jure antiquo prohibentur à quibus cunctos volumus ſe abſtinere. *l.* 17. *C. de nuptiis.*

[c] *V.* 35. *q.* 4.

[d] Affinitatis jure nulla ſucceſſio permittitur. *l.* 7. *C. com. de ſucceſſ.*

[a] Gradus dicti ſunt à ſimilitudine ſcalarum locorumve proclivium, quos ita ingredimur, ut à proximo

ximo in proximum, id eſt, in eum qui quaſi ex eo naſcitur, tranſeamus. *l.* 10. §. 10. *ff. de grad. & affin.*

II.

2. What are the Lines of Conſanguinity. By Lines of Conſanguinity is meant the Succeſſion of Degrees or Generations which are between one perſon and another. And as there are three Orders of Proximity, that of Aſcendants, that of Deſcendants, and that of Collaterals, ſo there are likewiſe three Orders of Lines[b].

III.

3. Line of Aſcendants. In the Order of Aſcendants of the perſon whoſe Relation we want to know, we place above him his Father, his Grand-father, his Great Grand-father, and his other Anceſtors, each of them in their rank according to their Degrees, and the firſt Degree is that which aſcends from the Son to the Father, the ſecond from the Father to the Grand-father, the third from the Grand-father to the Great Grand-father, and ſo on ſucceſſively with the others, according to the ſame Order. Thus the Father is in the firſt degree to his Son, and the Grand-father in the ſecond degree to the Grand-ſon, and ſo on with the reſt. It is theſe Degrees whereof the ſituation one above the other makes the Line of Aſcendants, which, being joined with that of the Deſcendants, of which we ſhall ſpeak in the following Article, makes together only one Line[c].

IV.

4. Line of Deſcendants. In the Order of Deſcendants of the perſon whoſe Relation is in diſpute, we place under him his Son, his Grandſon, and the other Deſcendants, every one in his Rank according to their Degrees; the firſt of which is that which deſcends from the Father to the Son, the ſecond from the Son to the Grand-ſon, the third from the Grand-ſon to the Great Grand-ſon, and the others in the like manner, according to the ſame Order. Thus the Son is in the firſt degree to the Father, and the Grand-ſon in the ſecond degree to the Grand-father, and ſo on with the reſt[d]. It is theſe degrees whereof the ſituation of one under the other makes the Line of the Deſcendants, which as has been ſaid in the preceding Article, makes only one Line with that of the Aſcendants.

V.

5. Line of Collaterals. In the Order of Collaterals, there is this difference that diſtinguiſhes it from the Orders of Aſcendants and Deſcendants, that whereas there is only one Line of Aſcendants and Deſcendants, there are as many Lines of Collaterals as there are places of Aſcendants and Deſcendants, including therein the place of the perſon whoſe Kindred we enquire into. For at his ſide are his Brothers, at his Father's ſide are his Uncles; at his Son's ſide are his Nephews, and ſo on with the others in ſeveral Lines both aſcending and deſcending, as ſhall be explained in the tenth and following Articles, and as appears plainly enough by the Figure. Theſe are the Lines which are called Collateral, becauſe they are at the ſide of the direct Line of Aſcendants and Deſcendants. So that in order to reckon the degrees of Kindred between two Collateral Relations, it is neceſſary to find in the direct Line the firſt of the Deſcendants that is common to them, that is, the firſt of whom both the one and the other are deſcended, and then to count the degrees which aſcend from one of them to that common Parent or Aſcendant, and thoſe which from that Aſcendant deſcend to the other. Thus between two Brothers there are two degrees: the firſt, which aſcends from one of the Brothers to their Father; and the ſecond, which deſcends from the Father to the other Brother. Thus there are four degrees from one Couſin German to another, two which aſcend from one of them to his Father and Grand-father, and two which deſcend from the ſaid Grand-father to the other Couſin. And it was in this manner that Proximity was reckoned among thoſe perſons in the *Roman* Law, placing the Brothers in the ſecond degree, and the Couſin Germans in the fourth. But by the Canon Law, which is obſerved in *France*, as has been ſaid in the Preamble of this Section, the ſame degrees are conſidered under another view, and the computation is made in another manner, by placing Brothers in the firſt degree, and Couſin Germans in the ſecond. For they are compared among themſelves according to their ſituation under the common Parent or Aſcendant. Thus the two Brothers are in the firſt degree under their Father, and the two Couſin Germans are in the ſecond degree under their Grand-father. We ſhall ſee in the tenth and following Articles what relates to the other Collaterals; but this difference between the Canon and Civil Law is only in the Collateral Line; for as to the Aſcendants and Deſcendants, the degrees are the ſame in both Laws.

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[b] Gradus cognationis alii ſuperioris ordinis ſunt, alii inferioris, alii ex tranſverſo ſive à latere. Superioris ordinis ſunt, parentes: inferioris liberi: ex tranſverſo ſive à latere, fratres & ſorores, liberiq; eorum. *l.* 1. *ff. de gradib. & affin.*

[c] Primo gradu ſunt, ſupra pater, mater. *l.* 1. §. 3. *ff. de grad. & affin.*
Secundo gradu ſunt, ſupra avus, avia. *d. l.* §. 4.
Tertio gradu ſunt, ſupra proavus, proavia. *d. l.* §. 5.

[d] Primo gradu ſunt—infra filius, filia. *l.* 1. §. 3. *ff. de gradib. & affin.*
Secundo gradu ſunt—infra nepos, neptis. *d. l.* §. 4.
Tertio gradu ſunt—infra pronepos, proneptis. *d. l.* §. 5.

VI.

6. Divers Lines of Aſcendants and Deſcendants.

Although we reckon only one Line of Aſcendants, and one of Deſcendants, which between them make no more than one Line, which aſcends from the Children to the Fathers, and deſcends from the Fathers to their Children, and is called direct; yet each of theſe two Orders of Aſcendants and Deſcendants has under other views ſeveral Lines, which are to be diſtinguiſhed for divers uſes. For whereas, for example, it is neceſſary to conſider only one Line of Aſcendants and Deſcendants on the Father's ſide, when the queſtion is to compute the degrees from Father to Son between an Aſcendant and a Deſcendant[f]; yet if we will diſtinguiſh the Aſcendants on the Father's ſide and on the Mother's ſide of one and the ſame perſon, and his Deſcendants of Sons and Daughters, there are ſeveral Lines, as ſhall be explained in the three following Articles.

VII.

7. Lines of Aſcendants by the Father's ſide and Mother's ſide.

If we will reckon all thoſe who are in the Order of Aſcendants of any perſon, there is firſt a Line which aſcends from that perſon to his Father, to his Grand-father by the Father's ſide, to his Great Grand-father by the Father's ſide, and to the other Aſcendants from Father to Father: and there is another Line which aſcends from the ſame perſon to his Mother, to his Grand-mother by the Mother's ſide, and ſo on to the others from Mother to Mother. But theſe Lines not containing all the Aſcendants, there are ſeveral other Lines to be imagined, in order to comprehend them all, as ſhall be explained in the Article which follows.

VIII.

8 Multiplication of Aſcendants, and their Lines.

To underſtand aright the Order of thoſe other Lines of Aſcendants, beſides the two which have been mentioned in the preceding Article, it is neceſſary to conſider that the number of Aſcendants increaſes always the double at every degree. Thus, every one has in the firſt degree only his Father and his Mother, and in the ſecond he has his Grand-father and Grand-mother by the Father's ſide, and likewiſe his Grand-father and Grand-mother by the Mother's ſide. So that whereas in the firſt degree there are only two perſons, there are four in the ſecond, and in the third there are eight, which are the Father and Mother of the Grand-father by the Father's ſide, the Father and Mother of the Grand-mother by the Father's ſide, the Father and Mother of the Grand-father by the Mother's ſide, and the Father and Mother of the Grand-mother by the Mother's ſide. And according to this Order, in mounting always to the Aſcendants of each perſon, we ſhall go by ſeveral Lines which branch out at each Generation. And by this progreſſion we ſhall find ſixteen perſons in the fourth degree, thirty two in the fifth, ſixty four in the ſixth, one hundred twenty eight in the ſeventh[h], and ſo on with the reſt. Which would make above thirty millions of perſons in the five and twentieth Generation in aſcending. So that by continuing we ſhould find in much fewer Generations than what have been ſince the firſt Man, many more Aſcendants of each perſon than there have been Men ſince the Creation. But as many of the Aſcendants of one perſon are deſcended from the ſame Anceſtors, the Lines which were branched out, join together again at the firſt common Aſcendant, from whom the others were deſcended. Thus, this multiplication being often interrupted

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[e] Secundo gradu ſunt——ex tranſverſo frater, ſoror. *l.* 1. §. 4. *ff. de gradib. & affin.*

Since by the manner of counting the degrees according to the Roman *Law, the Brothers are in the ſecond degree, and that they are the firſt and neareſt in the Order of Collaterals, it is therefore ſaid that in that Order there is no firſt degree.* Superior quidem & inferior cognatio à primo gradu incipit. Ex tranſverſo, ſive à latere, nullus eſt primus gradus, & ideo incipit à ſecundo. *d. l.* §. 1.

Quarto gradu ſunt—fratres patrueles, ſorores patrueles: id eſt, qui, quæve ex duobus fratribus progenerantur. Item conſobrini conſobrinæq; id eſt, qui, quæve ex duabus ſororibus naſcuntur, quaſi conſororini. Item amitini, amitinæ, id eſt, qui quæve ex fratre & ſorore propagantur. Sed ferè vulgus iſtos omnes fratres communi appellatione conſobrinos vocant. *d. l.* 1, §. 6, *l.* 10. §. 15. *eod.*

[f] *This is a conſequence of the firſt Article.*

[g] *This is likewiſe a conſequence of the firſt Article.*

rupted by theſe common Aſcendants, ceaſes and is reduced in ſuch a manner, that we come at laſt to the only common Aſcendant from whom all Mankind is deſcended.

[k] Tritavi, itemque tritaviæ pater mater perſonas efficiunt centum viginti octo. *l.* 10. §. 18. *ff. de gradib. & affin.*

Admonendi ſumus parentium perſonas ſemper duplari: avum enim & aviam tam maternos, quàm paternos intelligimus. *l.* 3. §. *ult. eod.*

IX.

9. Difference between the Lines of Aſcendants and thoſe of Deſcendants.

There is this difference between the Lines of Deſcendants and the Lines of Aſcendants, that theſe are the ſame for all perſons; for every one has the ſame Order of Aſcendants that any other has, altho' the number of the Aſcendants of all perſons is unequal, according as they have more or fewer common Aſcendants in the ſenſe explained in the preceding Article. But it is not the ſame thing with reſpect to the Lines of Deſcendants; for theſe Lines branch out, and are divided differently according to the number of the Children and Deſcendants; and they end or are extended more or leſs, according as the Generations ceaſe or are continued. So that in many Families all their Deſcendants come to an end, and in many others their Poſterity will remain to the end of the world. Thus the Lines of the Deſcendants of each Family are diverſified. But if we want only to ſee the Degrees or Generations between one ſingle Aſcendant, and one ſingle Deſcendant, from Father to Son, there is no occaſion to imagine more than one Line, whatever number of Degrees there may be between the two[i].

[i] *This is a conſequence of the foregoing Articles.*

X.

10. Diverſe Lines of Collaterals.

As there are ſeveral Lines of Aſcendants and Deſcendants, in the ſenſe explained in the preceding Articles, altho' we reckon only one when we count the degrees from an Aſcendant to a Deſcendant, or from a Deſcendant to an Aſcendant; ſo we may alſo diſtinguiſh ſeveral Lines of Collaterals, according to the ſeveral degrees which they take up[l]; as ſhall be explained in the Articles which follow.

[l] *See the following Articles.*

To underſtand aright this and the following Articles, it is neceſſary to have the Figure before us.

XI.

11. Three Orders of Collaterals.

In order to make the knowledge of theſe ſeveral Lines of Collaterals eaſier, and to avoid confuſion therein, we may diſtinguiſh the ſaid Lines into three Orders. The firſt contains only one Line, which is that wherein are placed Brothers, Couſin Germans, ſecond Couſins, and the other Couſins who are at the ſide of the perſon whoſe Kindred we enquire into, and in ſuch a manner that they are all of them in an equal diſtance with the ſaid perſon from the Aſcendants that are common to them. The ſecond Order contains ſeveral Lines which are above that of the Brothers: and in the firſt of the ſaid Lines are the Uncles, in the ſecond the Great Uncles, and ſo on with the others, aſcending from Line to Line. And in each Line at the ſide of the Uncles and Great Uncles, and of the others upwards, are the Couſins, who are at a leſs diſtance than this perſon from their common Aſcendant. And the third Order of theſe Lines contains alſo ſeveral Lines which are underneath that of the Brothers: and in the firſt of the ſaid Lines are the Nephews, in the ſecond the Sons of Nephews, and ſo on with the others, deſcending from Line to Line. And in each of theſe Lines at the ſide of the Nephews and Sons of Nephews, and the others downwards, are the Couſins, who are farther removed than this perſon from their common Aſcendant. Thus all the Collaterals are comprehended in the ſeveral Lines of theſe three Orders, under the names of Brothers, Uncles, Nephews, and Couſins of both Sexes[m].

[m] *See the Figure, and the eighth, ninth, and tenth Articles of the firſt Section of the third Title.*

XII.

12. The Proximity of the Degrees of Collaterals is not regulated by the Order of the Lines.

This diſtinction of three Orders of the Lines of Collaterals has not this effect, that all thoſe of one Line are either nearer or remoter from the perſon whoſe Relations we enquire into, than all thoſe of another Line; but, excepting the Brothers, there are ſome in each Line who are nearer to this perſon than ſome in all the other Lines; and there are likewiſe in each Line ſome who are more remote from the ſame perſon than ſome in all the other Lines. Thus, the Uncle who is in the firſt Line of the ſecond Order, and the Nephew who is in the firſt Line of the third Order, are nearer than the Couſin German, who is in the Line of the firſt Order. And it is eaſy to ſee by the Figure, the different Proximities of all the Degrees in all the Lines of theſe ſeveral Orders[n].

[n] *See the Figure.*

XIII.

13. *Situation of the Lines of Collaterals.*

Of theſe three Orders, the firſt which begins with the Brothers, has only, as has been ſaid, one Line which croſſes and divides that of the Aſcendants and Deſcendants, in the point where the perſon whoſe Kindred we enquire into is placed. But as to the other two Orders, the one has as many Lines as there are Aſcendants, and the other as many as there are Deſcendants. And of all thoſe Lines which are parallel to thoſe of the Brothers, thoſe of the ſecond Order are above, and every one of them croſſes the place of one of the Aſcendants. And the Lines of the third Order are underneath, and each of them croſſes the place of one of the Deſcendants. Thus we may obſerve this difference between the ſaid three Orders, that in the firſt, which has only one Line, all thoſe who are in it, and the perſon whoſe Kindred we ſearch into, are equally diſtant from the Aſcendants whom they have in common. That in the ſecond, which is compoſed of the Lines that croſs the places of the Aſcendants, all thoſe who are in it, are nearer to the common Aſcendants than the perſon whoſe Kindred is in queſtion. And that in the third Order, which is made up of the Lines which croſs the places of the Deſcendants, all thoſe who are in it are more remote than this perſon from the Aſcendants that are common to them[o].

XIV.

14. *Two ways of counting the Degrees, one according to the Roman Law, and the other according to the Canon Law.*

According to theſe Orders of Collaterals, to count the Degrees of Kindred between two perſons, as they were computed in the *Roman* Law, we need only to follow the Generations from one to the other, as has been ſaid in the fifth Article, mounting from one of the two to their common Aſcendant, and deſcending to the other. Thus, between one and his Brother there are two Degrees, as has been explained in the ſame Article. Thus, between one and his Uncle there are three Degrees, two which aſcend from this perſon to his Grand-father, who is their firſt common Aſcendant, and a third which deſcends from the Grand-father to the Uncle. And by this computation the Brothers, as has been ſaid, are in the ſecond Degree to one another, and the Uncle and Nephew are in the third[p]. But according to the Canon Law, the two Brothers are in the firſt Degree, and the Uncle and Nephew in the ſecond. For among Collaterals the Rule is, that thoſe who are equally diſtant from their common Parent or Aſcendant, are in the ſame degree of diſtance from one another that each of them is from the common Aſcendant; and that thoſe who are at unequal diſtances from their common Aſcendant, are in the ſame Degree to one another that the perſon who is moſt remote from that Aſcendant is to the ſaid Aſcendant[q]. Which makes the computation of all the Degrees of Collaterals very eaſy.

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[o] *See the Figure.*

[p] Tertio gradu ſunt——ex tranſverſo, fratris, ſororiſq; filius, filia, & convenienter patruus, amita, avunculus, matertera. *l.* 1. §. 5. *ff. de gradib. & affin.*

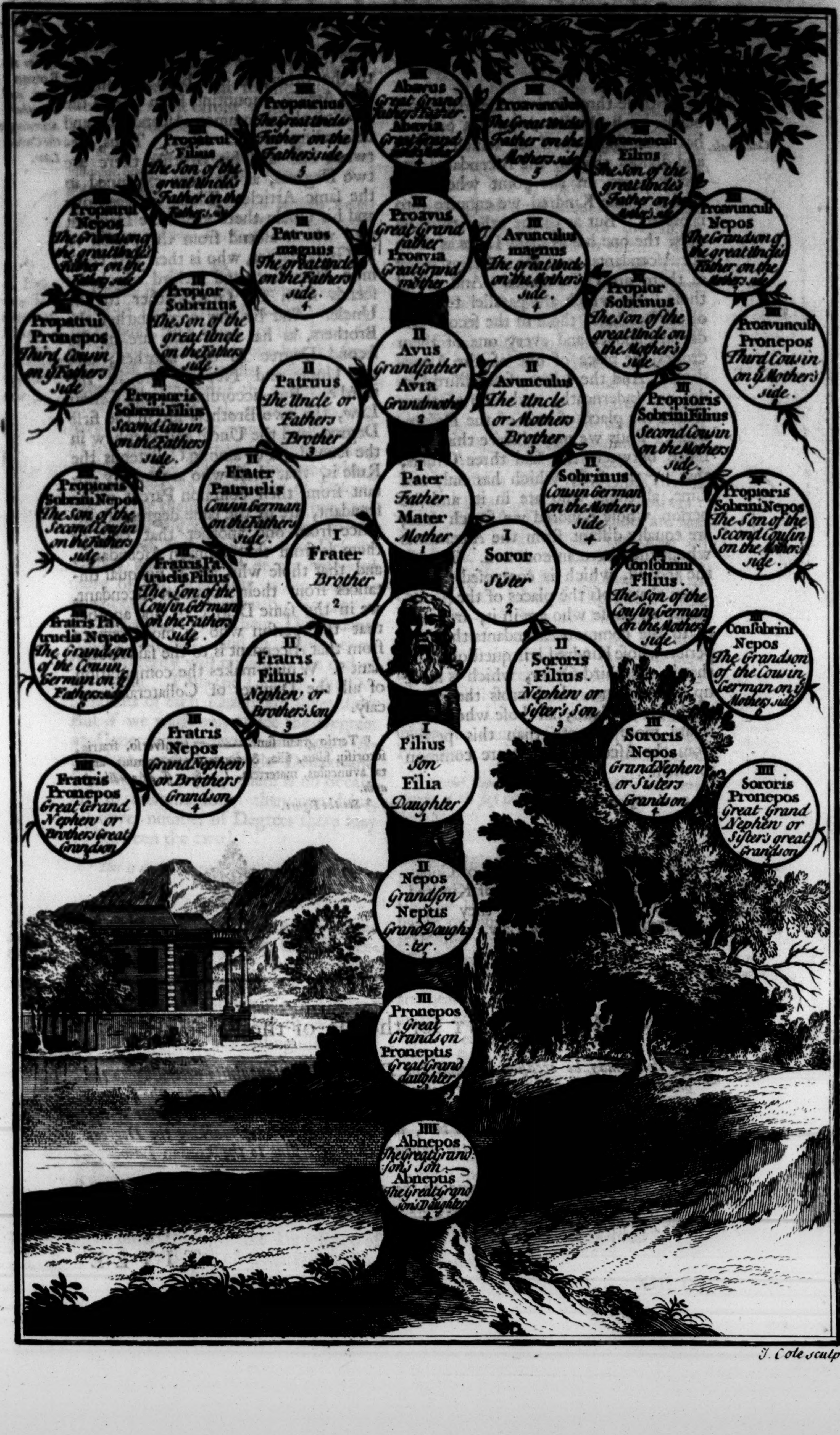
[q] *See the Figure.*

◆

ADVERTISEMENT for the uſe of the FIGURE.

Since there may be occaſion to count the Degrees of Conſanguinity according to the manner in the Roman *Law, or according to that of the Canon Law, the following Figure ſerves both for the one and the other. For in each place the Number of the Degrees is differently marked for the two, the number at the top marking the Degrees according to the Canon Law, and the number below according to the* Roman *Law.*

As for the Lines, they are marked by the places of which they are compoſed. And it is eaſy to diſtinguiſh them all by the bare view of the Figure, where they are ſuch as we have juſt now explained them.


IIII Abavus Great Grand Father's Father Abavia Great Grand Father's Mother 4
IIII Propatruus The great Uncle's Father on the Father's side 5
IIII Proavunculus The Great Uncle's Father on the Mother's side 5
IIII Propatrui Filius The Son of the great Uncle's Father on the Father's side
IIII Proavunculi Filius The Son of the great Uncle's Father on the Mother's side
IIII Propatrui Nepos The Grandson of the great Uncle's Father on the Father's side
IIII Proavunculi Nepos The Grandson of the great Uncle's Father on the Mother's side
III Proavus Great Grand father Proavia Great Grand mother
III Patruus magnus The great Uncle on the Father's side 4
III Avunculus magnus The great Uncle on the Mother's side 4
III Propior Sobrinus The Son of the great Uncle on the Father's side
III Propior Sobrinus The Son of the great Uncle on the Mother's side
IIII Propatrui Pronepos Third Cousin on ye Father's side
IIII Proavunculi Pronepos Third Cousin on ye Mother's side
II Avus Grandfather Avia Grandmother 2
II Patruus The Uncle or Fathers Brother 3
II Avunculus The Uncle or Mothers Brother 3
III Propioris Sobrini Filius Second Cousin on the Father's side 6
III Propioris Sobrini Filius Second Cousin on the Mother's side 6
II Frater Patruelis Cousin German on the Father's side
II Sobrinus Cousin German on the Mothers side 4
IIII Propioris Sobrini Nepos The Son of the Second Cousin on the Father's side
IIII Propioris Sobrini Nepos The Son of the Second Cousin on the Mother's side
I Pater Father Mater Mother 1
I Frater Brother 2
I Soror Sister 2
III Fratris Patruelis Filius The Son of the Cousin German on the Father's side
III Consobrini Filius. The Son of the Cousin German on the Mother's side
IIII Fratris Patruelis Nepos The Grandson of the Cousin German on ye Father's side 6
IIII Consobrini Nepos The Grandson of the Cousin German on ye Mother's side 6
II Fratris Filius. Nephew or Brother's Son 3
II Sororis Filius. Nephew or Sister's Son 3
I Filius Son Filia Daughter
III Fratris Nepos Grand Nephew or Brothers Grandson 4
III Sororis Nepos Grand Nephew or Sisters Grandson 4
IIII Fratris Pronepos Great Grand Nephew or Brothers Great Grandson 5
IIII Sororis Pronepos Great Grand Nephew or Sister's great Grandson
II Nepos Grandson Neptis Grand Daugh:ter
III Pronepos Great Grandson Proneptis Great Grand daughter
IIII Abnepos The Great Grand:son's Son Abneptis The Great Grand son's Daughter 4

J. Cole sculp.

TITLE II.

In what manner FATHERS, MOTHERS, *and other* ASCENDANTS *ſucceed.*

THE Succeſſion of Parents to Children is not according to the Order of Nature, as is the Succeſſion of Children to Parents. But when it does happen, that Parents outlive their Children who die without Children, it is but juſt that they ſhould not ſuffer the double loſs both of their Children, and alſo of the Goods which they may leave behind them: And this ſort of Succeſſion of Aſcendants, which in one ſenſe is Not natural, is in another reſpect conformable to the Law of Nature, which calls them to the Succeſſion as being the Next of Kin, and to Equity, which gives them this comfort under their loſs.

It is perhaps becauſe the Succeſſion of Aſcendants is not conformable to the Order of Nature, that it has been ſo differently regulated by divers Laws among the *Romans*, both with reſpect to Fathers, and alſo with reſpect to Mothers. As for Fathers, ſeeing they had the property of every thing which their Children who were not emancipated could acquire, excepting only the Peculiar Patrimonies of which we ſhall ſpeak in the Preamble of the ſecond Section of this Title, the Goods of the ſaid Children whom their Fathers ſurvived, did not paſs to any Heir, but they remained to the Fathers who had a right to the ſaid Peculiar Patrimonies, if their Children left no Children behind them, and died without diſpoſing of them. And as for the Children who were emancipated, and who had acquir'd ſome Eſtate, their Fathers did not ſucceed to them by the ancient Law, unleſs that when they did emancipate them they had taken the precaution to ſecure to themſelves the Right of ſucceeding to them, by obſerving a formality which had this effect; and without which they did not ſucceed to them[a].

As to the Mothers, they had not in the beginning any ſhare in the Succeſſion of their Children, whether they were emancipated or not, and likewiſe the Children did not ſucceed to their Mother. In proceſs of time, Mothers did ſucceed, but differently, according to the different times, and the whimſical changes that many Laws made in their Right of Succeſſion, by the diſtinctions of the caſes where the Mothers ſucceeded in conjunction with the Father alone, or with the Father and Brothers of their deceaſed Children, or with the Father and the Brothers and Siſters, or with the Brothers and Siſters without the Father, or with the Brothers without Siſters, or with the Siſters without Brothers. Which made many different Combinations, and as many Rules which diverſifyed the ways which Fathers and Mothers ſucceeded to the Children[b]. But without entring into all this detail which would be of no manner of uſe, we ſhall confine our ſelves to the lateſt Laws, which have fixed all thoſe changes, and which are in uſe in the Provinces where the *Roman* Law is received as their Cuſtom.

Here we may obſerve the inconvenience of the Succeſſion of Aſcendants, in making the Goods to paſs from one Family to another; when a Mother, for inſtance, ſucceeding to her Son who had already inherited the Succeſſion of his Father, tranſmits his Paternal Eſtate either to her Children by a ſecond Huſband, or to other perſons. And it is the ſame thing with reſpect to the Father and other Aſcendants who ſucceed to their Children.

It is againſt this inconvenience that proviſion has been made by that Rule of the Cuſtoms in *France*, which directs that Immoveables which come by Deſcent from their Anceſtors ſhall not remount, Which has been explained in another place[c]. And becauſe the ſaid Rule did not extend to the Provinces where the *Roman* Law takes place as Cuſtom, it was there provided for by that Ordinance which is called the Edict of Mothers[d], which ordains that Mothers ſhall ſucceed only to the Moveables, and other Goods which their Children may have acquired otherwiſe than by the Father's ſide; and that they ſhall have

[a] *V. §. ult. inſt. de legit. agn. ſucceſſ.*

[b] *L. 10. ff. de ſuis & legit. l. 2. §. 9. ff. ad Senat. Tertull. & Orphit. d. l. §. 18. Tit. inſt. de Senat. Tertull. & tit. de Senat. Orphit. l. 2. C. ad Senat. Tert. l. 4. eod. l. 7. eod. d. l. §. 1. l. 9. C. de leg. hæred. l. 14. eod. l. 15. eod. Nov. 22. c. 47. §. 2. Nov. 118. c. 2. Nov. 84. c. 1.*

have only the Uſufruct of the half of the Immoveables which came to their Children by deſcent from the Father's ſide. But that Edict is reſtrained to Mothers, and does not make the leaſt alteration with reſpect to Fathers and other Aſcendants.

[c] *See the Preface to this ſecond Part, N°* 4. *and the Remark on the ſixth Article of this Section.*

[d] *Of King* Charles IX. an. 1567.

SECT. I.

Who are thoſe that are called Aſcendants, and in what manner they ſucceed.

The CONTENTS.

1. *Who are Aſcendants.*
2. *Who are the Grand-fathers and Anceſtors.*
3. *Aſcendants of both Sexes.*
4. *In what manner the Father and Mother ſucceed.*
5. *The neareſt Aſcendants exclude the remoteſt.*
6. *A kind of repreſentation among the Aſcendants.*
7. *The Brothers and Siſters of the whole blood ſucceed with the Aſcendants.*
8. *When the Aſcendants, Brothers and Nephews ſucceed together.*
9. *Aſcendants have the right of Tranſmiſſion.*
10. *Aſcendants of Baſtards.*

I.

1. *Who are the Aſcendants.*

WE uſe frequently the names of Parents and Aſcendants, to ſignify indifferently all the perſons from whom every one derives his birth. And in this ſenſe the Father and Mother are of the number of Aſcendants, and they are placed in the ſame Line[a]. But becauſe they are in the firſt degree, they are diſtinguiſhed from the other Aſcendants: and the name of Aſcendants belongs more properly to Grand-fathers, and the other Anceſtors above them.

II.

2. *Who are the Grand-fathers and Anceſtors.*

We call by the name of Grand-fathers, thoſe who are in the degree immediately above the Father and Mother. Thus the name of Grand-father belongs to the Father's Father, and to the Mother's Father. And we call in general by the name of Fore-fathers, the Great Grand-father, and others above him[b]. But this laſt name is never made uſe of in the ſingular number, when we ſpeak only of one Aſcendant.

III.

3. *Aſcendants of both Sexes.*

The rank of Anceſtors comprehends the two Sexes. And as to what concerns Succeſſions, the Anceſtors of both Sexes are called indifferently to thoſe which may belong to them[c]; as ſhall be explained in the Articles which follow.

IV.

4. *In what manner the Father and Mother ſucceed.*

The Father and Mother ſucceed equally to their Sons or Daughters who die without Children. And if both the one and the other ſurvive, they divide the Inheritance between them: or whichſoever of the two ſurvives alone ſucceeds to the whole Inheritance[d]; ſaving the Goods which ſhall be ſpoken of in the following Section[e]. But if the Son or Daughter to whom the Father or Mother, or both of them, are to ſucceed, had Brothers or Siſters of the whole Blood; theſe Brothers and Siſters would have their ſhare in the Succeſſion; as ſhall be ſhewn in the ſeventh Article[f].

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[a] Quidam parentem uſque ad tritavum appellari aiunt: ſuperiores, majores dici. Hoc veteres exiſtimâſſe, Pomponius refert. Sed Caius Caſſius omnes in infinitum parentes dicit: quod & honeſtius eſt, & meritò obtinuit. *l.* 4. §. 2. *ff. de in jus voc.*

Altho' the French *word* Parent *does often in the* French *Language take in the Collateral Relations; yet they often uſe it for the Aſcendants, as when one ſpeaks of the duty of Children towards their Parents.*

[b] Parentes uſque ad tritavum apud Romanos proprio vocabulo nominantur. Ulteriores qui non habent ſpeciale nomen majores appellantur. *l.* 10. §. 7. *ff. de gradib. & affin.*

[c] Differentia nulla ſervanda inter perſonas iſtas, ſive fœminæ, ſive maſculi fuerint, qui ad hæreditatem vocantur. Et ſive per maſculi, ſive per fœminæ perſonam copulantur: & ſive ſuæ poteſtatis, ſive ſub poteſtate fuerit, is cui ſuccedunt. *Nov.* 116. *c.* 2. *in f.*

[d] Si igitur defunctus deſcendentes quidem non relinquat hæredes, pater autem, aut mater, aut alii parentes ei ſuperſint, omnibus ex latere cognatis hos præponi ſancimus: exceptis ſolis fratribus ex utroque parente conjunctis defuncto. *Nov.* 118. *c.* 2.

As to what concerns the Mother, ſee what has been remarked in the Preamble to this Title.

[e] *See the fifteenth, ſixteenth and ſeventeenth Articles of the following Section.*

[f] *See the ſeventh Article of this Section, and the remark that is there made on it.*

[*The Law in* England, *as to the Succeſſion of Inteſtates, is different from what is laid down in this Article. For the Father and Mother do not ſucceed jointly to the Eſtate of their Sons and Daughters who die Inteſtate, and without Wife or Children; but the Father ſucceeds*

ſucceeds alone, and excludes the Brothers and Siſters, and all other Relations. And if after the death of a Father, any of his Children die Inteſtate without Wife or Children, in the life-time of the Mother, the Mother in that caſe ſucceeds jointly with the Brothers and Siſters of the deceaſed, and every Brother and Siſter, and their Repreſentatives, have an equal ſhare with her. Stat. 22. & 23. Car. 2. cap. 10. 1 Jac. 2. cap. 17. §. 7.]

V.

5. The neareſt Aſcendants exclude the remoteſt.

If there are many Aſcendants who ſurvive their Common Deſcendant, they who are in the neareſt degree will exclude thoſe that are more remote[g]. Thus the Father alone, or the Mother alone, or both together, exclude the Grand-fathers and Grand-mothers, and the Grand-fathers exclude the Great Grand-fathers. For there is no repreſentation among Aſcendants, as there is among Deſcendants.

[g] Si autem plurimi aſcendentium vivunt, hos præponi jubemus qui proximi gradu reperiuntur, maſculos & fœminas, ſive paterni, ſive materni ſint. *Nov.* 118. *c.* 2.

See the ſecond and third Articles of the ſecond Section of the foregoing Title.

The Rule explained in this Article is quite oppoſite to the Spirit of the Cuſtoms of France, *which by the Rule,* paterna paternis, materna maternis, *of which mention has been made in other places, prefer the remoteſt Aſcendants to thoſe who are nearer, with reſpect to the Goods deſcended from their Stock. Which ſeems to be more equitable and more natural; and there ſeems even to be ſomething of a hardſhip in the contrary Rule.* See the remark on the following Article.

VI.

6. A kind of Repreſentation among the Aſcendants.

Altho' there be no Right of Repreſentation among Aſcendants, to make thoſe who are at the greateſt diſtance to concur in the Succeſſion with the neareſt; yet there is among them another kind of Repreſentation which has another effect. That is when there are ſeveral Aſcendants who concur in the ſame degree, ſome of them by the Father's ſide, and others by the Mother's ſide; for if this caſe ſhould happen, the Succeſſion of the Deſcendants would be divided into two Moieties, one of which would be given to the Aſcendants by the Father's ſide, and the other to thoſe of the Mother's ſide, altho' the number ſhould be leſs on one ſide than on the other. The Paternal Aſcendants being conſidered as taking the place of the Father, and the Maternal as ſucceeding in that of the Mother[i].

[i] Si autem eundem habeant gradum, ex æquo inter eos hæreditas dividatur. Ut medietatem quidem accipiant omnes à patre aſcendentes, quanticunque fuerint: medietatem verò reliquam à matre aſcendentes quantoſcunque eos inveniri contigerit. *Nov.* 118. *c.* 2.

This Rule is not to be extended to any other of the Provinces in France, *beſides thoſe which are governed by the* Roman *Law. For in the Provinces which are governed by their Cuſtoms, the Paternal Goods being appropriated to the Relations by the Father's ſide, and the Maternal Goods to thoſe related by the Mother's ſide, the Aſcendants on one ſide exclude thoſe on the other from the Goods deſcended from their Stock; and they ſucceed to them notwithſtanding that other Rule of the Cuſtoms, that the Immoveables which come by deſcent from Anceſtors do not aſcend; that is to ſay, do not go to the Aſcendants. For the motive and uſe of this Rule, is only to hinder the Aſcendants of one Stock from ſucceeding to the Eſtate deſcended from the other Stock, that the ſaid Eſtate may not be tranſmitted from one Stock to the other.*

VII.

7. The Brothers and Siſters of the whole Blood ſucceed with the Aſcendants.

The Father and Mother, and all the other Aſcendants, exclude all the Collaterals from the Succeſſion of their Children and other Deſcendants, except the Brothers and Siſters of the whole blood, who ſucceed by the head with the Father and Mother, or other Aſcendants, to the Succeſſion of their Brother, or Siſter. So that if, for example, the Father and Mother, or one of them, or in default of them, other Aſcendants ſurvive one of their Sons, the Succeſſion will be divided between them and their other Children, Brothers or Siſters of the whole blood to the deceaſed, by equal portions, and by the head, according to the number of perſons which the Father, the Mother, or in default of them, the other Aſcendants make together with their Children[l].

[l] Si verò cum aſcendentibus inveniantur fratres aut ſorores ex utriſque parentibus conjuncti defuncto, cum proximis gradu aſcendentibus, vocabuntur, ſi & pater aut mater fuerint: dividenda inter eos quippe hæreditate ſecundùm perſonarum numerum. Uti & aſcendentium, & fratrum ſinguli æqualem habeant portionem. *Nov.* 118. *c.* 2. See the following Article.

☞ It is to be remarked on this Rule touching the concurrence of Brothers and Siſters of the whole blood with the Father, or Mother, and the other Aſcendants, that ſeveral Interpreters have been of opinion, that this concurrence took place only with reſpect to the Father and Mother; and that the other Aſcendants ought to be excluded by the Brothers. And their opinion is grounded on theſe words of the Text, *Si & pater aut mater fuerint*; the meaning of which they took to be, that it is only the Father and Mother who can ſucceed jointly with the Brothers, and that conſequently the other Aſcendants do not concur in the Succeſſion. But beſides that the whole ſequel of this text calls to the Succeſſion together with the Brothers, the Aſcendants in the neareſt degree without any diſtinction, and that the condition even of the remoteſt Aſcendants is more favourable than that of the Brothers; we need only to remark that that which led thoſe Interpreters into this opinion was the fault of the Tranſlator of this Novel, who inſtead of theſe words in the *Greek* Original, εἰ ϗ πατὴρ ἢ μήτηρ εἴησαν, which ſignify, *Et ſi pater aut mater fuerint*, that is to ſay, that altho' it were even the Father or Mother, has put it, *ſi & pater aut mater fuerint*, that is, provided it be the Father or Mother. Having taken for an equivocal expreſſion, the word εἰ ϗ, *etſi* for *ſi &*. So that whereas it is in the Original, that the Brothers ſucceed jointly even with the Father and Mother who are the neareſt Aſcendants; they fancied, that it was only the Father and Mother who had right to ſucceed jointly with the Brothers, as if it were a favour granted to the Father and Mother, not to be excluded by the Brothers.

[*By the Law of* England, *the Brothers and Siſters do not concur with the Father in the Succeſſion of their deceaſed Brother and Siſter, but the Father wholly excludes the Brothers and Siſters from the Succeſſion, as has been already mentioned. For by the Act of Parliament for ſettling of Inteſtates Eſtates, the Rule is, that where there is neither Wife nor Children, the next of Kindred ſucceed unto the Inteſtate. If the perſon dying Inteſtate leaves behind him a Wife and Children, one third part of the deceaſed's Eſtate goes to the Wife, and all the Reſidue, by equal portions, to and amongſt the Children, and ſuch perſons as legally repreſent them, in caſe any of the ſaid Children be dead. If there be no Children, nor any legal Repreſentatives of them, then the Moiety of the ſaid Inteſtate's Eſtate is to be allotted to the Wife of the Inteſtate, and the Reſidue of the ſaid Eſtate to be diſtributed equally to every of the next of Kindred of the Inteſtate; who are in equal degree, and thoſe who legally repreſent them. In caſe there be no Wife, then all the ſaid Eſtate is to be diſtributed equally to and amongſt the Children. And in caſe there be no Child, then to the next of Kindred in equal degree; and their legal Repreſentatives.* Stat. 22. & 23. Car. 2. cap. 10.]

[*According to this Act of diſtribution of Inteſtates Eſtates, the Mother who had ſurvived the Father of the Inteſtate, being the next in degree of Kindred to the deceaſed, would have excluded the Brothers and Siſters of the Inteſtate, as the Father does now; if the Law had not received an alteration in that particular, by a ſubſequent Statute, which allots unto the Mother only an equal ſhare with the Brothers and Siſters of the deceaſed, as has been already obſerved on the fourth Article of this Section.* Stat. 1. Jac. 2. cap. 17. §. 7.]

VIII.

8 When the Aſcendants, Brothers and Nephews ſucceed together.

If in the caſe of the Brother or Siſter of the whole blood, who ſhould ſucceed to their Brother or Siſter jointly with the Father, or Mother, or other Aſcendants, as has been ſaid in the foregoing Article, there ſhould happen to be Children of a Brother of the whole blood that is deceaſed; the Children of the ſaid Brother would ſucceed likewiſe with the Aſcendants, and with the Brothers and Siſters of the deceaſed, and would have among them the ſhare which their Father, Brother to the deceaſed, would have had if he had lived[m].

☞ Altho' in this text there is mention made only of the Children of a Brother, and not of thoſe of a Siſter, yet there appears no reaſon to make any diſtinction between them. And it ſeems, that as the Rule explained in the preceding Article calls to the Succeſſion the Siſters, as well as the Brothers, with the Aſcendants; the Rule in this Article ought not to exclude the Children of Siſters, ſince they repreſent their Mothers, as well as the Children of the Brothers repreſent their Fathers.

But there ariſes from the Rule of this Article another difficulty, which proceeds from this, that the 127th Novel ſpeaks only of the caſe where the Children of a Brother ſucceed jointly with their Uncle, Brother to the deceaſed, and with an Aſcendant, and that it makes no mention of the caſe where there is no Brother to the deceaſed, but only ſome Aſcendant, and the Children of a Brother that is deceaſed. Thus it might be called in queſtion, whether in this laſt caſe the Children of the deceaſed Brother ſhould ſucceed with an Aſcendant, or if they ſhould be excluded by the Aſcendant, in the ſame manner as they would have been before this 127th Novel, which has eſtabliſhed this new Right in their favour, contrary to the diſpoſition of the 118th Novel, which called only the Brothers alone with the Aſcendants. But ſince this 127th Novel which calls the Children of the Brothers to the Succeſſion of their Uncle, together with his other Brothers and the Aſcendants, has only made mention of the caſe where there are Brothers of the deceaſed, and ſays nothing of the caſe where there are no Brothers, the moſt learned Interpreters have been of opinion that this Law has left the caſe, of which it makes no mention, to be decided by the 118th Novel, which by not calling them to the Succeſſion, excludes them from it. It would have been an eaſy matter for *Juſtinian* to have explained himſelf ſo as to have left no difficulty in this caſe. But perhaps this Law, as well as many others, has been made with a view to ſome particular caſe, rather than with a deſign to make a general Law for regulating all the caſes which might be comprehended under it; and that for that reaſon the Law was reſtrained to the particular caſe which gave occaſion for it. To which we muſt add, that if it were neceſſary to examine the queſtion, whether when the deceaſed has no Brothers, but only Nephews with an Aſcendant, the Nephews ought to ſucceed together with the Aſcendant; it might be with ſome reaſon urged in favour of the Nephews, that the change which is the occaſion that the deceaſed has left no Brothers behind him, ought not to make their condition leſs favourable, nor deprive them of the Right of Repreſentation, which is granted to them when there are Brothers. But in reaſoning upon what is determined in this caſe, by theſe two Novels, the 118th, and the 127th, it may be alledged againſt them, that on one ſide the Rules concerning the Interpretation of Laws direct, that the new Laws which derogate from the old ones be reſtrained to that which they expreſly determine*: and that on the other ſide the Nephews have not the Right of Repreſentation, except in the caſes where theſe two Laws have given it them; and that by the ancient Law, when there were only Nephews of the deceaſed to ſucceed to him, they divided the Succeſſion by the head, according to their number, without any Repreſentation†.

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[m] Sancimus ut ſi quis moriens relinquat aſcendentium aliquem & fratres qui poſſint cum parentibus vocari, & alterius præmortui fratris filii. Et tantam accipiant portionem, quantam eorum futurus erat pater accipere, ſi vixiſſet. Hæc verò ſancimus de illis filiis fratris, quorum pater ex utroque parente jungebatur defuncto. Et abſolute dicimus, ordinem, quando cum ſolis vocantur fratribus, eundem eos habere jubemus & quando cum fratribus vocantur aliqui aſcendentium ad hæreditatem. *Nov.* 127. *c.* 1.

* *See the ſixteenth and eighteenth Articles of the ſecond Section of the Rules of Law.*

† *See the laſt Remark on the eighth Article of the ſecond Section of the third Title of this Book.*

IX.

9. *Aſcendants have the Right of Tranſmiſſion.*

As Children and other Deſcendants ſucceed to their Fathers and Mothers, and other Aſcendants, in ſuch a manner that the Goods of the Inheritance are acquired to them before they do any Act as Heir, or even before they know the death of the Aſcendant to whom they ſucceed; ſo Fathers and Mothers, and other Aſcendants, have the ſame Right. And if having ſurvived their Deſcendants to whom they ſucceed, they ſhould happen to die before they had entred to the Succeſſion, they would tranſmit it to their Heirs[a].

* *See the thirteenth Article of the ſecond Section of the foregoing Title, and the Remark that is there made, as alſo the tenth Section of Teſtaments.*

X.

10. *Aſcendants of Baſtards.*

As we do not reckon in the number of Children who ſucceed to their Fathers and Mothers, and other Aſcendants, thoſe who are not lawfully begotten; ſo we do not place among the perſons who have right to ſucceed to their Deſcendants, the Fathers and Mothers, or other Aſcendants of this ſort of Children*.

* *See the eighth Article of the ſecond Section of Heirs and Executors in general.*

SECT. II.

Of the Rights which ſome Aſcendants may have, excluſive of the others in the Goods of the Children.

ALL that has been ſaid touching the Succeſſion of Aſcendants, in the preceding Section, relates to the order in which they are ranked by the Laws which call them to the Succeſſions of their Deſcendants, and how they ſucceed according to their ranks. And in this Section we ſhall explain ſome peculiar Rights which ſome Aſcendants may have, excluſive of others, on the Goods of their Deſcendants.

For the better underſtanding this matter concerning the Rights of Parents in the Goods of their Children, and the Laws which relate thereto, it is neceſſary to remark, that by the ancient *Roman* Law, the Sons who were ſtill in their Father's Family, that is to ſay, the Children who were not emancipated, but were ſtill under their Father's Authority, could have nothing of their own. And all that could fall to them either by Succeſſion, or Donation, or whatever they acquired by any other way, even by their own Induſtry, belonged to the Father[a], ſaving only that which the Son who was ſtill under his Father's Authority might get either by his Service in the Army, or by his ſkill at the Bar[b]. For what the Son who was in his Father's Family had acquired by any of theſe two ways, was intirely his own, his Father having no manner of right to it, not ſo much as the Uſufruct of it; to which was afterwards added this which the Son ſhould acquire in the exerciſe of any Publick Office or Dignity, or in any Employment that had a publick Salary annexed to it[c]. It was this ſort of Goods which they called by the name of *Peculium*, and which they diſtinguiſhed into *Peculium caſtrenſe*, by which was meant all that they acquired in the War, and *Peculium quaſi caſtrenſe*, which comprehended all that was got by thoſe other ways. There was likewiſe another ſort of *Peculium*, to wit, that which the Father gave out of his Eſtate to his Son who was ſtill in his Family, whether it were in Money, or other things, that he might manage it apart, and improve it. But the profit of this *Peculium* belonged to the Father, as proceeding from his own Eſtate[d].

As to the Children who were emancipated, whatever they could acquire was their own: and this was one of the effects of Emancipation, which was called for this reaſon, the benefit of being able to acquire Goods, *Beneficium bonorum quærendorum*[e].

Afterwards the Emperors gave to the Children who were under their Father's Authority the propriety of the Goods which they had of their Mother, and of what they got in Marriage, or by ſome free Gift, and the Fathers retained the Uſufruct of the ſaid Goods[f]. And at laſt *Juſtinian* ordered that all the Goods which the Children, even thoſe who were not emancipated, ſhould acquire, the ſame ſhould be intirely their own, in whatever manner they acquired the ſaid Goods, whether by their own Induſtry, or by Succeſſion, or by ſome Liberality, or otherwiſe, but under two reſerves; one was of the profit which the Son, who was ſtill in his Father's Family, may have made of the Patrimony which his Father had intruſted to his care and management, the property of the ſaid profit belonging ſtill to the Father, as it did formerly according to the Ancient Law; and the other reſerve was of the Uſufruct which *Juſtinian* gave to the Father of all which the Children who were not emancipated ſhould acquire, except thoſe ſorts of peculiar Patrimonies of which both the Property and Uſufruct belonged wholly to the Children by the ancient Law, in which he made no manner of alteration[g].

Theſe different diſpoſitions of the *Roman* Law with reſpect to the Right of Fathers in the Goods of their Children, belonged likewiſe to the Father's Father, who had kept his Grand-children ſtill under his power, and he had the ſame Rights on their Goods; but here we have made mention only of the Father, and not of the Grand-father, for a reaſon which ſhall be explained in the Remark on the firſt Article of this Section.

Seeing the ſubject matter of this Section takes in the diſtinction of Children who are emancipated, and of thoſe who are not, it is neceſſary to remark concerning Emancipation, that which has been ſaid of it in the fifth and ſixth Articles of the ſecond Section of Perſons, and to add thereto, that we ſee in the Cuſtoms of *France*, the diſtinction of Children who are emancipated, and of thoſe who are not. But with remarkable differences, which diſtinguiſh the ſaid Cuſtoms among themſelves, and which diſtinguiſh them likewiſe from the Provinces which are governed by the *Roman* Law. Theſe differences conſiſt not only in what relates to the Rights of Parents in the Goods of their Children not emancipated, but alſo in the ways by which Children are held to be emancipated. Thus, as touching the Rights of Parents to the Goods of their Children not emancipated, there are ſome Cuſtoms which give the Uſufruct, not only to the Father, but alſo to the Mother, and to the Survivor of them, of the Goods of their Children, until they come of Age. There are ſome Cuſtoms which retain ſtill ſomething of the ancient *Roman* Law, in that, by the ſaid Cuſtoms, Donations made to Children who are not emancipated, belong to the Father, notwithſtanding the change which *Juſtinian* made in the ſaid ancient Law, as has been already taken notice of. Other Cuſtoms again give to the Father the Property of all the Moveables which the Son may chance to acquire before he accompliſhes the age of five and twenty years. And other Cuſtoms diſpoſe differently concerning the ſame thing. And in ſome of them it is even ſaid, that the Paternal Authority does not take place there.

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[a] §. 1. inſt. per quas perſ. cuiq. acquir.

[b] d. §. 1. l. 1. §. 15. ff. de collat. l. 1. §. 6. ff. ad Senat. Trebell. l. 3. §. 5. ff. de bon. poſſ.

[c] L. ult. C. de inoff. teſt. See the third Article of this Section.

[d] Toto tit. ff. de pecul.

[e] L. 1. ff. ſi à parent. quis manum. ſit.

[f] L. 1. C. de bon. mat. l. 1. C. de bon. quæ lib. l. 5. eod.

[g] L. 6. C. de bon. quæ lib.

As to the ways by which Children are held to be emancipated, the moſt univerſal is that which is almoſt every where in uſe by Marriage, becauſe the Huſband becomes thereby the Head of his Wife and Family. Emancipation is likewiſe performed by an Act made in due form[h]. There are ſome Cuſtoms where the Son is emancipated by his attaining the age of twenty years, others at the age of five and twenty, or if he has a Publick Office[i], or if he carries on a Trade ſeparately by himſelf, with the knowledge and approbation of his Father and Mother. There are again ſome Cuſtoms where the Son is held to be emancipated, if he lives in a diſtinct Habitation from his Father, which may be gathered from the twenty fifth Novel of the Emperor *Leon*. In ſome Cuſtoms Marriage does not emancipate the Children of Noblemen, unleſs the ſame be therein expreſly mentioned; neither does it emancipate perſons of an inferior Rank, until that after their Marriage they have lived a year and day out of the Houſe, and ſeparate from their Fathers. And there are likewiſe ſome Provinces which are governed by the *Roman* Law, where Marriage does not emancipate.

We have made here theſe Remarks concerning the different diſpoſitions of the *Roman* Law, and of the Cuſtoms of *France*, not only becauſe of the relation they have to the ſubject matter of this Section, but to ſhew by this diverſity of diſpoſitions, without mentioning others of the *Roman* Law, which it would have been ſuperfluous to explain here, that, as it has been remarked in other places, the matters which may be regulated by Arbitrary Laws, are ſubject to this multiplicity of Rules, not only in different places, but even in the ſame places, according to the times and the different views of thoſe who have the right of making the Rules[l].

It remains only that we ſhould acquaint the Reader, that among the many Rules relating to the ſubject matter of this Section, we have confined our ſelves to thoſe which are both agreeable to the *Roman* Law, and moſt univerſally received. Which takes in all the Principles and Rules which are moſt eſſential in this matter.

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18. *The Change made by ſecond Marriages.*

I.

1. The Father has no Right in the Property of the Goods acquired by the Children.

Of all the Goods which the Children may acquire by their Labour or Induſtry, or which may come to them by any other Title whatſoever; whether they be emancipated, or not, whether they be Adult, or under the age of Puberty, whether they be Males or Females, the Father has no right in the Property of them, which belongs ſolely to the Children[a], ſaving only the Profit which may have ariſen from the

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[h] *V. l. ult. C. de emancip. lib.*

[i] *V. §. 4. inſt. quib. mod. jus. pat. pot. ſolv. l. ult. C. de conſul.*

[l] *See the eleventh Chapter of the Treatiſe of Laws.*

Goods of the Father, which he had put into the hands of his Son who was not emancipated. For the Propriety of the ſaid profit would belong to the Father[b], but he has in the Goods acquired by his Son a right to the Uſufruct of them, which ſhall be explained in the following Articles.

[a] Si quis itaque filiusfamilias vel patris ſui, vel avi, vel proavi in poteſtate conſtitutus, aliquid ſibi acquiſierit, non ex ejus ſubſtantia cujus in poteſtate ſit, ſed ab aliis quibuſcumque cauſis, quæ ex liberalitate fortunæ, vel laboribus ſuis ad eum pervenit, eas ſuis parentibus non in plenum, ſicut antea fuerat ſancitum, ſed uſque ad uſumfructum ſolum acquirat. Et eorum uſusfructus quidem apud patrem, vel avum, vel proavum, quorum in ſacris ſit conſtitutus, permaneat: dominium autem filiisfamilias inhæreat, ad exemplum tam maternarum, quàm ex nuptialibus cauſis filiisfamilias acquiſitarum rerum. Sic etenim & parenti nihil derogabitur, uſumfructum rerum poſſidenti: & filii non lugebunt quæ ex ſuis laboribus ſibi poſſeſſa ſunt, ad alios transferenda aſpicientes, vel ad extraneos, vel ad fratres ſuos, quod etiam gravius multis eſſe videtur. *l.* 6. C. *de bon. quæ lib.*

[b] Si quid ex re patris obveniat, hoc ſecundùm antiquam obſervationem totum parenti acquiratur. Quæ enim invidia eſt quod ex patris occaſione profectum eſt, hoc ad eum revertit. §. 1. *inſt. per quas perſ. cuiq. acquir.*

In this Article we have made mention only of the Father, and not of the Grand-father, with reſpect to the Uſufruct; and likewiſe in the following Articles there is mention made only of the Father; becauſe that whereas by the Roman *Law the Son who was married remained ſtill in the power of his Father, and that thus the Grand-children, as well as their Fathers, remained likewiſe under the authority of their Grand-father, who had for that reaſon the Uſufruct of their Goods; by the Uſage in* France *the Son who marries being emancipated by the Marriage, except in ſome particular places, as has been obſerved in the Preamble to this Section, the Father has neither the Property nor the Uſufruct of any thing that the married Son acquires. And the Uſufruct of whatever the Children of this married Son may acquire belongs to their Father, and not to their Grand-father. But if it ſhould ſo happen, that the Grand-father, or Father, had little or no Eſtate of their own, nor the Uſufruct of any Goods belonging to their Children or Grand-children, they would have always a right to take what is neceſſary for their Maintenance out of the Eſtate belonging to their Children, as ſhall be ſhewn in the tenth Article.*

II.

2. The Father has the Uſufruct of the Goods of his Children who are not emancipated.

The Father has the Uſufruct during his Life of the Goods which his Children who are not emancipated may have acquired[c]. Unleſs it be of the Goods that are excepted by the Rules which follow.

[c] *See the firſt of the Texts cited on the foregoing Article.*

III.

3. The Father has not the Uſufruct of the Son's peculiar Patrimony.

The Father has not the Uſufruct of what his Son who is not emancipated may have of that ſort of peculiar Patrimony which is acquired either in the Army, or at the Bar, or in the exerciſe of ſome Dignity, of ſome Office, or Publick Imployment[d].

[d] Exceptis caſtrenſibus peculiis, quorum nec uſumfructum patrem, vel avum, vel proavum habere veteres leges concedunt: in his enim nihil innovamus, ſed vetera jura intacta ſervamus. Eadem obſervando etiam in his peculiis, quæ, quaſi caſtrenſia peculia, ad inſtar caſtrenſis peculii acceſſerunt. *l.* 6. *C. de bon. quæ lib. V. l. ult. C. de inoff. teſt. & l. un. C. de caſtr. omn. palat. pecul.*

If a Son who is ſtill in his Father's power ſhould carry on a Trade ſeparately from that of his Father, and that with his Father's conſent, would it not be juſt that the profit ariſing from the ſaid Trade ſhould belong wholly to the Son as it is regulated by ſome Cuſtoms, as has been obſerved in the Preamble? V. Nov. Leon. 25.

IV.

4. Nor of the Gifts of the Prince.

We muſt likewiſe except out of the Goods belonging to the Son that is not emancipated, of which the Father has a right to the Uſufruct, that which the Son receives from the Prince's Bounty. For a Benefit of this kind ſuppoſes at leaſt an equal merit, if not a greater, as the bare Service in the Army. And the Favours of the Prince do not admit of any diminution to the prejudice of thoſe whom he is pleaſed to honour with them[e].

[e] Cùm multa privilegia imperialibus donationibus jam præſtita ſunt, dignum incrementum & his conferre noſtra dignata eſt clementia. Si quis igitur à ſereniſſimo principe, vel à piiſſima auguſta, ſive maſculus, ſive fœmina donationes ſit conſecutus, vel conſecuta, ſive mobilium, ſive immobilium, ſive ſe moventium rerum, filiusfamilias tamen conſtitutus, vel conſtituta, habeat hujuſmodi res omni acquiſitione abſolutas, & nemini eas acquirat, neque earum uſumfructum pater, vel avus, vel proavus ſibi vindicet. Sed ad ſimilitudinem caſtrenſis peculii omnem facultatem in eas filii vel filiæfamilias habeant; ut enim imperialis fortuna omnes ſupereminet alias, ita oportet & principales liberalitates culmen habere præcipuum. *l.* 7. C. *de bon. quæ lib.*

V.

5. Nor of that which is given on condition that the Father ſhall not have the Uſufruct of it.

The Goods given to the Son that is not emancipated, whether it be by any of his Aſcendants, or by other perſons, upon this condition, that the Father ſhall have no right to the Uſufruct of them, are excepted from the Rule which gives the Uſufruct to the Father; and this condition ſhall have its effect[f].

[f] Sancimus igitur licentiam eſſe matri & aviæ aliiſque parentibus, poſtquam reliquerint filiis partem quæ lege debetur, quod reliquum eſt ſuæ ſubſtantiæ, ſive in ſolidum voluerint, ſive in partem filio vel filiæ; nepoti vel nepti, & deinceps deſcendentibus donare, aut etiam per ultimam relinquere voluntatem, ſub hac definitione atque conditione, ſi voluerint, *ut pater, aut qui omnino eos habent in poteſtate, in his rebus neque uſumfructum, neque quodlibet penitus habeant participium.* Hæc enim & extraneis relinquere poterant, unde nulla parentibus utilitas naſceretur. Hoc itaque non ſolùm parentibus, ſed etiam omni perſonæ licere præcipimus. *Nov.* 117. *c.* 1.

There are ſome Cuſtoms which make the ſame exception to the Uſufruct of the Father which is explained in this Article.

VI.

6. The Father ſucceeding to his Son together with the Brothers, has not the Uſufruct of their Portions.

In the caſe where the Father ſurviving one of his Children who left behind him Brothers of the whole Blood, ſucceeds to him together with the Brothers, as has been ſaid in the ſeventh Article of the firſt Section, ſeeing he has the Property of one Portion of the Goods of his deceaſed Child, he has not the Uſufruct of the Portions belonging to his other Children, Brothers of the deceaſed[g].

[g] Aſcendentium & fratrum ſinguli æqualem habeant portionem. Nullum uſum ex filiorum, aut filiarum portione, in hoc caſu, valente patre ſibi penitùs vindicare. Quoniam pro hac uſus portione, hæreditatis jus ſecundùm proprietatem per præſentem dedimus legem. *Nov.* 118. *c.* 2.

VII.

7. The Father's duty in relation to the Goods of which he has the Uſufruct.

The Father who has the Uſufruct of the Goods of his Children, is bound to take care of every thing that belongs to the ſaid Goods, to preſerve the Rights, to get in the Debts, to proſecute and defend the Law-Suits, to lay out the neceſſary Expences, and in general to do every thing that a faithful Adminiſtration requires[h].

[h] Parentes autem penes quos maternarum rerum utendi, fruendiq; tantum poteſtas eſt, omnem debent tuendæ rei diligentiam adhibere. Et quòd jure filiis debetur, in examine per ſe, vel per procuratorem poſcere: & ſumptum ex fructibus impigrè facere: & litem inferentibus reſiſtere. Atque ita omnia agere, tanquam ſolidum perfectumque dominium eis acquiſitum fuiſſet. *l.* 1. *C. de bon. mat.* See in the Title of Uſufruct the Rules which may agree to the Uſufruct of Fathers.

VIII.

8. The Father has the Property of all the advantage that he makes by the Uſufruct.

If the Father having reaped ſome advantage from the ſaid Uſufruct, makes any purchaſe therewith, or encreaſes otherwiſe his Eſtate thereby, he may diſpoſe of the income thereof as he pleaſes; and whatever part thereof ſhall be found to remain in his Succeſſion, the ſame ſhall be common to all his Children; and the Child from whoſe Goods he has reaped this profit, ſhall have no greater ſhare thereof than the others. For it was a Right which the Father had acquired, and which belonged to him in the ſame manner as his other Goods[i].

[i] Et ſi quid ex uſu earum (rerum) pater avus vel proavus collegerit, habet licentiam quemadmodum cupit hoc diſponere, & in alios hæredes tranſmittere. Vel ſi ex earum rerum fructibus res mobiles, vel immobiles, vel ſe moventes comparaverit, eas etiam quomodo voluerit habeat, & tranſmittat, & in alios transferat, ſive extraneos, ſive liberos ſuos, ſive quamlibet perſonam. *l.* 6. §. 2. *C. de bon. quæ liber.*

IX.

9. If the Father ſuffers his Son to enjoy the Profits, they are the property of the Son.

But if on the contrary the Father who had the Uſufruct of the Goods of one of his Children, lets the Child himſelf reap the profits, the other Children cannot after the Father's death claim any thing on account of the ſaid Uſufruct, nor of the advantage that has been made by it. For it was free for the Father to abſtain from the Uſufruct, and to let the Child to whom the Goods belonged enjoy the profits thereof[l].

[l] Sin autem res ſibi memorato modo acquiſitas parens noluerit retinere: ſed apud filium aut filiam vel deinceps perſonas reliquerit, nullam poſt obitum ejus licentiam habeant hæredes alii patris, vel avi, vel proavi, eundem uſumfructum, vel quod ex hoc ad filiosfamilias pervenit utpote (patri debitum) ſibi vindicare. Sed quaſi diuturna donatione in filium celebranda, qui uſumfructum detinuit, quem patrem ejus habere oportuerat, ita cauſa intelligatur, ut eundem uſumfructum poſt obitum patris ipſe lucretur, parente jus exactionis quaſi ſibi debitæ à filio qui uſumfructum conſenſu ejus poſſidebat, ſuæ poſteritati, vel ſucceſſioni minimè tranſmittente. Quatenùs in omni pace inter ſe ejus ſucceſſio permaneat, nec altercationis cujuſdam (maximè inter fratres) oriatur occaſio. *l.* 6. §. 2. *C. de bon. quæ lib.*

X.

10. Parents have their Alimony, and other neceſſaries out of their Childrens Eſtate.

Whether the Father have ſome Uſufruct of the Goods of his Children, but which is not ſufficient for his Maintenance, or whether he has none at all, he ought to have out of the Goods of his Children, whether they be emancipated or not emancipated, that which may be neceſſary for his Food, for his Maintenance, for his neceſſaries during any ſickneſs, and other ſuch like wants, according to his quality, and the value of the Goods. And the Mother, and all the Aſcendants both by the Father and Mother's ſide, who happen to be in the like want, have the ſame right[m].

[m] Parentum neceſſitatibus liberos ſuccurrere juſtum eſt. *l.* 1. *C. de alend. lib. ac parent.*

Competens judex à filio te ali jubebit, ſi in ea facultate eſt, ut tibi alimenta præſtare poſſit. *l.* 2. *eod.*

Utrum autem tantùm patrem, avumve paternum, proavumve paterni avi patrem, cæteroſque virilis ſexus parentes alere cogamur, an verò etiam matrem, cæteroſque parentes, & per illum ſexum contingentes cogamur alere, videndum. Et magis eſt ut utrobique ſe judex interponat, quorumdam neceſſitatibus faciliùs ſuccurſurus, quorumdam ægritudini, & cùm ex æquitate hæc res deſcendat caritateque ſanguinis, ſingulorum deſideria perpendere judicem oportet. Idem in liberis quoque exhibendis à parentibus dicendum eſt. Ergo & matrem cogemus præſertim vulgò quæſitos liberos alere, nec non ipſos eam. *l.* 5. §. 2. 3. & 4. *ff. de agnoſc. & al. lib.* Alimenta autem pro modo facultatum erunt præbenda egentibus. *d. l.* §. 19. Filia tua non ſolùm reverentiam, ſed etiam ſubſidium vitæ ut exhibeat tibi, rectoris provinciæ auctoritate compelletur. *l.* 5. *C. de patr. pot.*

Is

It is to be remarked on this Article, that the Fathers and Mothers of Baſtards have the ſame Right. And although the Text quoted on this ſubject ſpeaks only of the Mother, yet it is the ſame Equity, with regard to the Father, when he is known. And this duty is likewiſe reciprocal on the part of the Parents towards the Children of this kind.

See the remark on the eighth Article of the ſecond Section of the firſt Title of the firſt Book.

XI.

11. Parents are bound to nouriſh and maintain their Children.

As Children are obliged to nouriſh and maintain their Parents, ſo Parents on their part are bound to take the ſame care of their Children, not only becauſe of the Uſufruct which they may have of their Goods, but by the Right of Blood, and according as the Eſtate of the Parents may be ſufficient for that purpoſe, unleſs it be that the Children render themſelves unworthy thereof. And in general it is a reciprocal duty between Aſcendants and Deſcendants, that ſuch of them as are able ought to maintain thoſe who are in want[n].

[n] Idem in liberis quoque exhibendis à parentibus dicendum eſt. *l. 5. §. 3. ff. de agn. & al. lib.*

Si patrem tuum officio debito promerueris, paternam pietatem tibi non denegabit. Quòd ſi ſpontè non fecerit, aditus competens judex alimenta pro modo facultatum præſtari tibi jubebit. *l. ult. C. de alen. lib. ac parent.*

Ipſum autem filium, vel filiam, filios vel filias, & deinceps alere patri neceſſe eſt: non propter hæreditatem, ſed propter ipſam naturam, & leges quæ à parentibus alendos eſſe liberos imperaverunt: & ab ipſis liberis parentes, ſi inopia ex utraque parte vertitur. *l. ult. §. 5. de bon. quæ lib.* Non tantùm alimenta, verùm etiam cætera quoque onera liberorum patrem ab judice cogi præbere, reſcriptis continetur. *l. 5. §. 12. ff. de agnoſc. & alend. lib.* Quòd de alendis matre & filiis indigentibus definivimus, hoc quoque in omnibus aſcendentibus deſcendentibuſque perſonis utriuſque naturæ, valere præcipimus. *Nov. 117. c. 7. in f.*

XII.

12. Parents and Children are not bound for one another's Debts.

We muſt not reckon among the neceſſaries which Parents have a right to have ſupplied out of their Childrens Goods, the Debts which they owe. For the duty of Children towards their Parents is limited to what may regard their Perſons. And it is the ſame thing as to the Debts of the Children with reſpect to their Parents. But if a Father, or other Aſcendant were in Priſon for Debt, and his Son had the means of delivering him out of Priſon, by obliging himſelf to produce him when required, or to pay the Debt if he was able, if the Son ſhould fail in this duty towards his Father, his ingratitude would deſerve that he ſhould be diſinherited according to the circumſtances[o].

[o] Parens quamvis ali à filio ratione naturali debeat, tamen æs alienum ejus non eſſe cogendum exolvere filium, reſcriptum eſt. *l. 5. §. 16. ff. de agnoſc. & al. lib.* Neque ex ejus filii perſona qui cùm ſui juris eſſet, mutuam pecuniam accepit, pater ejus, ſi non fidem ſuam obſtrinxit, conveniri poteſt: neque ex ejus quem in poteſtate habet: ſi ſine juſſu ejus contractum eſt. *l. 1. C. fil. pro patr. vel pat. pro fil.*

See concerning what is ſaid of Diſinheriting, the third Article of the ſecond Section of undutiful Teſtaments.

XIII.

13. The Mother is not bound to maintain the Children, but in default of the Father.

This duty of nouriſhing and maintaining the Children belongs principally to the Father, and the Mother is not bound to it, except where the Father's Eſtate is not ſufficient. Thus the Mother, who in caſe of the neglect or refuſal of the Father, or in caſe of his abſence, has been obliged to ſupply her Child with thoſe neceſſaries out of her own Eſtate, may recover it out of the Father's Eſtate, unleſs it ſhall appear that ſhe has only given ſuch things as ſhe might have given out of a Motherly Affection, even although the Father had maintained the Child out of his own Eſtate[p].

[p] Si mater alimenta quæ fecit in filium à patre repetat, cum modo eam audiendam ita divus Marcus reſcripſit Antoniæ Montanæ, in hæc verba. Sed & quantum tibi alimentorum nomine, quibus neceſſario filiam tuam exhibuiſti, à patre ejus præſtari oporteat, judices æſtimabunt. Nec impetrare debes ea quæ exigente materno affectu in filiam tuam erogatura eſſes, etiamſi à patre ſuo educeretur. *l. 5. §. 14. ff. de agn. & al. lib.*

XIV.

14. It is the ſame thing with reſpect to the Grand-father by the Mother's ſide.

The Children of Daughters cannot claim their maintenance out of the Eſtate of their Grand-father by the Mother's ſide, except in the caſe where the Father or Grand-father by the Father's ſide are not able to maintain them. For the Children of the married Daughter are under the power of their Father, and out of the Family of their Grand-father by the Mother's ſide[q].

[q] Non quemadmodum maſculorum liberorum noſtrorum liberi ad noſtrum onus pertinent, ita & in fœminis eſt. Nam manifeſtum eſt, id quod filia parit, non avo, ſed patri eſſe ſuo oneri: niſi pater aut non ſit ſuperſtes, aut egens eſt. *l. 8. ff. de agn. & al. lib.*

XV.

15. Two ſorts of Rights which Aſcendants have in the Goods of their Children.

All the foregoing Rules reſpect the Rights which Parents have in the Goods of their Children during their Childrens Life. And as to the Goods which they leave behind them at their death, if they die without Children, their neareſt Aſcendants who ſurvive them ſucceed to them, as has been explained in the preceding Section, unleſs it be in ſuch Goods as are excepted by the following Rules[r].

[r] *See the places quoted in the Article.*

XVI.

16. *The things given by the Aſcendants revert to them.* If in the Inheritance of a Perſon who dies without Iſſue, and who leaves behind him a Father and Mother, or other Aſcendants, there ſhould happen to be ſome Goods which had been given to the ſaid perſon by one of the Aſcendants who ſurvive him; he who gave the ſaid Goods may take them back again, by vertue of the Right which is called Reverſion, and he will exclude from them all the other Aſcendants, even the neareſt, who would exclude him from the reſt of the Goods[s].

[s] *See the following Section, where the Right of Reverſion is explained.*

XVII.

17. *The Father takes back the profits which have proceeded from his Goods.* It is neceſſary likewiſe to remark, as an Exception to the Rule which calls jointly to the Succeſſion all the Aſcendants in the ſame degree, that if a Son who was not emancipated, whom his Father had intruſted with the management of ſome ſmall Patrimony, had made any profit by it; his Father and his Mother happening to ſurvive him, whatever profit had been made of the ſaid Patrimony which the Father had intruſted the Son with, would belong to the Father, he having as it were already a Right to it before the Son's death, as has been explained in the firſt Article; and the Mother would only have a ſhare in the other Goods which the Son had acquired ſome other way. And it would be the ſame thing in the caſes where the Brothers of the whole Blood ſhould likewiſe ſucceed, whether it were with the Father alone, or with the Father and Mother[t].

[t] Si quid ex re patris ei obveniat, hoc ſecundùm antiquam obſervationem, totum parenti acquiratur. §. 1. *inſt. per quas perſ. cuiq. acquir.*

See the Law quoted on the firſt Article, in which there are theſe words, *Non ex ejus ſubſtantia cujus in poteſtate ſit.*

XVIII.

18. *The change made by ſecond Marriages.* We muſt in the laſt place take notice of one other cauſe which occaſions ſome change in the Rights of Fathers, Mothers, and other Aſcendants, to the Goods of their Children; which is the caſe where the Father, Mother, or other Aſcendant who has Children, happens to marry again, which is a matter that is neceſſarily to be diſtinguiſhed, and which we ſhall ſpeak of in its proper place[u].

[u] *See the fourth Title of the third Book.*

SECT. III.

Of the Right of Reverſion.

WE have already ſpoken of the Right of Reverſion in the ſixteenth Article of the foregoing Section, where it was neceſſary to make mention of it, as being one of the Rights which the Aſcendants have in the Goods of the Deſcendants; but we ſpoke of it there only in general and for Order's ſake. And ſeeing this matter has ſome Rules which are peculiar to it, they ſhall be explained in this Section.

The Right of Reverſion, which gives back again to the Aſcendants the things which they had given to their Deſcendants who die before them without leaving behind them any Children, is ſo natural, that it has been equally received both in the ancient and modern *Roman* Law: And it is likewiſe received in *France*, both in the Provinces which are governed by their Cuſtoms, and in thoſe which follow the *Roman* Law. We ſee in the Laws two motives of Equity, which make this Right of Reverſion to be juſt and favourable. One is, to give to the Aſcendants this comfort, of not ſuffering at the ſame time the double loſs of their Children, and of the Goods which they had ſtript themſelves of in their favour[a]. And the other motive, which is a conſequence of the former, is not to diſcourage Aſcendants from exerciſing their Liberality towards their Deſcendants, as it might happen if they ſhould have any reaſon to fear this double Loſs[b]. But altho' theſe motives of the Right of Reverſion regard equally the Father and Mother, and all the Aſcendants by the Father and Mother's ſide; yet the Reverſion was limited in the *Roman* Law to the Father, and to the Aſcendants by the Father's ſide, who had in their Power the Children to whom they had given any thing; and the Mother, with the Aſcendants on her ſide, had not this Right unleſs they had ſtipulated it[c]. And ſome Interpreters have been of opinion, that *Juſtinian* had entirely aboliſhed this Right, and that the Father and Grandfather by the Father's ſide were excluded from it by his 118th Novel, becauſe that by the ſaid Law he calls equally the Aſcendants to the Succeſſions of the Deſcendants, according to the order of their Proximity, without reſerving to them this Right of Reverſion; from whence they have concluded, that if, for example, a Grand-father by the Father's ſide had made a Gift to his Grand-ſon, who ſhould happen to die, leaving behind him his Mother and this Grand-father, the Mother would exclude the Grand-father from having that which he had given to his Grand-ſon.

[a] Jure ſuccurſum eſt patri, ut filia amiſſa, ſolatii loco cederet, ſi redderetur ei dos ab ipſo profecta, ne & filiæ amiſſæ, & pecuniæ damnum ſentiret. *l. 6. ff. de jure dot. l. 4. C. ſolut. matr.*

[b] Proſpiciendum eſt enim, ne hac injectâ formidine, parentum circa liberos munificentia retardetur. *l. 2. C. de bon. quæ lib.*

[c] *See the Texts cited on the ſecond Article, and the Remark that is there made upon it.* V. Nov. Leon. 25.

This interpretation, which is ſo widely different from the Spirit of the ſaid Law, has not been received in *France*, and it may be ſaid, that the words of this Novel of *Juſtinian* cannot have this effect. For this Right of Reverſion, which is ſo expreſly eſtabliſhed by ſeveral Laws, and ſo equitable that it is as it were a part of the Law of Nature, could never be aboliſhed by a Law that makes no mention of it. And we ſhould have reaſon to exclaim againſt the hardſhip of a Law, which ſhould ordain in the caſe which we have juſt now mentioned, that the Mother ſhould exclude the Grand-father from the Right of Reverſion. Thus *Juſtinian* not having expreſly aboliſhed this Right by the ſaid Novel, it ought to ſubſiſt according to that Rule concerning the Interpretation of Laws, which directs us to reconcile the ancient Laws with the new, by interpreting the one by the other, and giving to them all the juſt effect which their intention demands, in every thing where they are not contrary to one another, and in that which the latter Laws have not abrogated[d]. But if this Rule comprehends likewiſe the Arbitrary Laws, it ought with much more reaſon to be underſtood of the Laws that are founded on Natural Equity, and eſpecially thoſe which, as this Law touching the Right of Reverſion to Aſcendants, have for their Principles Truths which cannot be called in queſtion without a kind of inhumanity.

If therefore we examine this 118th Novel according to this Rule, we ſhall find nothing in it that may give us any reaſon to think that *Juſtinian* had a deſign to aboliſh the Right of Reverſion. And it may likewiſe be added, that the natural effect of the Right of Reverſion, is to make the Goods that are ſubject to it, not to be conſidered as a part of the Succeſſion of the perſon to whom they had been given, but to be excepted and ſeparated from the Succeſſion, in order to be returned to the Aſcendant who has this Right. For the Gifts of Aſcendants to their Deſcendants imply this tacit condition, that if it happens that the Donor ſurvives the Donee who dies without Children, he ſhall take back again that thing which he ſtript himſelf of only with the view of tranſmitting it to his Deſcendants. Thus this thing, with reſpect to the Aſcendant who gave it, may be conſidered as not being a part of the Inheritance of the Donee, and by conſequence not ſubject to the Laws which regulate Succeſſions.

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I.

1. *Definition of Reverſion.*

BY the Right of Reverſion is meant, the Right which a Donor who ſurvives his Donee has to take back the things which he had given him, as ſhall be explained by the following Rules[a].

[a] Quod dedit iterum ad eum revertatur. *l. ult. C. comm. utr. jud.*

II.

2. *Two ſorts of Reverſion, either by the Law, or by Agreement.*

We ought to diſtinguiſh two ſorts of the Right of Reverſion. That which the Law gives to Fathers and other Aſcendants, altho' there be no Agreement about it: and that which has been ſtipulated by an expreſs Agreement, whether it be by an Aſcendant, or any other Donor, even a Stranger[b], that is to ſay, one to whom the Donee is no ways related.

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[d] *See the eighteenth Article of the ſecond Section of the Rules of Law.*

[b] Si quis pro filio ſuo ante nuptias donationem conſcripſerit, vel dederit, vel pro filia ſua dotem; & hoc quod dedit, iterum ad eum revertatur, *vel ſtipulatione, vel lege hoc faciente, &c. l. ult. C. com. utr. jud.* Si non ſpecialiter extraneus dotem dando, in ſuam perſonam dotem ſtipulatus ſit, vel pactum fecerit &c. *l. un. §. 13. C. de rei ux. act.* Extraneum autem intelligimus omnem citra parentem per virilem ſexum aſcendentem, & in poteſtate datam perſonam non habentem. *d. §. in f. V. tit. Ulp. 6. §. 5.* V. Nov. Leon. 25.

Altho' the Reverſion which is mentioned in theſe laſt Texts was of a larger extent than that which is ſpoken of here; and that it had this effect, that the Dowry was reſtored to the Donor not only in the caſe where the Daughter that was endowed died, but even in her lifetime in caſe of a Divorce; yet we have added theſe two Texts, in order to obſerve therein two things. One is, that when a Stranger gave a Portion with a Woman in Marriage, he had not this Right of Reverſion, unleſs he had ſtipulated it: and the other is, that they reckoned in the number of Strangers, even the Mother, and the Aſcendants by the Mother's ſide, becauſe they had not the Daughter in their power. See touching this Remark that which is made on the fourth Article.

III.

3. The Reverſion by Agreement is regulated by the Agreement.

The Reverſion by Agreement hath its effect, ſuch as it is ſettled by the Agreement, whether it be between Aſcendants and Deſcendants, or other perſons[c].

[c] *The Agreement about the Reverſion having nothing unlawful it, it hath its effect according to the Rules of Covenants.*

See the Texts cited on the foregoing Article, and the eleventh Article of the ſecond Section of Dowries.

See the cloſe of the Remark on the fifth Article.

IV.

4. Reverſion of things given in favour of Marriage.

If a Father, a Mother, or other Aſcendant having endowed a Daughter, or made ſome preſent to one of his Children, or Deſcendants, in favour of their Marriage, ſurvives the Donee, who dies without Iſſue, he ſhall take back the things which he gave. And although the Reverſion of the ſaid things has not been expreſly ſtipulated, yet the Donor ſhall have them before any other Heir, and even preferably to the neareſt Aſcendant, who perhaps may exclude him from the Inheritance of the ſaid Donee[d].

[d] Jure ſuccurſum eſt patri, ut filia amiſſa, ſolatii loco cederet, ſi redderetur ei dos ab ipſo profecta: ne & filiæ amiſſæ, & pecuniæ damnum ſentiret. *l. 6. ff. de jure dot.*

Dos à patre profecta ſi in matrimonio deceſſerit mulier filia familias ad patrem redire debet. *l. 4. C. ſol. matrim. l. 17. in f. ff. de Senat. Maced.*

Conſtitutionis novæ capitulum clariore interpretatione ſancimus, ut quæ per filios nepotes, pronepotes, itemq; filias, neptes, proneptes, quamvis in poteſtate ſint minimè acquiri patri decrevimus, à marito vel uxore, quocunque titulo collata, ſive ultima tranſmiſſa voluntate, nullus ad id quoque pertinere exiſtimet, quod ab ipſo parente datum, vel dotis, vel ante nuptias donationis causâ, pro una ex memoratis perſonis præſtitum fuerat: ut minimè ad eum ſi caſus tulerit revertatur. Proſpiciendum eſt enim ne hac injectâ formidine parentum circa liberos munificentia retardetur. *l. 2. C. de bon. quæ lib.*

See the ſixth, ſeventh and eighth Articles of the ſecond Section of the Title of Dowries.

☞ Although the Texts cited on this Article, and thoſe which have been quoted on the firſt and ſecond Articles, do not extend to the Mother, and the other Aſcendants by the Mother's ſide, yet we have nevertheleſs comprehended in the Article all the Aſcendants without diſtinction. For according to the Uſage in *France*, they have all of them this Right of Reverſion, and the ſame Equity makes the Reverſion to be as juſt on their part, as on the part of the Father. There are even ſome Cuſtoms in *France*, which extend the Right of Reverſion, not only to the Mother, and the Aſcendants on the Mother's ſide; but even to Collateral Relations, even altho' there be no Agreement for ſo doing. And this Right is likewiſe given to Collaterals in ſome places in *France* which are governed by the *Roman* Law; but in other places they have it not, except where it is expreſly ſtipulated.

We muſt remark on this Article, that although theſe diſpoſitions of the *Roman* Law regard only Dowries and Donations made in favour of Marriage; yet ſeeing the Right of Reverſion is no leſs juſt in the other ſorts of Donations, the greateſt part of the Cuſtoms in *France* have extended it to all Donations in general by expreſs Diſpoſitions. And it is the common Uſage in *France*, both in the Cuſtoms which have made no expreſs proviſion therein, and likewiſe in the Provinces which follow the *Roman* Law, that the Reverſion in favour of Aſcendants takes place in all ſorts of Donations, altho' there be no expreſs ſtipulation to that purpoſe.

We muſt likewiſe farther obſerve in relation to the ſame diſpoſitions of the *Roman* Law, that they do not diſtinguiſh the caſe where the Deſcendant, who is the Donee by his Contract of Marriage, dies without iſſue, from that when he leaves Children behind him. Which gave riſe to a queſtion, which Uſage has decided between two Parties, one of which pretended that altho' the Deſcendant who was the Donee left Children behind him, yet the Reverſion took place; the other alledging that the Reverſion was not to take place but in the caſe where the Donee died without Iſſue[a]. It is this ſecond opinion that has been eſtabliſhed as the Rule: and it is ſo juſt and ſo natural, that it may be ſaid, that it is not only the Plurality of Voices, but that it is alſo Reaſon which has eſtabliſhed it as a Rule; ſince Donations in favour of Marriage, and the Dowries of Daughters have the ſame end as Marriage, and reſpect not only the Donees, but likewiſe their Deſcendants. From whence it follows, that when there are Children who ſurvive their Fathers or Mothers, to whom the Donation had been made in favour of Marriage, the motive of the Donation ſubſiſts in their perſons; and they make the motive of the Reverſion to ceaſe, which is to prevent the Donor's falling at the ſame time into the double loſs both of his Goods and of his Child, as has been obſerved in the Preamble of this Section. For if the Donee leaves Children behind him, the Aſcendant who was the Donor and who ſurvives him, conſiders in thoſe Children the perſon whom they repreſent, and he ſees the Goods which he had beſtowed paſs to the uſe which engaged him to give them away.

Seeing the conſideration of the Children of the Donee makes the Reverſion to ceaſe when the Children ſurvive him, a queſtion has been ſtarted, whether in this caſe the Right ceaſes in ſuch a manner, that if the ſaid Children ſhould happen to die before the Aſcendant who was the Donor, whether he would be deprived of the Right of Reverſion. But becauſe the ſaid Children are conſidered themſelves as Donees of their Grand-father, as we have juſt now obſerved; it would ſeem that it might be urged, that the Donation being continued in their perſons, the Right of Reverſion was only ſuſpended in their favour, and that it begins to have its effect whenever the Donation ceaſes to have its effect by their death. For in that caſe this Donor who ſurvives both the Donee and the Donee's Children, is in the ſame condition as if he had ſurvived the Donee dying without Iſſue. Since by his ſurviving all this branch of his Deſcendants on whoſe account the Donation was made, he ſurvives in effect his Donees, and comes within the motive of the Laws which grant the Right of Reverſion.

Altho' the Donation were not made in favour of Marriage, yet it ſeems that it would be fully as equitable that the Children of the Donee ſhould make the Reverſion to ceaſe in that caſe; and that on the contrary it ſhould take place if the Donor did ſurvive the Donee and his Children. For every Donation from an Aſcendant to a Deſcendant has a view to the ſettlement of the Perſon and Family of the Donee; and the motives of the Rules of Reverſion which we have juſt now explained, ſeem to be common to all ſorts of Donations in favour of Children.

V.

5. This Right does not hinder the Profits which do ariſe out of the Goods ſubject to the Reverſion.

In the caſe of the preceding Article, the profits which the Wife of the Donee has a right to out of the Donation made to her Huſband by his Father or other Aſcendant, in favour of their Marriage; and the profits which the Huſband has a right to in the ſame manner out of his Wiſe's Marriage Portion, would have their effect: and the Reverſion would be diminiſhed by thoſe kinds of profits, whether they were regulated by the Contract it ſelf, or by Cuſtom, or ſome other Law. For this Donation and this Dowry being in favour of the Marriage, they ought to follow the conditions thereof, which are ſuch, that whatſoever is given to the Wife is ſubject to the Rights of the Huſband; and whatſoever is given to the Huſband, is likewiſe ſubject to the Rights of the Wife, unleſs it has been otherwiſe agreed on[e].

☞ Altho' there ſhould be no Covenant to regulate theſe profits, as there was in the caſe of this Text, yet if they are regulated by Cuſtom, it is equally juſt that they ſhould diminiſh the Reverſion. For the Donor knew ſufficiently this conſequence of his Donation, and that the Goods which he gave would be ſubject to theſe ſorts of profits. Which regards as well the profits that the Wife has a Right to out of the things given to her Huſband, as the profits which the Huſband has a Right to out of his Wife's Marriage Portion. And ſince the Text cited on this Article takes in the whole Dowry according to the agreement that had been made, with much more reaſon may it be applied to the profits which conſume only a part of it.

If beſides the profits that belong to the Wife, out of the things given to her

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[*] *It may be obſerved touching theſe opinions, that both the one and the other have ſome foundation in the Roman Law.* V. l. 12. ff. de pact. dotal. Ulp. Tit. 6. §. 4.

[e] Si pater dotem dederit, & pactus ſit, ut mortua in matrimonio filia, dos apud virum remaneat: puto pactum ſervandum, etiam ſi liberi non interveniant. *l. 12. ff. de pact. dot.*

her Huſband, ſhe had likewiſe her Dowry to recover, and the other Goods of the Huſband were not ſufficient to anſwer the ſame; would the Reverſion, of which the caſe had happened, the Huſband being dead without Children hinder the Wife from recovering her Dowry out of the things given to the Huſband? Seeing this Reſtitution of the Dowry is a conſequence of the Contract of Marriage, the things which are given to the Huſband ought to be comprehended among the Goods of the Huſband which are reſponſible for the Dowry; and this is a charge which the Donor could not be ignorant of, ſince the Dowry was promiſed only on the aſſurance that all the Goods belonging to the Huſband ſhould be anſwerable for it; which included particularly the things given on account of the Marriage, unleſs they had been excepted by an expreſs clauſe[a].

But if the Donee had contracted Debts, could his Creditors hinder the effect of the Reverſion? Or could the Donor alledge againſt the Creditors, that the Goods which he had given are appropriated to him in the caſe of the Reverſion, and that the Donee could not mortgage them to his prejudice, no more than an Heir who is charged with a Subſtitution can engage the Goods which are ſubject to the Subſtitution? And would it likewiſe be ſaid that this Donee could not alienate the Goods ſubject to the Reverſion, nor diſpoſe of them by Teſtament?

As to the Alienation and Mortgage of the Goods which are given, we muſt conſider what are the motives of the Donations made by Aſcendants to their Deſcendants, and judge by thoſe motives of the uſe that the Donee may make of the things given him, what right he has to them, and what right the Donor has ſtill in them. The intention of the Aſcendants who make Preſents to their Deſcendants, is always without doubt that the Goods which are given may ſerve towards the ſettlement of the Donee, and to all the uſes that ſhall be conſequences of the ſaid ſettlement, which implies all the uſes that any Maſter of a Family may make of the Goods for his Perſon and for his Family. Thus this Donee has over thoſe Goods which are given him, the right to make uſe of them according as his affairs ſhall require; which ſuppoſes the liberty of uſing them in the ſame manner as any Proprietor may uſe the Goods that are his own. And the Donor has on his part his Right of Reverſion in the ſaid Goods, if the caſe does happen.

If we put in the ſcales this Right of the Donor, and that of the Donee, in order to give to the one and to the other their juſt effect, we ſee that the Donee being Maſter of the things given him, and given towards his Settlement, it is a conſequence of ſuch a Donation, that he may uſe them according as his affairs ſhall oblige him, and as the ſaid ſettlement and all its conſequences may demand. Which implies the neceſſity of uſing them ſo as to mortgage and alienate them. For if, for example, this Donee is a perſon that has occaſion to purchaſe an Office, it will become juſt and neceſſary that the Creditors who ſhall lend him Money upon a Mortgage of the Goods given, or thoſe to whom he ſhall ſell them in order to lay out the price in the Purchaſe of the ſaid Office, ſhould have nothing to fear on the ſcore of the Right of Reverſion, ſince their ſecurity upon the Office might fail them in caſe it be ſuppreſſed, or fall in its value. From whence it follows, that a Donee may for any other affair mortgage the Goods which are given him, as well as the reſt of his Goods; and that what he may do for one affair, he may do for all others, ſince the Right of Reverſion does not put the Donee under Tutorſhip, and does not oblige him to examine ſo nicely, whether he imploys to advantage the Goods which the Donation has made him maſter of; and that the Creditors of the ſaid Donee are not bound on their part to take any other precautions than thoſe which are uſually taken with all Debtors who poſſeſs only free Goods, which they may diſpoſe of as being abſolutely Maſters of them, ſince the Reverſion ought not to be compared to a Subſtitution which leaves no liberty to the Poſſeſſor to diſpoſe of the Goods to the prejudice of the perſon who is ſubſtituted to them; otherwiſe it would be neceſſary that a Contract of Marriage in which a Father endows his Daughter, ſhould be made publick as a Subſtitution, in order to preſerve to him his Right of Reverſion. And it is ſo juſt and ſo natural that the Reverſion ſhould ceaſe with reſpect to the Creditors of the Donee, that ſome Cuſtoms in *France* which ordain that the Goods given by Aſcendants ſhould return to them without the burthen of the Debts of the Donee, do add that the Goods given are nevertheleſs ſubject by way of Supplement to the Debts of the Donee, in caſe his other Goods ſhould not be ſufficient to diſcharge them.

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[a] *See the ſeventeenth Article of the firſt Section of Subſtitutions direct and fiduciary.*

Laſtly it may be ſaid, that the nature and proper character of the Right of Reverſion is to diſtinguiſh in the Maſs of the Goods belonging to the Succeſſion of the Donee, the things that were given, and that are ſubject to this Right, in order to take them out of the Maſs, and to return them back to the Donor, not as if he had always remained Proprietor of them, but as ſucceeding to ſuch of the ſaid Goods as remain ſtill in the Inheritance. Thus it is by a kind of Succeſſion that the Donor takes back the things which he had given: and we ſee that ſome Cuſtoms in *France*, inſtead of giving to Fathers and Mothers, and other Aſcendants, the Reverſion of the things given to their Children and Deſcendants, do barely ordain that they ſhall ſucceed to the things which they gave them. It follows from this nature of Reverſion, whether we will conſider it as a Succeſſion to the things that are given, or as a Right independent of the quality of Heir, and which the Aſcendant who is the Donor acquires a right to by the Donation it ſelf; that the effect of this Right is limited, according to the nature of ſuch Donation, to diſtinguiſh in the Inheritance the things that were given, in order to take them away from any other Heir beſides him who has the Right of Reverſion; but that the Reverſion ought not to have the retroactive effect of an appropriation, which may hinder the Donee from mortgaging or alienating the Goods, and which may turn not only to the prejudice of the Donee, but even to the prejudice of third perſons, who had reaſon to look upon the things that were given as being a part of the Donee's Goods, as well as the other Goods which he poſſeſſed by any other Title. And altho' it may be ſaid againſt the Creditors who were prior to the Donations, that they had not reckoned upon the Goods which were given to their Debtor after their Debt was contracted, yet their condition ought not to be diſtinguiſhed from that of the Creditors who were poſterior to the Donation. For beſides that the condition of the laſt Creditors ought not to be better than that of the firſt, the Goods which the Debtor ſhould afterwards acquire were likewiſe engaged to his prior Creditors, and the deſtination of the things that were given for the uſe and benefit of the Donee, implied much more the acquitting of what he already owed, than the facility of borrowing and contracting new Debts.

Altho' the Donee may diſpoſe of the Goods given him to the prejudice of the Reverſion, by alienating or mortgaging them, it does not thence follow, that if he commits any Crime, he ſubjects the ſaid Goods to confiſcation. For this kind of Engagement is not of the nature of thoſe which hinder the effect of the Reverſion, ſince on the contrary the Civil Death of the Donee who is condemned, ought to have the ſame effect to make way for the Right of Reverſion as the Natural Death would have, but if the condemned perſon had Children, it might be ſaid in behalf of the Forfeiture, that the caſe of the Reverſion had not happened, and that therefore the Forfeiture ought to take place; ſince the Children hindering the effect of the Reverſion, the things that were given would ſtill belong to the Donee that is condemned, and by conſequence would be included in the Forfeiture. But ſince the Children make this Right of Reverſion to ceaſe, when they ſurvive after the natural death of the Donee their Father, and ſince the Goods fall to them by the ſaid death, might we not give the ſame effect to the Civil Death, and make the ſaid Goods to paſs to the Children of this Donee, not as a Succeſſion which ſhould give them the Right of their Father, for the condemned perſon has no Heirs; but as an effect of the Donation, and of the intention of the Donor, who becauſe of the incapacity which has happened to the Donee, would have the things given to paſs to the Donee's Children; for they were not only given to this Donee, but the intention of the Donor was, that the Children ſhould have them after their Father, preferably to himſelf. Or we might under another view conſider the Donee as being dead without Children, ſince he died without Heirs: and reſtore to the Donor the things which he had given, but with the charge of keeping them for the Children of his Child to whom he had made the Donation. This we thought fit to mention, becauſe it has been adjudged after this manner in one of the Parliaments of *France*, and becauſe this temperament ſeems to be conformable to Equity, and to the Spirit of the Rules of Law.

As to the Diſpoſitions which the Donee might make by a Teſtament, we ſee that ſome of the Cuſtoms in *France* have limited this Right of Reverſion to the caſe where there are no Children, nor any diſpoſition made by the Donee; which leaves a liberty of diſpoſing to the prejudice of the Reverſion, both by Alienations, and by Diſpoſitions made in proſpect of death. And this Rule ſeems to be taken from the 25th Novel of *Leon*, where he blames as an abuſe which had crept in contrary to the ancient Law, the Uſage of not being at liberty to diſpoſe by Teſtament, to the prejudice of the Reverſion: and he re-eſtabliſhed the ſaid Liberty, reſerving only to the Donor his Legitime, or the Falcidian Portion. But we ſee on the contrary, in ſome Provinces which are governed by the written Law, that they obſerve there a Law that is quite the reverſe, which favours in ſuch a manner the Right of Reverſion, that not only the Donee cannot diſpoſe of the things that are given him by Teſtament, but that he cannot even alienate them, or mortgage them.

From theſe two extremes, the one which permits the Donee without diſtinction either to alienate, to mortgage, or to diſpoſe by Teſtament; and the other which takes from him the liberty of all manner of diſpoſition whatſoever, it has happened that in ſome places where the Law touching this matter is not ſo preciſely determined, there have ariſen ſeveral Law-Suits touching the validity of diſpoſitions made by Donees to the prejudice of the Right of Reverſion which the Law gives to Aſcendants who are Donors; which has made many people wiſh that ſome proviſion were made therein. And if it may be allowed in the mean while to make one bare reflection on Rules which are ſo oppoſite the one to the other, it would ſeem that as to the Alienation and Mortgage, the reaſons which have been obſerved render the Rule, or Uſage which allows them favourable; and that as to Teſtamentary Diſpoſitions, as they are not of the ſame neceſſity for the behoof of the Donee, as is the liberty of mortgaging and alienating, ſo neither are they within the intention of the Donor; but on the contrary we ought not to preſume that he intended that a Legatary ſhould be preferred to him; it would not ſeem unjuſt that the Reverſion ſhould take away the liberty of diſpoſing by Teſtament. And if, for inſtance, a Grand-father by the Father's ſide had given to his Grand-ſon an Eſtate in Land ſituated in a Country that is governed by the *Roman* Law; and that the ſaid Grand-ſon had deviſed it to his Mother, who ſurvived him, together with his ſaid Grand-father, or if he had deviſed the ſaid Land to one of his Friends; it would ſeem to be conſonant both to Humanity and Equity, that the ſaid Grand-father ſhould have that effect of the Right of Reverſion, ſo as to have the preference both of the Mother, and alſo of the Stranger: and that we might with very good reaſon, and without treſpaſſing againſt the Principles and Spirit of the Laws, judge that the ſaid Legacy had proceeded either from a Principle of ingratitude in the Donee, if he thought that the Donor would out-live him, or from a perſuaſion that his Grand-father would die before him. And either the one or the other of theſe conſiderations, being backed with the favour of the Right of Reverſion, might unjuſtly make the ſaid Legacy give place to the Right of Reverſion, and introduce the Rule of the Provinces where Teſtamentary Diſpoſitions are prohibited to the prejudice of the Right of Reverſion. And as it would be neither reaſonable nor poſſible to make the validity of the diſpoſitions of Donees, to the prejudice of the Right of Reverſion, to depend on the quality and circumſtances of the ſaid Diſpoſitions, ſo as to ratify and confirm ſome of them which might be favourable, and to annul others, as containing ſome hardſhip; and likewiſe becauſe the Rule ought to be ſimple and uniform; it would ſeem juſt, if there were a neceſſity of making a choice between theſe two oppoſite Rules, to annul rather all Diſpoſitions of Donees made to the prejudice of the Right of Reverſion, than to confirm them all without diſtinction; and this Rule, as well as that which permits the Alienation and the Mortgage of the ſaid Goods, would be without any manner of inconvenience. For thoſe who ſhould be afraid of the effect and conſequences either of the one or the other, might regulate the conditions of the Donations, and of the Reverſion, as they ſhould think fit, and either reſtrain or enlarge by their covenants, the liberty to alienate, to mortgage, and to diſpoſe by Teſtament; for Covenants of this kind would be very lawful[b].

All that has been ſaid hitherto concerns the Right of Reverſion as it is regulated by Law, altho' there has been no agreement about it. But if the Reverſion is ſtipulated by an expreſs Covenant, whether it be by an Aſcendant, or any other perſon, Relation or Stranger to the Donee, the Reverſion in that caſe will have the effect which it ought to have by the Covenant. And unleſs it makes expreſs mention of the liberty to diſpoſe, it is the common opinion, that as an expreſs ſtipulation ſeems to have more force than that which is barely given by the Law, the Reverſion which is founded on an Agreement hinders all Diſpoſitions. Which is ſtill more equitable with reſpect to Donors who are not Aſcendants. For ſince they have not the ſame affection for the eſtabliſhment of the Donees, and their Families, as Aſcendants have, it is natural to preſume that the Covenant by which the Reverſion is ſtipulated takes away from the Donee the liberty of all Diſpoſitions to the prejudice of the Donors.

We have perhaps enlarged too much on a Subject which has but a few Rules in the *Roman* Law; and perhaps likewiſe we have ſaid too little on a Subject that is of ſo frequent uſe, and ſo full of difficulties. But we thought that, without entring into a particular inquiry into the ſeveral ſorts of difficulties, which would be endleſs and of no profit, it was neceſſary to take notice of the moſt material; and that it might be ſufficient for deciding all thoſe which may ariſe, to eſtabliſh the Principles on which the Deciſions may depend.

VI.

6. The Father has the Reverſion of the Dowry given by the Grand-father on the Father's ſide.

If a young Woman that is endowed by her Grand-father on the Father's ſide, having ſurvived her Grand-father, dies without Children, her Father being alive, the Father takes back the Dowry as if he himſelf had given it, altho' he be not Heir to his Father who was Grandfather to the Daughter; and he excludes from it the Mother, and the other Children whom he has by her, and who might ſucceed with him. For as it is the duty of the Father to endow his Daughter, ſo it was for the Father's ſake that the Grand-father did endow his Grand-daughter. And this Dowry reverts to him by a double Right, both as repreſenting his Grand-father, and as taking back a Gift which his Father had given for him, and on his account. Which is the reaſon why this Right is in his perſon independant on the quality of Heir to his Father, Grandfather to the Daughter, and that it was acquired to him in a manner from the moment of the Donation, that it might have its effect whenever the caſe thereof ſhould happen[f].

TITLE III.

In what manner BROTHERS, SISTERS, and other COLLATERALS do ſucceed.

We have ſeen in the Preamble of this Second Book, that there are three Orders of Perſons whom the Laws call to Succeſſions. The firſt is that of Children, and other Deſcendants. The ſecond of Fathers, and Mothers, and other Aſcendants. And the third is of Collaterals; who are ſo called, becauſe they deſcend every one by his Line from Father to Son, from an Aſcendant that is common to them; which is the reaſon, that they are placed one at the ſide of the other, underneath the perſon from whom they deſcend.

SECT. I.

Who are the Collaterals.

The CONTENTS.

1. *Definition of Collaterals.*
2. *Three kinds of Brothers; Brothers of the whole blood, Brothers by the Father's*

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[b] *See the twenty ſeventh Article of the ſecond Section of the Rules of Law.*

[f] Dotem quam dedit avus paternus, an poſt mortem avi mortua in matrimonio filia, patri reddi oporteat, quæritur. Occurrit æquitas rei, ut quod pater meus propter me filiæ meæ nomine dedit, proinde* ſit atque ipſe dederim. Quippe officium avi circa neptem ex officio patris erga filiam pendet. Et quia pater filiæ, ideo avus propter filium nepti dotem dare debet. *l. 6. ff. de collat.*

Altho' the Law quoted on this Article ſeems contrary to the 79th Law, ff. de jure dot. *yet we thought that the Equity which was the motive thereof, ought to make the Rule, without its being neceſſary to examine in what manner theſe two Laws may be reconciled.*

* Perinde.

Father's ſide, Brothers by the Mother's ſide.
3. *Uncles, Aunts, Nephews, Nieces.*
4. *Divers ſorts of Uncles, Aunts, Nephews and Nieces.*
5. *Great Uncles, Great Aunts.*
6. *Grand Nephews, Grand Nieces.*
7. *Couſins.*
8. *Firſt Order of Collaterals.*
9. *Second Order of Collaterals.*
10. *Third Order of Collaterals.*

I.

1. *Definition of Collaterals.* BY Collaterals, are meant all thoſe who being neither Aſcendants nor Deſcendants to one another, are deſcended either from the ſame Father, or the ſame Mother, or from another Aſcendant that is common to them. Thus Brothers and Siſters are Collaterals to one another; thus the Uncle and Nephew are alſo Collaterals to one another; and Couſins the ſame[a].

[a] Gradus cognationis alii ſuperioris ordinis, alii inferioris, alii ex tranſverſo, ſive à latere. *l.* 1. *ff. de grad. & affin.* Ex latere venientes. *l.* 9. §. 1. *C. de natur. lib.*

II.

2. *Three kinds of Brothers; Brothers of the whole Blood, Brothers by the Father's ſide, Brothers by the Mother's ſide.* Among the Collaterals, the neareſt are Brothers and Siſters[b], who are of three ſorts. Thoſe who are born of the ſame Father, and of the ſame Mother[c], whom we call Brothers of the whole Blood: thoſe who are born of one and the ſame Father, but of different Mothers, who are called Brothers by the Father's ſide; and thoſe who have one and the ſame Mother, but different Fathers, whom we call Brothers by the Mother's ſide[d].

[b] Ex tranſverſo ſive à latere fratres, & ſorores. *l.* 1. *ff. de grad. affin.*

[c] Fratres & ſorores ex eodem patre, & ex eadem matre natos. *Nov.* 118. *c.* 3.

[d] Qui ex uno parente conjuncti ſunt defuncto ſive per patrem ſolum, ſive per matrem. *d. C.* 3.

III.

3. *Uncles, Aunts, Nephews, Nieces.* The neareſt of kin after Brothers and Siſters, are Uncles and Aunts; that is to ſay, the Brothers and Siſters of the Father, or Mother: and Nephews and Nieces; that is to ſay, the Children of Brothers or Siſters[e].

[e] Ex tranſverſo fratris ſororiſque filius filia, & convenienter patruus amita, avunculus matertera. *l.* 1. §. 5. *ff. de grad. & affin.*

IV.

4. *Divers ſorts of Uncles, Aunts, Nephews, and Nieces.* As we muſt diſtinguiſh among Brothers and Siſters, thoſe who are Brothers or Siſters of the whole blood, that is to ſay, by the ſame Father and Mother; from thoſe who are only of the half blood, that is, who have only in common the ſame Father, or the ſame Mother: ſo likewiſe among Uncles and Aunts, we may diſtinguiſh between thoſe who are Brothers of the whole blood to the Father or Mother, and thoſe who are only Brothers by the half blood, that is, either by the Father's ſide alone, or by the Mother's ſide alone. And the ſame diſtinction may be made among Nephews and Nieces, between thoſe who are Children of Brothers or Siſters of the whole blood, and thoſe who are Children of Brothers or Siſters by the half blood[f].

[f] *We take notice here of theſe ſeveral ſorts of Uncles and Aunts, and of Nephews and Nieces, in order to diſtinguiſh theſe different kinds of Relations. For altho' theſe differences are not conſidered in the* Roman *Law, which reſtrains to Brothers and Siſters alone the diſtinction of Brothers by the whole blood, and Brothers by the half blood, and calls to Succeſſions all the other* Collaterals, *according to their degrees, without diſtinguiſhing whether they be related by the Father alone, or the Mother alone, or by both, as ſhall be explained in the ninth Article of the following Section; yet it is neceſſary to know theſe different ſorts of Kindred, and they are of uſe in the Cuſtoms of* France, *which appropriate Eſtates inherited by Deſcent, to the neareſt of Kin on the Side, and in the Line, from which they deſcended; as has been already remarked.*

V.

5. *Great Uncles, Great Aunts.* The Great Uncle is the Brother of the Grand-father or Grand-mother, whether it be by the Father's ſide, or Mother's ſide. And the Brothers of the remoter Aſcendants, ſuch as Great Grand-fathers, Great Grand-father's Father, and others, are likewiſe comprized in our language, under the name of Great Uncles, who may be diſtinguiſhed by the degrees of firſt or ſecond Great Uncle. And it is the ſame thing with reſpect to Great Aunts, whether thoſe Great Uncles and Great Aunts be related by the whole blood, or by the half blood to the Aſcendant whoſe Brothers and Siſters they are[g].

[g] Ex tranſverſo —— patruus magnus, amita magna, id eſt, avi frater & ſoror, avunculus magnus; matertera magna, id eſt, aviæ frater & ſoror. *l.* 1. §. 6. *ff. de grad. & affin. v. l.* 10. §. 15. & *ſeqq.*

VI.

6. *Grand Nephews, Grand Nieces.* The Grand Nephew is the Nephew's Son, Grand-ſon to the Brother or Siſter, whether he be deſcended of the whole Blood, or of the half blood. And all the Deſcendants of Nephews are likewiſe called Grand Nephews, who may be diſtinguiſhed by the degrees of firſt and ſecond Grand-Nephew. And

what is here ſaid of Grand Nephews, ought likewiſe to be underſtood of Grand Nieces[k].

[k] *Ex tranſverſo fratris ſororiſque nepos neptis. l. 1. §. 6. ff. de grad. & aff. V. l. 10. §. 15. & ſeqq.*

VII.

7. *Couſins.* All the other Collaterals are comprehended in our Language under the name of Couſins; the neareſt of which are the Children of Brothers and Siſters, whom we call Couſin Germans; whether they be the Children of Brothers of the whole blood, or of the half blood. And it is the ſame thing with reſpect to the Children of Siſters, whether they be Siſters of the whole blood, or of the half blood; or to the Children of Brothers and Siſters. For in what manner ſoever the Brothers and Siſters are linked together, the name of Couſin Germans is given indifferently to the Children of the one with reſpect to the Children of the other. And as for the other Couſins more remote, they are to be diſtinguiſhed according to their Ranks, in the Orders of the Collaterals, which ſhall be explained in the following Articles[l].

[l] Eodem gradu (quarto) ſunt & illi qui vocantur fratres patrueles amitini amitinæ, conſobrini conſobrinæ: hi autem ſunt qui ex fratribus vel ſororibus naſcuntur, quod quidam ita diſtinxerunt; ut eos quidem qui ex fratribus nati ſunt, fratres patrueles, item eas quæ ex fratribus natæ ſunt, ſorores patrueles, ex fratre autem & ſorore amitinos amitinas, eos verò & eas qui quæve ex ſororibus nati natæve ſunt, conſobrinos conſobrinas, quaſi conſororinos: ſed plerique hos omnes conſobrinos vocant. *l. 10. §. 15. ff. de grad. & affin.*

VIII.

8. *Firſt Order of Collaterals.* We muſt diſtinguiſh in the Collaterals of any perſon, three different Orders. The firſt is of thoſe who are placed at the ſide of that Perſon in the ſame Line, in ſuch a manner that they are all equally diſtant with the ſaid Perſon from the firſt Aſcendant that is common to them. Thus Brothers and Siſters are at the ſame diſtance from their Father. Thus Couſin Germans are at the ſame diſtance from their Grand-father. And ſecond Couſins are at the ſame diſtance from their Great Grand-father[l].

[l] *This is a conſequence of the preceding Articles, and which may be eaſily underſtood by a view of the Table of Kindred.*

IX.

9. *Second Order of Collaterals.* The ſecond Order of the Collaterals of any perſon, is of thoſe who are at a leſs diſtance than they from the firſt Aſcendant that is common to them. Thus the Uncle is not in ſo remote a degree from his Father, as is his Nephew, who is Grand-ſon to his Father. Thus the Couſin German of the Father of any perſon, who is called Uncle according to the way in *Britanny*, being Grandſon of the Great Grandfather of the ſaid perſon, is not at ſo great a diſtance as that perſon is from the ſaid Great Grand-father. Thus the Couſin Germans of all the other Aſcendants of any perſon, are leſs remote than the ſaid perſon from the firſt Aſcendants who are common to them[m].

[m] *See the Figure.*

X.

3. *Third Order of Collaterals.* The third Order of the Collaterals of any one, is of thoſe who are more remote than the ſaid perſon from the firſt Aſcendant that is common to them. Thus the Nephew is at a greater diſtance from his Grand-father than his Uncle, who is Son to the ſaid Grand-father. Thus the Son of the Couſin German of any perſon, who is called Uncle after the manner of *Britanny*, is at a greater diſtance from his Great Grand-father, who is their firſt common Aſcendant. Thus all the Deſcendants of Couſin Germans, and of the others who are in the firſt Order, are more remote than the ſaid perſon from the Aſcendant of whom they are all deſcended[n].

[n] *See the Figure.*

SECT. II.

The Order of the Succeſſion of Collaterals.

IT is to be obſerved on this Section, that whatever ſhall be ſaid therein, touching the Proximity among Collaterals, who exclude one another according as they are nearer, is to be underſtood only with regard to the Provinces in *France*, which are governed according to the written Law. For in the Cuſtoms of *France* there are two contrary Rules. One which is common to all the Cuſtoms, which calls to the Succeſſion of Eſtates inherited by Deſcent, not the neareſt Collaterals without diſtinction, but thoſe who are neareſt on the ſide from whence the ſaid Eſtate of Inheritance deſcended. Thus the Couſin

German on the Father's ſide of the deceaſed will ſucceed to him in the Goods which deſcended to him from the Father's ſide, altho' the deceaſed had left behind him a Brother by the Mother's ſide, who was nearer to him than the ſaid Couſin German. The other Rule which is peculiar to ſome Cuſtoms, is that which admits of Repreſentation in the Collateral Line to an infinite degree: which makes that Collaterals of a more remote degree are not excluded by others who are nearer.

The CONTENTS.

1. *Brothers are the firſt in the Order of Collaterals.*
2. *Brothers of the whole blood exclude the others.*
3. *The Children of the Brothers of the whole blood concur with their Uncles.*
4. *The Children of the Brothers of the whole blood, exclude the Brothers of the half blood.*
5. *Brothers by the Father's ſide alone, and thoſe by the Mother's ſide alone, concur together.*
6. *The Children of Brothers of the half blood repreſent their Fathers.*
7. *The Right of Repreſentation is limited to Brothers Children.*
8. *The Nephew is preferred to the Uncle, altho' in the ſame degree.*
9. *All the other Collaterals ſucceed according to their Proximity.*

I.

1. *Brothers are the firſt in the Order of Collaterals.*

THE Succeſſion of one that dies without Children, or other Deſcendants, and without Father, or Mother, or other Aſcendants, paſſes to the Collaterals. And if the deceaſed had Brothers or Siſters, they will ſucceed in the firſt place[a], and will exclude all the others. But Brothers and Siſters ſucceed differently, according to the diſtinctions which ſhall be explained in the following Articles.

II.

2. *Brothers of the whole blood exclude the others.*

If the perſon whoſe Succeſſion is to go to his Brothers alone, when there is no Deſcendant, or Aſcendant, hath left behind him Brothers of the whole blood, and likewiſe other Brothers of the half blood, whether they be by the Father's ſide alone, or by the Mother's ſide alone, or of both theſe kinds; the Brothers of the whole blood, who would have concurred with the Aſcendants if there had been any, will ſucceed all alone, and exclude the others[b], and their Deſcendants[c]. And this Rule, as well as thoſe which follow, are to be underſtood of Siſters as well as Brothers, whether the Siſters be alone, or that with them there are likewiſe Brothers, ſeeing their condition ought to be equal. But for the greater clearneſs, and for brevity's ſake, we ſhall only name the Brothers alone.

III.

3. *The Children of Brothers of the whole blood concur with their Uncles.*

If together with the Brothers of the whole blood there are Children of another Brother of the whole blood, who died before the Brother whoſe Succeſſion is to be divided; thoſe Children will repreſent their Father, and will concur with their Uncles, Brothers to the deceaſed; and will have among them all the ſhare which their Father would have had if he had been alive[d].

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[a] Si igitur defunctus neque deſcendentes neque aſcendentes reliquerit, primos ad hæreditatem vocamus fratres & ſorores. *Nov.* 118. *c.* 3.

[b] Primos ad hæreditatem vocamus fratres & ſorores ex eodem patre & ex eadem matre natos, quos etiam cum patribus ad hæreditatem vocavimus. *Nov.* 118. *c.* 3.

See concerning what is ſaid in this Article, of the Brothers concurring with the Father and Mother, and other Aſcendants, in the Succeſſion of their Brother, the ſeventh Article of the firſt Section of the ſecond Title.

[c] Ex diverſo ſiquidem ſuperſtes frater ex utroque parente conjungitur defuncto, præmortuus autem per unum parentem jungebatur, hujus filios ab hæreditate excludimus: ſicut ipſe ſi viveret ab hæreditate excludebatur. *d. Nov.* 118. *c.* 3.

[*We muſt obſerve here in relation to the diſtinction between the whole blood and the half blood, that the Law of* England *is different in this particular, according as the Succeſſion regards Lands of Inheritance, or Perſonal Eſtate. In the caſe of Inheritances, the whole blood is always preferred; and the half blood is no blood inheritable by deſcent.* Coke, 1 Inſtit. fol. 14. *In Succeſſion to Perſonal Eſtate, the Law has been more uncertain, the Statute* 22 & 23 Car. 2. cap. 10. *for the better ſettling of Inteſtates Eſtates, taking no notice of this diſtinction between the whole blood and the half blood, but directing the Diſtribution to be made among all thoſe who are in equal degree of Kindred to the Inteſtate, and it being certain that Brothers and Siſters of the half blood are in the ſame degree with Brothers and Siſters of the whole blood, it has been the general opinion, that according to the ſaid Statute of Diſtributions, Brothers and Siſters of the half blood were intitled to an equal ſhare of the Inteſtate's Eſtate, with the Brothers and Siſters of the whole blood; altho' there have been ſeveral Precedents, where it has been judged ſince the Statute for the half Blood to have but a half ſhare. But the Law in this particular, is now become fixed and certain, ever ſince the Decree of the Houſe of Lords, in the Cauſe of* Watts *& alii verſus* Crooke, *upon an Appeal from a Decree in Chancery, which had been given in favour of the half blood, and which was affirmed by the Houſe of Lords.* Shower's Caſes in Parliament, pag. 108.]

[d] Si autem defuncto fratres fuerint, & alterius fratris aut ſororis præmortuorum filii, vocabuntur ad hæreditatem iſti cum de patre & matre thiis

maſculis & fœminis. Et quanticumque fuerint, tanquam ex hæreditate præcipient portionem quantam eorum parens futurus eſſet accipere, ſi ſuperſtes eſſet. *Nov.* 118. *c.* 3.

We muſt obſerve in this Article the firſt caſe of the Repreſentation among Collaterals. See touching this Right of Repreſentation, the fourth, ſixth, ſeventh and eighth Articles; and as for the Repreſentation in the direct Line, ſee the ſecond and third Articles of the ſecond Section of the firſt Title.

It may be remarked in relation to the Right of Repreſentation among Collaterals, that the ſaid Right hath its bounds, as it is explained in this Article, and in the fourth, ſixth, ſeventh and eighth Articles, and that it hath likewiſe the ſame bounds in many of the Cuſtoms in France; *but in ſome of them the Repreſentation takes place in the Collateral Line without any limitation, as has been obſerved in the Preamble to this Section: and that in other Cuſtoms there is no Repreſentation at all in the Collateral Line, unleſs the ſame has been eſtabliſhed by Covenant; and that there are even ſome Cuſtoms which have aboliſhed the Repreſentation in the direct Line of Deſcendants, as has been remarked on the ſecond Article of the ſecond Section of the firſt Title.*

[*The Law in* England, *as to the Right of Repreſentation in the Collateral or Tranſverſal Line, is ſomewhat different in the Inheritance of Lands, from what it is in Succeſſion to Perſonal Eſtates. For in the caſe of Perſonal Eſtates, there is no Repreſentation admitted among Collaterals after Brothers and Siſters Children.* Stat. 22. & 23. Car. 2. cap. 10. §. 7. *But in the Inheritance of Lands, this Right transferred by Repreſentation is infinite and unlimited in the degrees of thoſe that deſcend from the Repreſented, whether it be Deſcents Lineal, or Tranſverſal. Hales's* Hiſtory of the Common Law of *England*, pag. 237.]

IV.

4. The Children of the Brothers of the whole blood exclude the Brothers of the half blood.

If the deceaſed left behind him no Brothers of the whole blood, but only Children of a Brother of the whole blood, that had died before him; and if there were alive Brothers of the deceaſed by the half blood, either by the Father's ſide alone, or the Mother's ſide alone, or of both theſe ſorts together; the Children of the Brother of the whole blood, Nephews to the deceaſed, would be preferred before their Uncles, Brothers to the deceaſed by the Father's ſide alone, or by the Mother's ſide alone, and would exclude them from the Succeſſion in the ſame manner as their Father would have done if he had been alive; and altho' they are in a remoter degree than their Uncles, yet repreſenting their Father, they come in his place[e].

[e] Unde conſequens eſt, ut ſi fortè præmortuus frater, cujus filii vivunt, per utramque partem nunc defunctæ perſonæ jungebatur, ſuperſtites autem fratres per patrem ſolum forſan aut matrem ei jungebantur, præponantur iſtius filii propriis thiis, licèt in tertio ſint gradu: ſive à patre, ſive à matre ſint thii, & ſive maſculi, ſive fœminæ, ſicut eorum parens præponeretur ſi viveret. *Nov.* 118. *c.* 3.

V.

5. Brothers by the Father's ſide alone, and

When there are no Brothers of the whole blood, nor any of their Children, and that there are Brothers either by the Father's ſide alone, or by the Mother's ſide alone, or Brothers of both theſe ſorts, they divide among them indifferently the Succeſſion by equal portions, according to the number of perſons[f].

thoſe Mot ſide a concu gether

[f] His autem non exiſtentibus (*fratribus ſcilicet ex utraque parente conjunctis*) in ſecundo ordine illos fratres ad hæreditatem vocamus qui ex uno parente conjuncti ſunt defuncto, ſive per patrem ſolum, ſive per matrem. *Nov.* 118. *c.* 3.

☞ It may be obſerved on this Article, that ſome Interpreters have been of opinion, that in the caſe where Brothers born of the ſame Father, and of a different Mother, concur with the Brothers by the Mother's ſide alone, theſe ought to inherit the Goods of their Brother which he had by his Mother, and thoſe other Brothers to inherit the Goods he had from his Father, and that they ſhould divide only among them the Goods which their deceaſed Brother had acquired ſome other way. This opinion is grounded on this, that *Juſtinian* had made a Law before this 118th Novel, by which he had ordained, that in the Succeſſion of any perſon, who dying without Children ſhould leave behind him a Father, together with Brothers, the Father in this caſe ſhould have the property of no part of the Goods but only the Uſufruct thereof; and that the Brothers ſhould have the property; and that if the deceaſed had Goods which he had inherited from his Mother, the Brothers by the ſame Mother with the deceaſed ſhould be preferred in thoſe Goods to the other Brothers[a]. It is this Law which ſeems to have given riſe to the Rule in the Cuſtoms of *France*, which tranſmits the Goods to the Families from whence they came; and which appropriates the Paternal Goods to the Relations by the Father's ſide, and the Maternal Goods to thoſe on the Mother's ſide, *paterna paternis*, *materna maternis*, which has been extended to all the degrees in the Collateral Line. But other Interpreters have thought, that *Juſtinian* had aboliſhed this diſtinction between Paternal and Maternal Goods by the 118th Novel, and that he had abrogated that Law which had eſtabliſhed it; having made no mention of the diſtinction of Goods in this 118th Novel, no more than in his 84th Novel, where in regulating a Succeſſion between Brothers by the ſame Father and Mother, and Brothers by the Father's ſide alone, and Brothers by the Mother's ſide alone, he prefers the Brothers by the ſame Father and Mother, and makes no diſtinction of theſe two ſorts of Goods, altho' the occaſion did require it. Here he had an opportunity of explaining his mind in this matter, whether his intention had been to aboliſh this diſtinction, or without aboliſhing it, to leave to the Brothers by the Father's ſide the Paternal Goods, and to thoſe by the Mother's ſide the Maternal Goods, and to give the preference to the Brothers by the ſame Father and Mother only in the other kinds of Goods. One word added to theſe two Novels, or at leaſt to the 118th Novel, would have removed this difficulty; but ſince this Novel excludes indifferently the Brothers by the Father's ſide alone, or by the Mother's ſide alone from the Succeſſion of their Brothers, when there are Brothers both by the ſame Father and by the ſame Mother; they ſeem to be thereby excluded equally from all ſorts of Goods. And it is probably in this ſenſe that this Novel has been underſtood in one of the Provinces in *France* which are governed by the written Law. Seeing they have there derogated from it by a contrary Rule, which directs that the Brothers of the half blood, whether it be by the Father alone, or by the Mother alone, ſhould ſucceed with the Brothers of the whole blood to the Goods which came from their Stock[b].

[a] *L. 13. §. 2. Cod. de legit. hæred.*

[b] *See the ſixty fifth Article of the fifth Chapter of the Cuſtoms of* Bourdeaux, *and Country of* Guienne.

VI.

6. The Children of Brothers of the half blood repreſent their Fathers.

As the Children of Brothers of the whole blood concur with their Uncles, who were likewiſe Brothers to the deceaſed by the whole blood; ſo the Children of Brothers of the half blood concur likewiſe with their Uncles of the ſame quality, when the ſaid Uncles ſucceed to their Brother, Uncle to the ſaid Children; and every one of them repreſenting their Father, they take among them all the portion that he would have had if he had been alive[g].

[g] Ipſis fratrum filiis tunc hoc beneficium conferimus quando cum propriis judicantur thiis maſculis & fœminis, ſive paterni, ſive materni ſint. *Nov. 118. c. 3.*

VII.

7. The Right of Repreſentation is limited to Brothers Children.

The Right of Repreſentation, which puts Children in the place of their deceaſed Fathers, that they may ſucceed in the ſame manner as their Fathers would have done if they had been alive, is limited to the Children of Brothers, and is not extended to the Children of other Collaterals, who ſucceed all by the head, according to their number of perſons, and degree of Proximity; the neareſt always excluding the remoteſt. Thus when the deceaſed has no Brothers, but only Uncles, and Children of another Uncle deceaſed, the Children of the deceaſed Uncle are excluded by the Uncles that are alive[h].

[h] Hujuſmodi verò privilegium, in hoc ordine cognationis, ſolis præbemus fratrum maſculorum & fœminarum filiis aut filiabus, ut in ſuorum parentum jura ſuccedant. Nulli enim alii omnino perſonæ, ex hoc ordine venienti, hoc jus largimur. *Nov. 118. c. 3.*

[*It has been already obſerved, that in the Succeſſion to Perſonal Eſtates in* England, *no Repreſentations are admitted among Collaterals after Brothers and Siſters Children.* Stat. 22. & 23. Car. 2. cap. 10. §. 7.]

VIII.

8. The Nephew is preferred to the Uncle, altho' in the ſame degree.

If the deceaſed left behind him neither Deſcendants, nor Aſcendants, nor Brothers, nor Siſters, but only an Uncle, and a Nephew; the Nephew would ſucceed to him, and exclude the Uncle. For altho' they are both of them in the ſame degree of Proximity, yet the Nephew has the Right of Repreſentation of his Father, Brother to the deceaſed, who would be preferred before the Uncle[i]; and the Uncle on his part has no manner of Right of Repreſentation, according to the Rule explained in the foregoing Article.

[i] Quandoquidem igitur fratris & ſororis filiis tale privilegium dedimus, ut in propriorum parentum ſuccedentes locum, ſoli in tertio conſtituti gradu cum iis qui in ſecundo gradu ſunt ad hæreditatem vocentur, illud palam eſt, quia Thiis defuncti maſculis & fœminis, ſive à patre, ſive à matre præponuntur: ſi etiam illi tertium cognationis ſimiliter obtineant gradum. *Nov. 118. c. 3.*

☞ Some Interpreters have been of opinion, that the Rule explained in this Article, ought only to be underſtood of the caſes where there are Brothers to the deceaſed who are living and exclude the Uncle; but that when there are only Uncles and Nephews, without Brothers to the deceaſed, they ought to ſucceed together; and the Succeſſion is ſo regulated by the Cuſtoms of ſome places. But there are many conſiderations which ſeem to require that the Nephews to the deceaſed ſhould be preferred to his Uncles, even in the caſe where the deceaſed has no Brothers alive. For beſides the reaſon taken notice of, in the Article, that it is only the Children of Brothers that have the Right of Repreſentation, as has been mentioned in the preceding Article, and that the Uncles do not repreſent their Father, Grand-father to the deceaſed; if we examine the words of the text quoted on this Article, they bear ſo naturally the ſenſe of giving always the preference to the Nephews of the deceaſed before his Uncles, that they do not ſeem to be capable of having any other conſtruction put upon them. For firſt, it is there ſaid, that the Nephews are conſidered as being in the ſame degree with their Fathers, by the Right of Repreſentation. Thus, the Law gives them a rank which precedes that of the Uncles of the deceaſed. And in the ſecond place, it is there ſaid expreſly, that the Nephews of the deceaſed are preferred before their Uncles; which would not be true, if the Uncles might ſucceed together with the Nephews, and were only excluded by the Brothers.

Might we add to theſe reaſons, that it is natural that Inheritances ſhould deſcend rather than aſcend? And that thus the Nephews being in the Rank of Deſcendants, they ought to be preferred to the Uncles, who are in the Rank of Aſcendants. But this argument would prove too much, if we ſhould extend it to the Collaterals who are in a remoter degree than the Uncles and the Nephews: For, as ſhall be ſhewn in the following Article, the 118th Novel calls to the Succeſſion all the Collaterals without diſtinction, except Brothers, and Brothers Children, according to their degrees; the neareſt always excluding the remoteſt; and thoſe who are in the ſame degree concurring together, without any diſtinction of the Lines which are below that of the Brothers, and of thoſe which are above it, and without any Repreſentation.

8. The Children of Brothers of the half blood repreſent their Fathers.

But if we ſuppoſe that the Nephews, Children of the Brother of the deceaſed, are Children only of a Brother of the half blood, ought they to be preferred to the Uncle of the deceaſed? It would ſeem that the ſame reaſons which give the preference to the Children of Brothers of the whole blood, give it likewiſe to the Children of Brothers of the half blood. For beſides that the double tie is only conſidered among Brothers, and that among all the other Collaterals the Proximity alone diſtinguiſhes their Ranks; according to the Rule of the following Article; the Children of Brothers of the half blood repreſenting their Fathers, who would exclude the Uncles of the deceaſed, they have the ſame right which their Fathers would have had, if they had been alive.

We ought not to omit adding here a Remark concerning another caſe which falls out very often, and in relation to which ſome Interpreters have ſtarted a queſtion. It is the caſe where an Inheritance being to be divided among the Children of Brothers to the deceaſed, he having no Brothers alive, and the ſaid Children being in an unequal number, three, for example, of one Brother, and four of another: Whether thoſe Children of the Brothers ought to ſucceed by the head, according to their number, or by Repreſentation, the Children of each Brother taking the Share which their Father would have had. Before the 118th Novel of *Juſtinian*, this queſtion was decided by the 2d *Law*, §. 2. *ff. de ſuit & legit. hæred.* which provided, that the Children of Brothers ſhould ſucceed by the head, according to their number. *Hæc hæreditas proximo agnato, id eſt, ei quem nemo antecedit, defertur: & ſi plures ſint ejuſdem gradûs, omnibus in capita ſcilicet. Ut putà, duos fratres habui, vel duos patruos; unus ex his unum filium, alius duos reliquit: hæreditas mea in tres partes dividitur.* It is true, that this 118th Novel has given to the Children of Brothers the Right of Repreſentation, which has occaſioned ſome to fancy, that in this caſe the Children of Brothers deceaſed ought likewiſe to have this Right. But the benefit of the Repreſentation given to the Children of Brothers by this Novel, is only to make them concur with their Uncles, Brothers to the deceaſed, to take the portion that their Father would have had, if he had been alive. And the motive of this Law, is not to diſtinguiſh the condition of the Children of Brothers among themſelves, when there are no Brothers to the deceaſed, and to make the Nephews to the deceaſed by ſeveral Brothers ſhare unequally, according as the Children of one of the Brothers ſhall happen to be in a greater number than the Children of another, ſo that this motive of the Repreſentation ceaſes among them, when they ſucceed all alone, and without Brothers to the deceaſed. And they ſucceed then only according to their Proximity, which being equal, makes them ſucceed by the head. And it is in this manner that their Succeſſion is regulated by the Laws of the *Wiſigoths*, which are for the moſt part taken from the *Roman* Law. *Qui moritur, ſi fratres aut ſorores non reliquerit, & filios fratrum & ſororum reliquerit; ſi ex uno fratre ſit unus filius,*

9. The Right of Repreſentation is limited to Brothers Children.

filius, & ex alio fratre vel ſorore forſitan plures, omnem hæreditatem defuncti capiant, & æqualiter per capita dividant portiones. lib. 4. legis Wiſigotorum tit. 2. capitul. 8.

IX.

9. All the other Collaterals ſucceed according to their Proximity. After Brothers and the Children of Brothers, all the other Collaterals ſucceed according to their degrees of Proximity, without any other diſtinction, the neareſt excluding always the remoteſt. And if there happen to be ſeverals in the ſame degree, they ſucceed equally by the head, and according to their number[1].

[1] Si verò neque fratres neque filios fratrum, ſicut diximus defunctus reliquerit, omnes deinceps à latere cognatos ad hæreditatem vocamus, ſecundùm uniuſcujuſque gradus prærogativam. Ut viciniores gradu ipſi reliquis præponantur. Si autem plurimi ejuſdem gradûs inveniantur, ſecundùm perſonarum numerum inter eos hæreditas dividatur. Quod in capita noſtræ leges appellant. *Nov.* 118. *c.* 3.

SECT. III.

Of the Succeſſion of the Husband to the Wife, and of the Wife to the Husband.

It is not neceſſary to repeat here what has been ſaid concerning this kind of Succeſſion, in the Preface to this Second Part, N°. II. and in the Preamble of this ſecond Book; where the Reader may ſee the reaſon which has obliged us to ſet down here this Rule.

The CONTENTS.

1. *How the Huſband ſucceeds to the Wife, and the Wife to the Huſband.*

I.

1. How the Husband ſucceeds to the Wife, and the Wife to the Husband. THE Huſband ſucceeds to his Wife, and the Wife to her Huſband, if either of them die without Children, without Relations, and without a Will[a]; and the Survivor will exclude the Exchequer.

[a] Maritus & uxor ab inteſtato invicem ſibi in ſolidum, pro antiquo jure ſuccedant, quoties deficit omnis parentum, liberorúmve, ſeu propinquorum legitima vel naturalis ſucceſſio, fiſco excluſo. *l. un. C. unde vir & uxor. l. un. ff. eod.*

[*According to the Law of Succeſſion to Perſonal Eſtates in* England, *if a man dies inteſtate, leaving behind him a Wife and Children, the Wife of the Inteſtate is intitled to one third part of her Husband's Eſtate, and all the Reſidue goes to the Children, to be diſtributed amongſt them by equal portions. And in caſe there be no Children, nor any legal Repreſentatives of them, then one Moiety of the ſaid Eſtate is to be allotted to the Wife of the Inteſtate, and the Reſidue of the ſaid Eſtate is to be diſtributed equally to every of the next of Kindred of the Inteſtate, who are in equal degree, and thoſe who legally repreſent them.* Stat. 22. & 23. Car. 2. cap. 10.]

[*The ſaid Statute for ſettling Inteſtates Eſtates having made no mention of the Husband's Right to the Perſonal Eſtate of his Wife, which was not in her Poſſeſſion during the Coverture, and which the Husband had not acquired the right to by the Intermarriage, the Law touching the ſame was become ſomewhat uncertain, whether the ſaid Eſtate ſhould go to the ſurviving Husband, or to the Relations of the deceaſed Wife. And therefore to remove this doubt, it was thought fit to explain the aforeſaid Statute by a ſubſequent Act of Parliament, whereby it is declared, that the ſaid Act,* For the better ſettling of Inteſtates Eſtates, *ſhall not be conſtrued to extend to the Eſtates of Feme-Coverts that ſhall die inteſtate, but that their Husbands may demand and have Adminiſtration of their Rights, Credits, and other Perſonal Eſtates, and recover and enjoy the ſame, as they might have done before the making of the ſaid Act.* Stat. 29 Car. 2. cap. 3. §. *ult.*]

TITLE IV.

Of the COLLATION *of* GOODS.

WHEN there are Children, or other Deſcendants that ſucceed to their Father, Mother, or other Aſcendants, whether by Teſtament or by Law, when the perſon dies inteſtate [a], they ought reciprocally to bring in that which they had received out of the Eſtate of the perſon to whom they ſucceed; that is to ſay, to join it to the maſs of the Goods of the Succeſſion, and to divide it among them with the other Goods, according as they may be obliged to this Collation by the Rules which ſhall be explained in this Title.

[a] *See the tenth Article of the third Section of this Title.*

The firſt uſe that was made in the *Roman* Law of the Collation of Goods, and which was the Origin of it, was a conſequence of the ancient Law, which excluded the Children that were emancipated from the Succeſſion of their Fathers, when there were Children that were not emancipated. For when afterwards the emancipated Children were admitted to ſhare in the Succeſſion, they were obliged to bring into the Maſs of the Inheritance that was to be divided in common among them and their Brothers who had remained ſtill under their Father's Power and Authority, that which the emancipated Children had acquired from the time of their emancipation. Becauſe, as has been remarked in other places, that which the emancipated Son acquired after his emancipation, did belong wholly to himſelf; whereas all that the Son who was not emancipated acquired on his part, belonged wholly to his Father, except only that which was reckoned as a peculiar Patrimony, of which we have ſpoken in its proper place[b]. Thus there were two conſiderations that favoured this Law of the Collation of Goods; one was, becauſe the emancipated Son ſucceeding to his Father reaped the benefit of whatever his Brother that was not emancipated had acquired. And the other was, becauſe that altho' the Son who was not emancipated had made no Acquiſitions, yet it was by favour that the emancipated Son ſhared in the Succeſſion with him, and therefore it was but juſt that the Succeſſion ſhould be augmented with what he had acquired only by the benefit of his emancipation.

[b] *See the fifth Article of the ſecond Section of Perſons, the beginning of the Preamble to the ſecond Section of the ſecond Title of this ſecond Book, and the third Article of the third Section of this Title.*

In proceſs of time all the Children without diſtinction, whether they were emancipated or not, having been allowed to enjoy the abſolute property in whatever they acquired, as has been remarked in the Preamble of the ſecond Section of the ſecond Title of this Book, this firſt kind of Collation ceaſed[c]. And the uſe of the Collation was reduced to the Goods which the Children, whether they were emancipated or not, had acquired by the liberality of the Aſcendant to whom they were to ſucceed, together with the other Children who had not received the like bounties from the ſaid Aſcendant.

[c] *V. l. ult. C. de collat.*

It is of this kind of Collation that we are to treat under this Title. And as this matter takes in that which concerns the nature of the Collation, the perſons who are obliged to it, together with the perſons to whom the Collation is to be made, and the Goods that are ſubject to it, theſe three parts ſhall be the ſubject matter of three Sections.

[*The Collation of Goods here treated of, is the ſame with what is called in the Common Law of* England *by the name of* Hotchpot, *which is deſcribed to be a blending or mixing together, and a partition of Lands given in Frank-Marriage, with other Lands in Fee-ſimple deſcended.* See the Terms of Law, verb. Hotchpot.]

[*And this Collation of Goods takes place likewiſe in the diſtribution of the Perſonal Eſtates of Inteſtates. For by the Statute of Diſtributions it is provided, that in caſe any Child, other than the Heir at Law, ſhall have any Eſtate by Settlement from the Inteſtate, or ſhall be advanced by the ſaid Inteſtate in his Life-time, by Portion not equal to the Share which will be due to the other Children by the Diſtribution, then ſo much only of the Surpluſage of the Eſtate of ſuch Inteſtate ſhall be diſtributed to ſuch Child or Children as ſhall have any Land by Settlement from the Inteſtate, or were advanced in the life-time of the Inteſtate, as ſhall make the Eſtate of all the ſaid Children to be equal, as near as can be eſtimated.* Stat. 22 & 23 Car. 2. cap. 10. §. 5.]

SECT. I.

Of the nature of the Collation of Goods.

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I.

1. *Definition of the Collation.*

THE Collation of Goods is the engagement of the Children, and other Deſcendants, to bring into the Maſs of the Inheritance of their Father, Mother, or other Aſcendant to whom they are deſirous to ſucceed, the Things which had been given them by the ſaid Aſcendant, that they may be divided between them and their Co-heirs, in the ſame manner as the other Goods of the Succeſſion. And the Equity of this Collation is very evident[a], the ſame being founded on the natural Equality among the Children in the Succeſſion of their Aſcendants; and upon the preſumption that ſuch a Gift was made only by way of advancement to the Donee of a part of that which he might expect out of the Succeſſion.

[a] Hic titulus manifeſtam habet æquitatem. *l. 1. ff. de coll. bon.*

We don't put down here the reſt of this Text, the ſame not being in uſe with us. But theſe firſt words may be applied in general to all the caſes where the Collation ought to take place. See the ſeventh and following Articles of the third Section.

II.

2. What ought to be reſtored, does not properly come under the name of Collation. It follows from the Rule explained in the foregoing Article, that the Collation being only to be underſtood of ſome Thing which did already belong to the Heir who is obliged to make the Collation; we ought not to include in this matter of the Collation of Goods, that which is a part of the Inheritance, and which one of the Heirs poſſeſſes by ſome other Title; as if he was Depoſitary of a Thing which the deceaſed had depoſited in his hands, or Debtor for a Sum of Money which the deceaſed had lent him, or that he was by ſome other means in poſſeſſion of ſome of the Goods of the Inheritance. For this Heir would be bound to make reſtitution of theſe kinds of things upon another ſcore than that of Collation. Neither muſt we reckon among the things ſubject to the Collation treated of here, that which a Teſtator who leaves by his Will to one of his Children a certain Eſtate in Land, or ſome Office, obliges him to pay in to the other Children, as a Sum of Money in conſideration of the ſaid advantage[b].

[b] *Since the Collation is underſtood only of the Things which had been given to the Children by the Aſcendants to whom they ſucceed; it is only improperly that we can give the name of Collation to the Reſtitutions which are ſpoken of in this Article.*

III.

3. All the Children are obliged to this Collation, without diſtinction. The engagement of the Heir of an Aſcendant that is obliged to this Collation towards the other Heirs of the ſame Aſcendant, being founded upon the motives explained in the firſt Article, which agree equally to the Children of both Sexes, to the Children that are emancipated, and to thoſe who are not, to the Children and Grandchildren of all degrees; this engagement is common without diſtinction to all theſe ſorts of Children and Deſcendants, for all the things that may be ſubject to the Collation, according to the Rules which ſhall be explained in the third Section[c].

[c] Ut liberis tam maſculini quam fœminini ſexûs, ſive ſui juris, ſive in poteſtate conſtitutis, quocûmque jure inteſtatæ ſucceſſionis, id eſt, aut teſtamento penitus non condito, aut ſi factum fuerit, contra tabulas bonorum poſſeſſione petita, vel inofficioſi querela mota reſciſſo, æqua lance parique modo proſpici poſſit: hoc etiam æquitatis ſtudio præſenti legi credidimus inſerendum, ut in dividendis rebus ab inteſtato defunctorum parentum, tam dos, quàm ante nuptias donatio conferatur. *l. 17. C. de collat.*

Altho' this Text makes mention only of the Collation in the Succeſſion of Inteſtates, yet it takes place likewiſe in the Teſtamentary Succeſſions. See the tenth Article of the third Section.

[*In the diſtribution of the Perſonal Eſtates of Inteſtates in* England, *a diſtinction is made between the Heir at Law and the other Children. For the Heir at Law, notwithſtanding any Land that he ſhall have had by deſcent, or otherwiſe, from the Inteſtate, is to have an equal part in the Diſtribution, with the reſt of the Children, without any conſideration of the value of the Land which he hath by deſcent, or otherwiſe, from the Inteſtate.* Stat. 22 & 23 Car. 2. cap. 10. §. 5.]

IV.

4. The Collation is regulated by the Law, or by ſome Act of the Teſtator or Donee. The Collation of Goods among Co-heirs is made in two caſes, and differently. One is the caſe where the Aſcendant, to whom his Children, or other Deſcendants are to ſucceed, has directed nothing touching the Collation of the Goods which he has given to one of the Children; which would be no hindrance why the ſaid Donee ſhould not be obliged to the Collation by the bare effect of the preceding Rules, and of thoſe which ſhall be explained in the third Section, and this Collation is founded on Equity, and on the Law which has eſtabliſhed it. The other is the caſe of a Collation ordained by ſome diſpoſition of the Donor, ſuch as the Donation it ſelf, or a Teſtament, which has regulated the conditions thereof[d].

[d] *See the eleventh Article of the third Section.*

V.

5. How theſe two ſorts of Collations are regulated. If the perſon to whom two or more Heirs are to ſucceed, has made ſome diſpoſition for regulating the Collations which they ſhall make among themſelves, the ſaid diſpoſition will be inſtead of a Law, according to the Rules which ſhall be explained in their place[e]. And if the deceaſed has ordered nothing concerning the Collations among his Heirs, they ſhall have for Rules thoſe that are explained in this Title.

[e] *See the ſeventh Article of the firſt Section of the firſt Title of the third Book.*

VI.

6. Collation of the Revenues. The Heir who is bound to bring in to his Co-heirs that which had been given him, ought likewiſe to bring in the Fruits or other Revenues thereof according to the nature of the Goods, ſuch as the Intereſt, if it is Money, the ſaid Revenues to be counted from the time that the Succeſſion was open[f].

[f] Filia quæ ſoluto matrimonio dotem conferre debuit, moram collationi fecit: viri boni arbitratu cogetur uſuras quoque dotis conferre: cùm emancipatus frater etiam fructus conferat, & filia partis ſuæ fructus percipiat. *l. 5. §. 1. ff. de dot. collat.*

Altho' this Text ſpeaks only of the Dowry, yet the reaſon is the ſame for all Collations. And altho' it be ſaid here, that the Intereſt is due by him who delays to bring in what he is bound to do, and that it may be doubted, whether the Intereſt be due before the demand, yet it is but juſt that it ſhould run from the moment that the Succeſſion to which the Collation is to be made is open; and as the other Goods of the Succeſſion, and the Revenues which they produce, are reckoned in the Partition from that time, ſo the Goods ſubject to the Collation are of the ſame kind, and are a part of the Inheritance, and therefore the Fruits and Produce thereof are due as well as the other Goods. This is regulated after this manner by ſome of the Cuſtoms, and is a conſequence of the Rule explained in the ſixth Article of the ſecond Section of Partitions. And it may be likewiſe ſaid, that every Heir who has Goods ſubject to Collation, acts an unfair and diſhoneſt part, if he does not bring them in, or does not declare what Goods he has of this kind.

VII.

7. He who is bound to collate, recovers the expences laid out upon the Goods ſubject to the Collation.

If for the preſervation of the Thing ſubject to Collation, or for other neceſſary cauſes, the Heir who ought to bring it in has been at any charges, he ſhall recover the value of them, or retain the Thing: As if he has laid out any thing on the neceſſary Repairs of a Houſe, or if he has carried on a Law-ſuit for the recovery of a debt, or of ſome Right. For theſe ſorts of expences diminiſhing the Goods, the Collation of them is likewiſe diminiſhed in ſo much[g].

[g] Cùm dos confertur, impenſarum neceſſariarum fit detractio: cæterarum non. *l. 1. §. 5. ff. de dot. collat.* See the twelfth and the following Articles of the third Section of Dowries.

VIII.

8. The Heir muſt either bring in what he has received, or take leſs for his ſhare.

The Heir who is bound to bring in what he has received by advancement, may ſatisfy that Obligation in two manners. One is by bringing in actually the thing that is ſubject to the Collation, that it may be included in the Maſs of the Goods, in order to be divided with the reſt. And the other way is, by retaining that which he ought to bring into the Maſs, and taking ſo much leſs out of the reſt of the Goods. Theſe are the two ways of Collation which are expreſſed in theſe words, *to bring into the Maſs of the Goods, or to take leſs out of it*[h].

[h] Sed & ſi tantum fortè in bonis paternis emancipatus remittat, quantum ex collatione ſuus habere debet, dicendum eſt emancipatum ſatis contuliſſe videri. *l. 1. §. 12. ff. de coll. bon.* Eo minus conferre. *l. 5. C. eod.*

Conferre, aut minus tanto accipere. *Nov. 97. c. 6.*

IX.

9. He who brings in the Goods ſubject to Collation, increaſes the number of the ſharers in the Partition.

The Collation is made in ſuch a manner, that whatever is brought in being added to the Maſs of the Goods, the whole is divided into as many portions as there are Heirs; including thoſe who collate, and thoſe to whom the Collation is made[i].

[i] Collatio in eumdem modum fiet, ut quicumque confert etiam ſuam perſonam numeret in partibus faciendis. *l. 1. in f. ff. de coll. bon.*

SECT. II.

Of the perſons who are bound to collate, and to whom the Collation ought to be made.

The CONTENTS.

1. *There is no Collation, but among Children.*
2. *He who renounces the Inheritance does not collate, unleſs it be for the Legitime or Child's part of the others.*
3. *To whom the Collation ought to be made.*

I.

1. There is no Collation, but among Children.

It is only the Children or other Deſcendants, Heirs to their Fathers, Mothers, or other Aſcendants, who are obliged to the Collation treated of in this Title; becauſe the motives of the Laws which ordain this Collation agree only to them[a].

[a] *See the firſt and third Articles of the firſt Section, and the texts which are there quoted.* See the following Articles.

Of the three Orders of Heirs, Deſcendants, Aſcendants, and Collaterals, it is only the firſt, in which are to be found the motives of the Right of Collation explained in the preceding Section. And the caſe of Collation does never happen even among Aſcendants: For the Deſcendants do not make any preſents to them. And as for the Collateral Succeſſions, the motives of the Collation not agreeing to them, there is never any Collation in them, unleſs it be ordained by the perſon whoſe Inheritance is to be divided.

II.

2. He who renounces the Inheritance does not collate, unleſs it be for the Le-

If the Children, or other Deſcendants, who had Goods ſubject to Collation, abſtain from the Inheritance, the Collation ceaſes. And as they take no ſhare in the other Goods of the Inheritance, *gitime, or Child's part of the others.* ritance, ſo neither do they give to the other Children or Deſcendants any ſhare of the Goods which they had acquired before the Succeſſion was open[b]. But if what remains in the Succeſſion is not ſufficient for the Legitime or Child's part of the other Children, reckoning into the Father's Eſtate the Goods that ought to have been brought in by him who abſtains from the Inheritance, if he had declared himſelf Heir; in that caſe he would be obliged to give part of them to the others, ſo as to make up what they want of their Legitime, or Child's part[c].

III.

3. To whom the Collation ought to be made. As the Collation takes place only among Children that are Co-heirs, ſo it is due only to thoſe who have theſe two qualities. Thus the Children who have no ſhare in the Inheritance, whether it be that they renounce it, or that they are excluded from it by being diſinherited, have likewiſe no ſhare in the Collation[d].

SECT. III.

Of Things which are ſubject to Collation, and of thoſe which are not.

The CONTENTS.

1. *Two ſorts of Goods of Children.*
2. *The Goods acquired otherwiſe than from the Aſcendants, are not ſubject to Collation.*
3. *The peculiar Patrimonies of the Son are not ſubject to Collation.*
4. *The Son does not bring in that which the Father was bound to give him.*
5. *The Expences of Education are not not brought in.*
6. *The things given to one of the Children as an advantage over and above what the others have, are not ſubject to Collation.*
7. *Dowries and Donations in favour of Marriage are brought into the Maſs of the Goods.*
8. *Collation of the Dower, when the Huſband is inſolvent.*
9. *All other Donations are brought into the Maſs of the Inheritance.*
10. *Whatever may be reckoned as a part of the Legitime, or Child's part, ought to be brought in.*
11. *The Collation is due, whether the deceaſed left behind him a Teſtament, or died inteſtate.*
12. *The Daughter brings into the Succeſſion of the Father, the Portion given her by the Grandfather on the Father's ſide.*
13. *The Things which have periſhed without the fault of the Donee, are not brought in.*
14. *What is conſumed by uſe ought to be brought in.*

I.

1. Two ſorts of Goods of Children. WE muſt diſtinguiſh two ſorts of Goods, which Children, or other Deſcendants may have, that are to divide among them the Succeſſion of their Father, Mother, or other Aſcendant. One ſort is, of the Goods which they had from their Father, Mother, or other Aſcendant, by ſome Title, which the following Rules make ſubject to Collation. And the other ſort is, of the Goods which they may have acquired any other way, by what Title ſoever it may be; whether by the liberality of other perſons beſides their Aſcendants, or by their own induſtry, or by other ways[a].

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[b] Ex cauſâ donationis, vel aliunde tibi quæſita ſi avi ſucceſſionem reſpueris, conferre fratribus compelli non potes. *l. 25. C. fam. erciſcund.*

Fuit quæſtionis, an ſi ſua hæres filia patri cum fratribus, contenta dote abſtineat ſe bonis, compellatur eam conferre? & Divus Marcus reſcripſit, non compelli abſtinentem ſe ab hæreditate patris. Ergo non tantùm data apud maritum remanebit, ſed & promiſſa exigetur etiam à fratribus: & eſt æris alieni loco, abſceſſit enim à bonis patris. *l. ult. ff. de dot. collat.*

This liberty of being free from the Collation upon renouncing the Inheritance, is generally received in France, *except in ſome particular Cuſtoms, where Children who are Donees in the Families of thoſe who are ignoble are obliged to bring into the Maſs of the Inheritance whatever has been given them by the Father, or Mother, or other Aſcendants, altho' they renounce the Succeſſion of the Donor.*

[c] Cum omnia bona à matre tua in dotem dicantur exhauſta, leges legibus concordare promptum eſt: ut ad exemplum inofficioſi teſtamenti, adverſus dotem immodicam exercendæ actionis copia tribuatur. Et filiis conquerentibus emolumenta debita conferantur. *l. un. C. de inoff. dot.* Debitum bonorum ſubſidium conſequantur. *l. 5. C. de inoff. donat.*

[d] *This is a conſequence of the firſt Article.*

[a] *There can be no Goods but what are contained under one or other of theſe two kinds.*

II.

2. The Goods acquired otherwiſe than from the Aſcendants, are not ſubject to Collation.

Whatever the Children may have acquired any other way than from the Goods of their Aſcendants, whether they have acquired it by a Teſtamentary Succeſſion, or by ſucceeding to Inteſtates, or by Donation, or any liberality of other perſons, or by their own induſtry, belongs entirely to themſelves, and is not ſubject to Collation[b].

[b] *See the firſt Article of the ſecond Section, In what manner Fathers ſucceed.*

III.

3. The peculiar Patrimonies of the Son are not ſubject to Collation.

The peculiar Patrimonies which have been mentioned in the third Article of the ſecond Section of the ſecond Title, are the proper Goods of the Son who is ſtill under his Father's Power, which not being deſcended to him from his Father, or other Aſcendant, are not ſubject to Collation. And ſeeing theſe ſorts of Goods belong ſo abſolutely to the Son, that his Father has not ſo much as the Uſe and Profits of them, it would not be juſt that the Co-heir ſhould have any ſhare in them[c]. But that which a Son who is ſtill under his Father's Authority may have gained by his management and adminiſtration of ſome Goods which the Father had intruſted him with, belongs properly to the Father, and is ſubject to Collation[d].

[c] Nec caſtrenſe, nec quaſi caſtrenſe peculium fratribus confertur. Hoc enim præcipuum eſſe oportere, multis conſtitutionibus continetur. *l. 1. §. 15. ff. de collat. bon. l. ult. C. eod.*

[d] Cum fratres tui durantes in familia patris peculium (ſi hoc neque caſtrenſe, neque relictum eis doceatur) præcipuum habere non poſſint. Sed in diviſionem paternæ veniat hæreditatis, *l. 12. C. de collat.* See the firſt and ſeventeenth Articles of the ſecond Section of the ſecond Title.

IV.

4. The Son does not bring in that which the Father was bound to give him.

If a Father had been required by a Teſtament, or other diſpoſition of any perſon, to give to his Son a Sum of Money, or ſome other thing; that which this Son poſſeſſes under this Title, would not be ſubject to be brought into the Succeſſion of his Father; becauſe it would not be to the Father's bounty that the Son owed this thing[e].

[e] Si ab ipſo patre hærede inſtituto fideicommiſſum fuerit relictum, *cùm morietur*, an id conferendum ſit, quoniam utile eſt hoc fideicommiſſum? & exiſtimo ut pro eo habeatur atque ſi poſt mortem patris relictum fuiſſet: nec cogetur hic conferre, quia moriente eo ejus non fuiſſet. *l. 1. §. 19. ff. de collat.*

V.

5. The Expences of Education are not brought in.

The Children, or other Deſcendants, ſucceeding to the Inheritance of their Father, or Mother, or other Aſcendant, do not bring in that which has been laid out upon their Studies, or in other Expences which their Education may have required. For theſe ſorts of Expences are what Parents are bound to lay out upon their Children, and are as it were a debt which they ought to acquit[f].

[f] Quæ pater filio emancipato ſtudiorum cauſa peregrè agenti ſubminiſtravit, ſi non credendi animo pater miſiſſe fuerit comprobatus, ſed pietate debita ductus: in rationem portionis, quæ ex defuncti bonis ad eumdem filium pertinuit computari æquitas non patitur. *l. 50. ff. fam. erciſc.*

VI.

6. The things given to one of the Children as an advantage over and above what the others have, are not ſubject to Collation.

The Things given to Children, or other Deſcendants, that they may have what is ſo given as an advantage over and above what the other Children their Co-heirs have, are not brought into the Maſs of the Inheritance collated, if it is evident that it was the expreſs will of the Donor, that what he gave ſhould remain with the Donee as an advantage over and above his equal ſhare with the reſt of the Heirs, or that it ſhould not be ſubject to Collation[g]. But if upon a computation of the thing given as an advancement to a Child, together with the Goods which remain in the Inheritance, it ſhould be found that the other Children had not their Legitime, or Child's part of the whole, the Donee would be obliged in this caſe to bring into the Maſs of the Goods, ſo much as to make up the Legitime, or Child's part of the others, even altho' he ſhould be willing to content himſelf with the Gift, and to renounce the Inheritance[h].

[g] (Sancimus) omnino eſſe collationes, & exinde æqualitatem ſecundùm quod olim diſpoſitum eſt. Niſi expreſſim deſignaverit ipſe ſe velle non fieri collationem, ſed habere eum qui cogitur ex lege conferre, & quod jam datum eſt, & ex jure teſtamenti. *Nov. 18. c. 6.*

If there were a Donation, or other Diſpoſition, which ſhould contain a Gift as an advantage to one Child over and above what the others ſhould have to their ſhares, this bare expreſſion of giving that by way of preference or diſtinction to that Child, would make the Collation to ceaſe. For otherwiſe, if the Child were obliged to bring it in and ſhare it with the others, it would be no particular advantage to the ſaid Child.

[h] Si quis donationem immenſam in aliquem aut aliquos filiorum fecit, &c. *Nov. 92. c. 1.* See the fourth and fifth Articles of the third Section of the Legitime.

VII. What-

VII.

7. Dowries and Donations in favour of Marriage, are brought into the Maſs of the Goods.

Whatever a Father, Mother, or other Aſcendants, whether they be by the Father's or Mother's ſide, of both Sexes, give to their Children, or other Deſcendants, on occaſion of their Marriages, whether it be to a Son, as a Settlement upon him in favour of his Marriage, or to a Daughter for her Marriage Portion, or otherwiſe, according to the different uſes of Donations of this kind, is ſubject to Collation. Thus Children, Sons or Daughters, ſucceeding to the Inheritance of an Aſcendant from whom they had received ſuch like liberalities, ought to bring them into the Maſs of the Goods of the Inheritance[i].

[i] Ut liberis tam maſculini quam fœminini ſexûs, ſive ſui juris, ſive in poteſtate conſtitutis, quocumque jure inteſtatæ ſucceſſionis, id eſt, aut teſtamento penitùs non condito, aut ſi factum fuerit, contra tabulas bonorum poſſeſſione petita, vel inofficioſi querela mota reſciſſo, æqua lance parique modo proſpici poſſit: hoc etiam æquitatis ſtudio præſenti legi credidimus inſerendum, ut in dividendis rebus ab inteſtato defunctorum parentum, tam dos quàm ante nuptias donatio conferatur, quam pater vel mater, avus vel avia, proavus vel proavia, paternus vel maternus dederit, vel promiſerit pro filio vel filia, nepote vel nepte, pronepote vel pronepte, nulla diſcretione intercedente, utrùm in ipſas ſponſas prò liberis ſuis memorati parentes donationem contulerint, an in ipſos ſponſos earum, ut per eos eadem in ſponſas donatio celebretur: ut in dividendis rebus ab inteſtato defuncti parentis, cujus de hæreditate agitur, eadem dos, vel ante nuptias donatio ex ſubſtantia ejus profecta, conferatur. *l. 17. C. de collat.*

Altho' this Text makes mention only of the Succeſſion to Inteſtates, yet it is the ſame thing in Teſtamentary Succeſſions.

Muſt we comprehend under liberalities in favour of Marriage which are ſubject to Collation, that which a Father, a Mother, or other Aſcendant makes a preſent of to his Son, or his Daughter-in-law, to his Daughter, or his Son-in-law, ſuch as is mention'd in this Law, the Expences of the Wedding, the Wedding-Clothes, the Wife's Paraphernalia, or other Preſents according to cuſtom? There are ſome Cuſtoms in France *which direct theſe ſorts of Preſents to be brought in, and others which exempt them from the Collation. Thus we ought to judge of this matter according to the Uſage of the place, if there is any, or according to the circumſtances of the quality of the perſons, of the nature of the preſents, and of their value.*

VIII.

8. Collation of the Dower when the Huſband is inſolvent.

If a Daughter having been endowed by her Father, Mother, or other Aſcendant, ſhould come to inherit to him, and her Huſband who had received and ſquandered away her Marriage Portion, ſhould happen to be inſolvent, ſhe would nevertheleſs be obliged to reckon it in the Maſs of the Goods to be divided between her and the other Heirs, if by the circumſtances this loſs may be imputed to her; as if ſhe had neglected to ſecure herſelf by a Separation of Goods, or to take other precautions for the Security of her Marriage Portion[l]. But if nothing can be laid to her charge, as if ſhe was a Minor, and that the ſaid loſs had happened thro' the fault of the perſon who had given the Marriage Portion, her Father, for example, or her Grand-father by the Father's ſide, who in default of the Father, who was either dead, or abſent, interdicted, or in a ſtate of madneſs, being obliged to endow his Grand-daughter, had paid the Portion to the Huſband whoſe inſolvency was apparent, or at leaſt much to be feared, ſhe might be diſcharged from this Collation according to the circumſtances, in bringing in only the Action for the reſtitution of the Marriage Portion, againſt the Huſband or his Heirs[m]. But if it was the Grand-father by the Mother's ſide, or other Aſcendant, who not being under any obligation to endow the young Woman, had given her a ſum of Money for her Portion out of mere liberality, ſhe being either of age, or under the tuition of her Father, Mother, or of a Tutor, the loſs of this Portion, altho' the Donor had paid it to the Huſband when inſolvent, would not free her from the obligation of accounting for it to her Co-heirs, if ſhe would ſucceed as Heir to the Donor who gave her the ſaid Portion. For this loſs would be a caſualty which could not be imputed either to the Donor, or to his Heirs.

[l] Quia enim dedimus mulieribus electionem etiam conſtante matrimonio, ſi malè res maritus gubernet, & accipere eas, & gubernare, & ſecundùm decentem modum, & ſicuti noſtrà conſtitutio dicit: ſiquidem ſuæ poteſtatis & perfectæ ætatis mulier eſt ſibimet culpam inferat, cur mox viro inchoante malè ſubſtantia uti non percepit, & non auxiliata eſt ſibi. Sic enim habitura erat in collationis ratione proprias res undique, & ſine diminutione, & in ea minus collationem facere. *Nov. 97. c. 6.*

[m] Sin autem illa quidem hæc conteſtata eſt patrem, ille autem neque movit, neque conſenſit, & neque dedit licentiam filliæ hoc agere, non eam periculum pati, ſed & conferri nudam actionem contra inopis mariti res, & fortunam eſſe communem & ipſi & ejus fratribus, non tamen ex collatione damnificari: ſed competentem ei partem dari ex paternis rebus, actionem illa quidem conferente. *d. c. 6. §. 1.*

We have endeavoured to form this Article upon ſuch part of the Text as agrees with our Uſage.

IX.

9. All other Donations are brought into the Maſs of the Inheritance.

Beſides the Donations in favour of Marriage, and the Marriage Portions of Daughters, all other Donations made by a Father, Mother, or other Aſcendant, to a Son, or a Daughter, or other Deſcendant, married or unmarried, ought to be brought into the Succeſſion, whether the deceaſed made a Teſtament, or died Inteſtate, unleſs the Donee has been diſcharged from the Collation by the Donor, as has been ſaid in the ſixth Article. And altho' the Collation be not injoined by the Teſtament when there is one, yet the Donee is nevertheleſs obliged to it [n].

[n] Illud quoque bene ſe habere credimus hac lege complecti: prioribus enim legibus valentibus, *in collationibus, ſi quidem ſine teſtamento morerentur parentes, collationes ſecundum eorum virtutem fieri: ſi vero teſtati nihil dicerent de eis, locum non fieri collationibus, ſed eos habere per datam ſortem, aut alio modo datas, & quæ ſunt relicta defendere.* Nos ſancimus, non eſſe omnino talem opinionem: ſed ſive quiſpiam inteſtatus moriatur, ſive teſtatus (quoniam incertum eſt ne forſan oblitus datorum, aut præ tumultu mortis anguſtiatus, hujus non eſt memoratus) omnino eſſe collationes, & exinde æqualitatem, ſecundùm quod olim diſpoſitum eſt. *Niſi expreſſim deſignaverit ipſe ſe velle non fieri collationem, ſed habere eum qui cogitur ex lege conferre & quod jam datum eſt, & ex jure teſtamenti.* Omnibus quæ prius de collationibus à nobis ſancita ſunt in ſua virtute manentibus. *Nov.* 18. *c.* 6. See the eleventh Article.

Si filiæfamilias conſtitutæ tibi *(fundus)* à patre donatus eſt, cum ſorore patri communi ſuccedens eum præcipuum habere, contra jura poſtulas. *l.* 13. *C. de collat.*

Ex cauſâ donationis, vel aliunde tibi quæſita, ſi avi ſucceſſionem reſpueris, conferre fratribus compelli non potes. *l. penult. C. fam. erciſc.*

Seeing this Law ſpeaks of Donations without diſtinction, and exempts from the Collation only him who renounces the Inheritance; it follows, that on the contrary he who does not renounce, is bound to bring in all ſorts of Donations.

X.

10. Whatever may be reckoned as a part of the Legitime, or Child's part ought to be brought in.

All that the Children, and other Deſcendants have received from their Father, Mother, or other Aſcendants, which might be reckoned to them as part of their Legitime, or Child's part, is ſubject to Collation. Thus the Monies which have been laid out on the purchaſe of ſome Office for one of the Children, and other ſuch like liberalities, ought to be brought into the Maſs of the Inheritance. For otherwiſe theſe bounties would be advantages which would deſtroy the Equality among the Children [o].

[o] Omnia quæ in quartam portionem ab inteſtato ſucceſſionis computantur his qui ad actionem de inofficioſo teſtamento vocantur, etiamſi inteſtatus is deceſſeris ad cujus hæreditatem veniunt, omnimodo cohæredibus ſuis conferunt. Quod tam in aliis, quàm in his quæ occaſione militiæ uni hæredum ex defuncti pecuniis acquiſitæ lucratur is qui militiam meruit, locum habebit: ut lucrum quod tempore mortis defuncti ad eum pervenire poterat, non ſolùm teſtamento condito quartæ parti ab inteſtato ſucceſſionis computetur, ſed etiam ab inteſtato conferatur. *l.* 20. *C. de collat.*

XI.

11. The Collation is due whether the deceaſed left behind him a Teſtament, or died inteſtate.

As the Collation which the Children and other Deſcendants who ſucceed to their Father, Mother, or other Aſcendants, owe reciprocally to one another, is equally due, whether the Aſcendant to whom they ſucceed has injoined it by ſome diſpoſition, or whether he has given no orders about it; ſo it is the ſame thing with reſpect to the Collation, whether the Donor has left behind him a Teſtament, or died Inteſtate; and it is likewiſe indifferent, whether, when there is a Teſtament, the Collation is enjoined by it, or whether it makes no mention at all of it. For it is only the expreſs will of the Donor that can free the Donee from bringing in the Gift [p]. And if a Teſtator has omitted to direct in his Teſtament the Collation of the Donations which he had made before, the Law ſupplies that omiſſion, and preſumes that he had forgot the Donations which are ſubject to Collation [q].

[p] *Sive quiſpiam inteſtatus moriatur, ſive teſtatus, omnino eſſe collationem, niſi expreſſim deſignaverit ipſe ſe velle non fieri collationem. Nov.* 18. *c.* 6. See this text intire, as it is quoted on the ninth Article.

[q] Quoniam incertum eſt ne forſan oblitus datorum, aut præ tumultu mortis anguſtiatus, hujus non eſt memoratus. *Nov.* 18. *c.* 6.

XII.

12. The Daughter brings into the Succeſſion of the Father, the Portion given her by the Grand-father on the Father's ſide.

If the Grand-father by the Father's ſide had endowed his Grand-daughter, the Father being alive, and that after the death of this Grand-father, the Father who had ſurvived him had left together with this Daughter, other Children, or Grand-children, who were to ſucceed to him as his Heirs, ſhe would be obliged to bring into the Inheritance of her Father, the Portion which the Grand-father had given her. For, ſeeing it was the duty of the Father to endow his Daughter, it was for him that the Grand-father gave her her Marriage Portion. So that it was the ſame thing as if the Father had given the Portion out of his own Eſtate. Which makes the ſaid Portion to be ſubject to the Collation, that the other Children, who are Heirs to their Father, may have a ſhare in it [r].

[r] Dotem quam dedit avus paternus an poſt mortem avi, mortua in matrimonio filia, patri reddi oporteat, quæritur? Occurrit æquitas rei, ut quod pater meus propter me filiæ meæ nomine

ne dedit, proinde ſit atque ipſe dederit, quippe officium avi circa nepotem ex officio patris erga filium pendet. Et quia pater filiæ, ideo avus propter filium nepti dotem dare debet. *l. 6. ff. de collat.*

☞ Altho' this Law ſpeaks only of the Right of Reverſion of this Marriage Portion in favour of the Father, yet we have thought proper to draw from thence the Rule explained in this Article for the Collation, and that upon two conſiderations. One is, that this Law being placed under the Title of Collation, we may conclude from thence that it has been put there with this view, that the Collation is due in this caſe. The other is, that the ſame Equity which makes us to conſider the Marriage Portion given by the Grand-father as if it were given by the Father, in order to give to the Father the Right of Reverſion of this Portion, as having proceeded from himſelf, demands likewiſe that the ſame Portion ſhould be brought into the Father's Inheritance, ſince we ought to look upon it as having proceeded from the Father, and that if he had ſurvived her the Reverſion of this Portion would have augmented his Succeſſion. And beſides, ſeeing this Daughter finds in her Father's Succeſſion that of her Grand-father, it is juſt likewiſe for this reaſon, that this Portion ſhould be brought into it. Thus as we have put down the Rule drawn from this Law for the Right of Reverſion, among the other Rules of this matter[a], the ſame reaſon has induced us to ſet down here ſuch another Rule for the Right of Collation.

It ſeems to follow from the Rule explained in this Article, that if a Grand-father had made any Preſent to his Grand-children, their Father being alive, who afterwards ſucceeded to the Grand-father, he ought to bring into the Grand-father's Succeſſion, the Preſents which had been made to his Children. And it is ſo regulated by the Cuſtoms of ſome places; which have likewiſe directed, that the Grand-ſon ſucceeding to his Grand-father by Repreſentation of his deceaſed Father, ſhould bring into the Maſs of the Goods, that which the ſaid Grand-father had given to his Father. Which is founded upon this, that as this Son ſucceeds to the Grand-father in the place of his Father, it is but juſt that he ſhould bring in what his Father would have been obliged to do, if he had ſucceeded; and in general, it is equitable in all caſes, that the Equality, which is the foundation of the Right of Collation, ſhould be obſerved among all the Deſcendants who are to ſhare the Succeſſions of their Aſcendants. *See the cloſe of the following Article.*

XIII.

13. The things which have periſhed without the fault of the Donee, are not brought in.

If the things that were given had periſhed without the fault of the Donee, whether it be after or before the Succeſſion was open, he would not be bound to bring in their value. For whatever periſhes in ſuch a manner that the loſs thereof cannot be imputed to the deed of any perſon, the loſs falls upon the Owner of it, and upon all thoſe who have any right in it[f]. And as to the profits which the Donee may have reaped from the things which were given him, thoſe which he had made before the Succeſſion was open, belonged intirely to himſelf, and were no part of the Inheritance. But if the thing did not periſh till after the Succeſſion was open, then the profits which had been made after the Succeſſion was open, would be conſidered as a part of the Succeſſion, and ſubject to Collation. And in general, the Children that are Co-heirs to their Aſcendants, ought to bring into the Maſs of the Inheritance reciprocally for the benefit of one another, all that Reaſon and Equity can demand, for making their condition as equal as is poſſible[g].

XIV.

14. What is conſumed by uſe, ought to be brought in.

We muſt not comprehend in the number of things periſhed, which have been mentioned in the foregoing Article, thoſe which periſh by caſualties, ſuch as a Houſe by Fire, a Land or Tenement carried away by a Flood or Inundation, Moveables taken away by Robbery. But we ought not to place

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[a] *See the ſixth Article of the third Section of the ſecond Title of this ſecond Book.*

[f] De illis, quæ ſine culpa filii emancipati poſt mortem patris perierunt, quæritur ad cujus detrimentum ea pertinere debeant. Et plerique putant ea, quæ ſine dolo & culpa perierint, ad collationis onus non pertinere. Et hoc ex *illis* verbis intelligendum eſt, quibus prætor *viri* boni arbitratu jubet conferri bona. *Vir* autem bonus non ſit arbitraturus conferendum id, quod nec habet, nec dolo, nec culpa deſiit habere. *l. 2. §. 2. ff. de collat.*

[g] Prætor viri boni arbitratu jubet conferri bona. *d. §. 2.* See the ſixth Article of the firſt Section.

FINIS.

MVSEVM
BRITAN
NICVM